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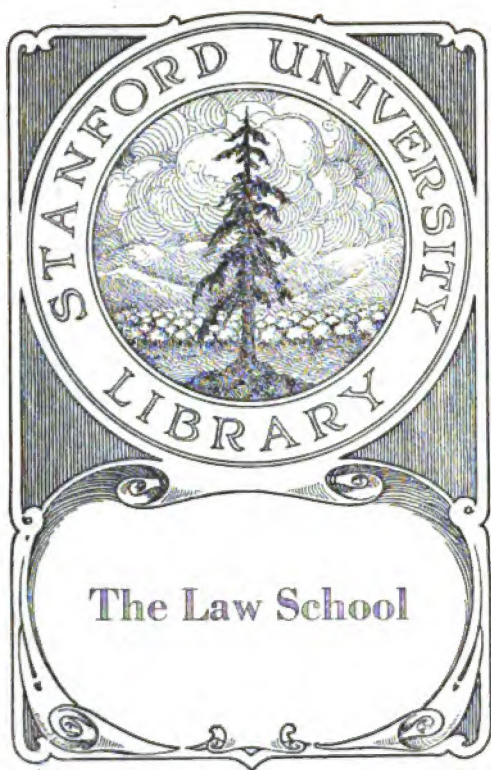
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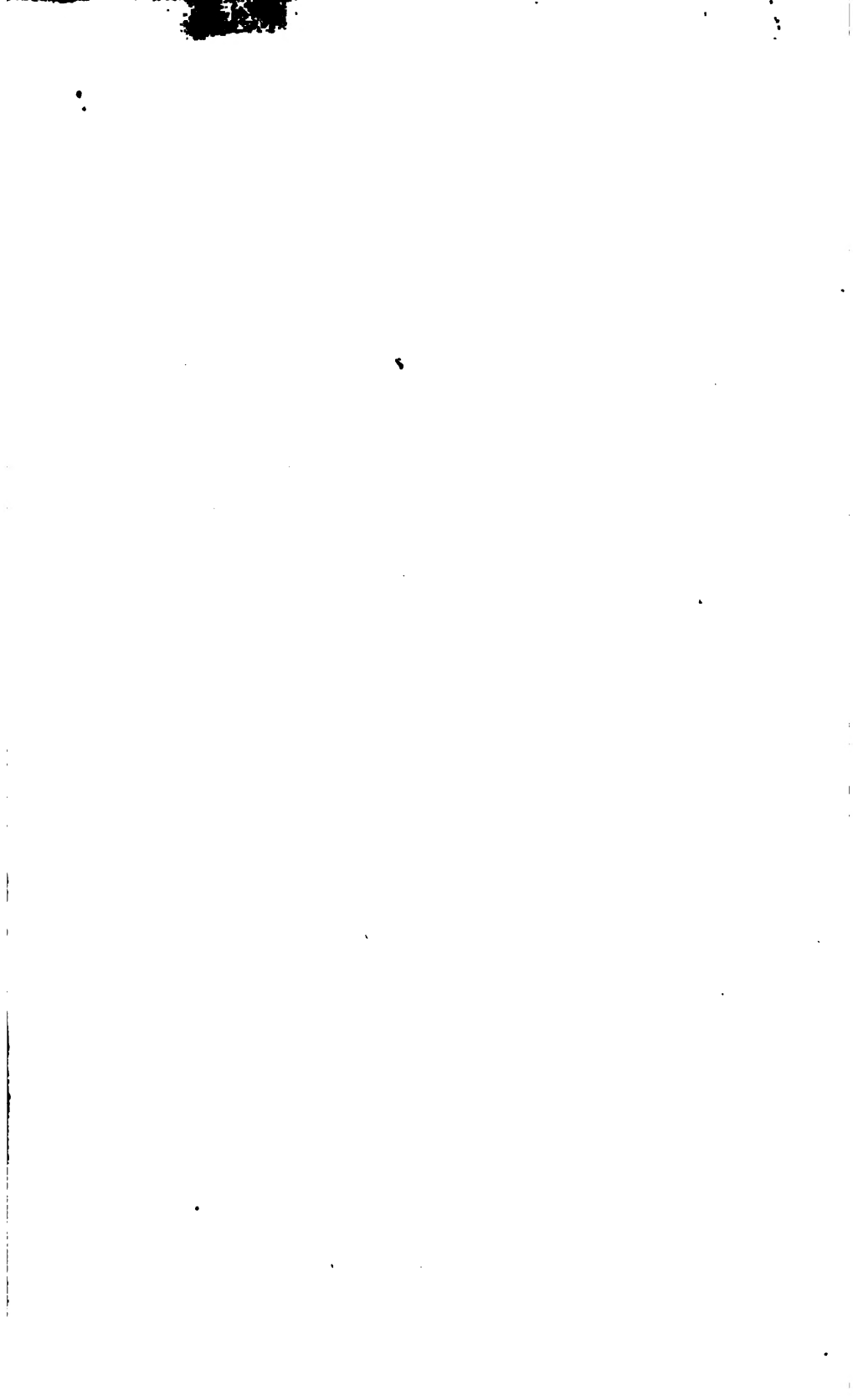
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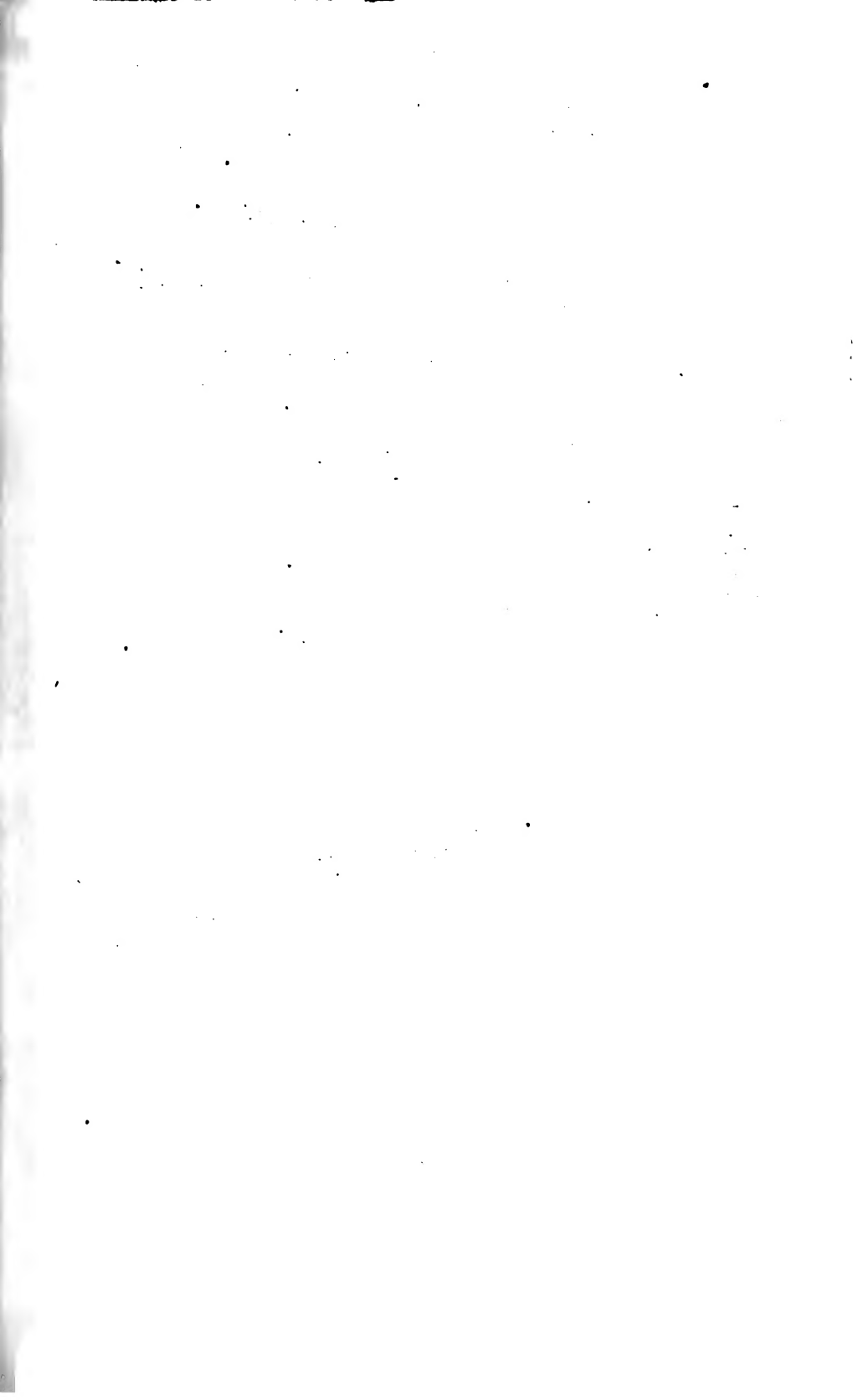












REPORTS OF CASES

ARGUED AND DETERMINED

IN THE

English Courts of Common Law.

WITH

TABLES OF THE CASES AND PRINCIPAL MATTERS.

William

HERETOFORE CONDENSED BY

THOMAS SERGEANT AND JOHN C. LOWBER, ESQRS.,

Now Reprinted in full.

VOL. XXIII.

CONTAINING THE CASES DECIDED IN THE COURT OF KING'S BENCH, FROM
HILARY TERM, 2 WILLIAM IV. 1832, TO TRINITY TERM, 1832, INCLU-
SIVE; AND IN THE COURT OF COMMON PLEAS, AND OTHER
COURTS, FROM TRINITY TERM, 1832, TO EASTER TERM,
3 WILLIAM IV. 1833, INCLUSIVE.

PHILADELPHIA:

T. & J. W. JOHNSON, LAW BOOKSELLERS,

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NO. 197 CHESTNUT STREET.

1852.

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AND

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OF THE INNER TEMPLE,

ESQES., BARRISTERS AT LAW.

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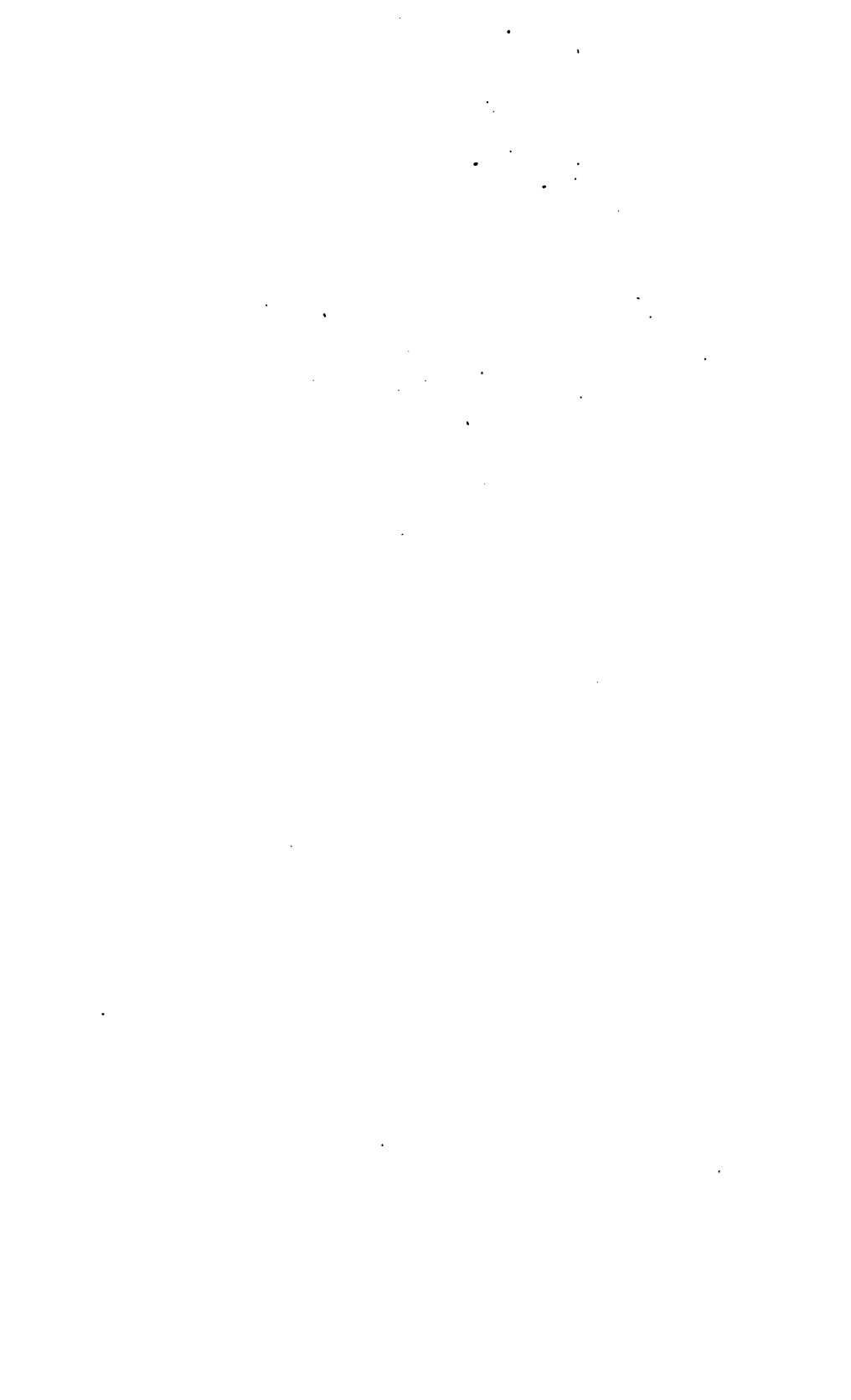
1852.

J U D G E S
OF THE
C O U R T O F K I N G ' S B E N C H ,
DURING THE PERIOD OF THESE REPORTS.

CHARLES LORD TENTERDEN, C. J.
Sir JOSEPH LITTLEDALE, Knt.
Sir JAMES PARKE, Knt.
Sir WILLIAM ELIAS TAUNTON, Knt.
Sir JOHN PATTESON, Knt.

ATTORNEY-GENERAL.
Sir THOMAS DENMAN, Knt.

SOLICITOR-GENERAL.
Sir WILLIAM HORNE, Knt.



A

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CASES
ARGUED AND DETERMINED
IN THE
COURT OF KING'S BENCH,
IN
Hilary Term,

IN THE SECOND YEAR OF THE REIGN OF WILLIAM IV. (a)

Chilaspie
MEMORANDUM.

PURSUANT to the statute 1 & 2 W. 4, c. 56, his Majesty, by his letters patent, dated the 5th of December, 1831, constituted a Court to be called The Court of Bankruptcy, and appointed the Honourable *Thomas Erskine* to be the Chief Judge, and *Albert Pell*, *John Cross*, and *George Rose*, Esquires, to be the other Judges of that Court.

*2]

*H. C. SELBY, Esq., v. BARDONS and Another.

An avowry in replevin stated that the plaintiff was an inhabitant of a parish, and rateable to the relief of the poor, in respect of his occupation of a tenement situate in the place in which, &c., that a rate for the relief of the poor of the said parish was duly made and published, in which the plaintiff was in respect of such occupation duly rated in the sum of 7*l.*; that he had notice of the rate, and was required to pay, but refused; that he was duly summoned to a petty sessions to show cause why he refused; that he appeared, and showed no cause, whereupon a warrant was duly made under the hands of two justices of the peace, directed to defendant, requiring him to make distress of the plaintiff's goods and chattels; that the warrant was delivered to defendant, under which he as collector justified taking the goods as a distress, and prayed judgment and a return. Plea in bar, *de injuriâ*, &c. Special demurrer, assigning for cause, that the plea offered to put in issue several distinct matters, and was pleaded as if the avowry consisted merely in excuse of the taking and detaining, and not in a justification and claim of right:

Held, by PARKE and PATTESON, Js., Lord TENTERDEN, C. J., dissentiente, that the plea in bar was good.

DECLARATION in replevin for taking the plaintiff's goods and chattels in Verulam Buildings, Gray's Inn, in the county of Middlesex, and detaining the same against sureties and pledges. The fourth avowry and cognizance were by the defendant Bardons, as collector of the poor-rates of that part of the parish

(a) *Parke*, J., usually sat in the Bail Court this term. During the first four days of the term, *Littledale*, J., was absent on a special commission for the trial of offences at Nottingham, and *Taunton*, J., on a like commission at Bristol.

of St. Andrews, Holborn, which lies above the bars, in the county of Middlesex, and of the parish of St. George the Martyr in the said county, and by the other defendant as his bailiff; and it is stated that the plaintiff was an inhabitant of the said part of the parish of St. Andrew, Holborn, and by law rateable to the relief of the poor of that part of the said parish, and of the parish of St. George the Martyr, in respect of his occupation of a tenement situate in the said place in which, &c., and within the said part of the parish of St. Andrew; that a rate for the relief of the poor of that part of St. Andrew, Holborn, and of the parish of St. George the Martyr, was duly ascertained, made, signed, assessed, allowed, given notice of, and published according to the statutes; and that by the said rate the plaintiff was, in respect of such inhabitancy and occupation as aforesaid, duly rated *in the sum of 7*l.*; that Bardons, as collector, gave him notice of the rate, and demanded payment, which he refused; that the plaintiff [*3] was duly summoned to appear at the petty sessions of the justices of the peace for the said county, to be holden at a time and place duly specified, to show cause why he refused payment; that he appeared, and showed no cause; that a warrant was duly made under the hands and seals of two justices of the peace for the county then present, directed to Bardons as collector, requiring him, according to the statute, to make distress of the plaintiff's goods and chattels; that the warrant was delivered to Bardons, under which he, as collector, avowed, and the other defendant, as his bailiff, acknowledged the taking of the goods as a distress, and prayed judgment and a return of the goods. The plaintiff pleaded in bar that the defendants of their own wrong, and without such cause as they had in their avowry and cognizance alleged, took the plaintiff's goods and chattels, &c. To this plea there was a special demurrer, and the causes assigned were, that the plea in bar tendered and offered to put in issue several distinct matters,—the inhabitancy of the plaintiff; his chargeability to the relief of the poor, in respect of his occupation mentioned in the avowry and cognizance; the ascertainment, making, signing, assessing, allowance, notice, and publication of the rate; the rating and assessment of the plaintiff; the notice to him of the rate; the demand and refusal of the sum assessed; the summons, the appearance before the justices, the warrant of distress, and delivery thereof to the defendant Bardons. Another cause assigned was, that the plea in bar was pleaded as if the avowry and cognizance consisted wholly in excuse of the taking and detaining, and did not avow *and justify the same, and claim a right to the goods and chattels by virtue of the statutes. [*4] To the fifth and sixth avowries and cognizances, which were similar in form to the fourth, the plaintiff pleaded de injuriâ; and there were special demurrers, assigning the same causes as above. The plaintiff joined in demurrer.

The case was argued in last Michaelmas term by *Coleridge* in support of the demurrer, and *Maule* contra. The Judges not being agreed in their opinions, now delivered judgment seriatim. The points urged and the authorities cited in argument are sufficiently stated and commented on in the opinions delivered by them.

PATTESON, J. The pleas in bar to the fourth, fifth, and sixth cognizances are so entirely at variance with one of the principal objects of special pleading, viz., that of bringing the parties to clear and precise issues of fact or of law, that I cannot bring my mind to consider them as maintainable upon principle. But if, upon the authority of decided cases, it should appear that they are maintainable, I am not prepared to overrule those cases upon any opinion that I may entertain respecting the inconvenience of so general a form of issue; and I am free to confess that, after an attentive examination of the authorities, I am of opinion that the pleas are maintainable.

The leading case upon the subject (I mean *Crogate's case*, 8 Co. 132, for the year-books throw little light on the subject), is by no means consistent in all its different parts, and much that is contained in the four resolutions is unnecessary to the decision of the case itself.

*The pleadings were in substance as follows :—Trespass for driving cattle.
 *5] Plea, a right of common as copyholder in a piece of pasture into which the plaintiff had put his cattle; and that defendant, as servant of the commoner, drove them out. Replication, *de injuriâ suâ propriâ absque tali causâ*.

The first resolution is in substance this: that the replication of *injuriâ absque tali causâ* refers to the whole plea; for all is but one cause. The second resolution is, that where any interest in land, or common, or rent out of or way over land is claimed, *de injuriâ* is no plea; for it is properly when the plea does consist of matter of excuse only, and no matter of interest whatever. The third resolution is, that where the defendant justifies under authority from the plaintiff, *de injuriâ* is no plea; so where he justifies under authority of law. The fourth resolution is, that the issue in the case then at bar would be full of multiplicity.

Upon the authority of this case, if the pleas in bar now under consideration be bad, they must be so on one of the following grounds :—

Either that the avowries claim some interest, or that the defendant justifies under authority of law within the meaning of the third resolution, or that they are bad for multiplicity.

In the first place, as to any claim of interest, it is plain that the avowries claim no interest whatever in land, the sort of interest to which the second resolution is in words confined. But, supposing any interest in goods were within the spirit of that resolution, still, I apprehend that it must be an interest existing antecedent to the seizure complained of, and not one which arises *merely out of that seizure; otherwise this plea could *never be good in
 *6] replevin where a return of goods is claimed, and, of course, an interest in them is asserted. Indeed, it seems to be considered in some text-books that this plea in bar can never be used in replevin; but on reference to the authorities cited for that position, they all appear to be cases where an interest in land was claimed by the avowry. In this respect, I confess that I cannot see any distinction between an action of replevin and one of trespass; and as the plaintiff can bring either at his election, it would be strange if he should be able by suing in trespass to entitle himself to the general form of replication, but if he sues in replevin should be debarred from it. The case of *Wells v. Cotterel*, 3 Lev. 48, was cited at the bar to establish that the plea of *de injuriâ* is good in replevin; but it appears in that case that three of the Judges held it good against the opinion of the fourth, but that all the Court held the avowry bad, and therefore no decision was necessary as to the plea. On the other hand, the case of *Jones v. Kitchen*, 1 Bos. & Pull. 76, is commonly referred to as establishing the position, that this plea in bar can never be used in replevin; but it does not go that length, for the avowry there was for rent in arrear, and, therefore, *de injuriâ* would have been equally bad had the form of the action been trespass. For, in *White v. Stubbs*, 2 Saund. 294, which was an action of trespass, *de injuriâ* was held to be a bad replication, the plea claiming an interest in land, and justifying the taking the goods as encumbering a room to which the defendant showed title.

As, therefore, the avowries in this case show no interest in land or in the goods seized, except that which *arises from claiming a return; and as I
 *7] find no authority for saying, that such claim of return is an interest within the meaning of the second resolution in *Crogate's* case, it seems to me that the avowries show matter of excuse only, and that, as to this ground of objection, the general pleas in bar of *de injuriâ* are good.

In the next place, are the general pleas bad on account of any authority in law shown by the avowries?

It is certainly stated in the third resolution in *Crogate's* case, that the replication *de injuriâ* is bad where the plea justifies under an authority in law; but this, if taken in the full extent of the terms used, is quite inconsistent with part of the first resolution, which states, that where the plea justifies under the

proceedings of a court not of record, the general replication may be used, or where it justifies under a *capias* and warrant to sheriff, all may be traversed except the *capias*, which cannot, because it is matter of record and cannot be tried by a jury. Now, the proceedings of a court not of record, and the warrant to a sheriff and seizure under it, are surely as complete authorities in law as any authority disclosed by the present avowries. With respect to the proceedings of a court not of record, a *quære* is made in *Lane v. Robinson*, 2 Mod. 102, whether a replication de *injuriâ* would be good; but the point did not arise in the case, and the year-books referred to in *Crogate's* case warrant the conclusion that it would. In Bro. Abr. title *De Son Tort demesne*, there are instances of this replication to a plea justifying by authority of law. There is also the case referred to in the argument at the bar, of *Chancey v. Win and Others*, 12 Mod. 580, in *which it is laid down by Lord Holt, that de [*8 *injuriâ* is a good replication in many cases where the plea justifies under [*8 an authority in law. I do not therefore think that the present pleas are objectionable on that ground.

In the last place, are the pleas bad on account of the issue, tendered by them, being multifarious?

If this were *res integra*, I should have no hesitation in holding that they were bad, and it cannot, I think, be denied that the present issues are as full of multiplicity as that in *Crogate's* case, and to which the fourth resolution there applied. But I am unable to find any instance in which this general replication has been held bad on that ground. The objection is indeed mentioned in the cases cited from Lord Chief Justice Willes's reports, but in no one of those cases does the decision proceed on that objection alone, and in all of them there were other undoubted objections. In *Cooper v. Monke*, Willes, 52, the plea justified under a distress for rent, and the general replication was clearly bad within the second resolution in *Crogate's* case. In *Cockerill v. Armstrong*, Willes, 99, the plea justified under a seizure of cattle damage feasant in a close of which the bailiffs and burgesses of Scarborough were alleged to be seised in fee; an interest, therefore, was claimed in the land, and the general replication was bad within the same resolution, and Lord Chief Justice Eyre in commenting on that case in *Jones v. Kitchin*, 1 Bos. & Pull. 80, expressly states that the replication was bad on that ground, and not because it put two or three things in issue, for that may happen in every case where the defence arises out of several facts all operating to one point of excuse. In *Bell v. Wardell*, [*9 Willes, 202, *the pleas set up a custom, which was held bad, and, there- [*9 fore, any decision as to the general replication became unnecessary.

It is every day's practice where the plea justifies an assault in defence of the possession of a close, or removing goods doing damage to it, to reply de *injuriâ* generally, and yet this objection as to the multifarious nature of the issue would apply in both cases. The same observation holds good where this general replication is used in actions for libel or slander, in which a justification is pleaded.

Many cases are referred to in Com. Dig. tit. *Pleader*, (F) 18, and several following numbers, and, again, 3 (M) 29, in none of which do I find that the general form of replication has ever been held bad on account of its putting in issue several facts.

The cases of *Robinson v. Rayley*, 1 Burr. 316, and *O'Brien v. Saxon*, 2 B. & C. 908, are authorities to show that it cannot be objected to on that account, provided the several facts so put in issue constitute one cause of defence, which, as it seems to me, they always will, where the plea is properly pleaded, however numerous they may be, since if they constitute more than one cause the plea will be double.

The present avowries state many facts undoubtedly, but they are all necessary to the defence, and combined together they show but one cause of defence, namely, that the plaintiff's goods were rightly taken under a distress for poor

rates, and if the general replication be held bad in this case, I am at a loss to see in what case such a replication can be held good, where it puts more than *10] one fact in issue. I am compelled, therefore, *however reluctantly, to come to the conclusion, that the pleas in bar are good.

PARKE, J. (a), after stating the pleadings, proceeded as follows:—

The question for our decision is, whether the objections pointed out in the special demurrer, and which have been insisted upon in the argument before us, are well founded in law? It appears to me, upon an examination of the authorities, that they are not, and that the pleas in bar are good.

It is true that these pleas in bar put in issue a great number of distinct facts; and it is also true that the general rule is, that where any pleading comprises several traversable facts or allegations, the whole ought not to be denied together, but one point alone disputed: and I am fully sensible that the tendency of such a rule is to simplify the trial of matters of fact, and to save much expense in litigation. But it is quite clear, that from a very early period in the history of the law, an exception to this general rule has been allowed with respect to all actions of trespass on the case, in the plea of the general issue; and with respect to *some* actions of tort, in the replication of *de injuriâ suâ propriâ absque tali causâ*. This replication, where it is without doubt admissible, generally, indeed it may be said always, puts in issue more than one fact, and often a great number. For instance, in an action of assault, where there is a justification that the defendant was possessed of a house; that the plaintiff *11] entered; that the defendant requested him to retire, and he refused; *that the defendant laid his hands on the plaintiff to remove him, and the plaintiff resisted;—all these facts may be denied by this general replication. Com. Dig. Pleader, (F) 18. *Halt v. Gerard*, Latch, 128, 221, 273. So, where an obligation to repair fences, and a breach of the fences by the plaintiff is pleaded as an excuse for a trespass with cattle, *Rastell*, 621, a, Com. Dig. Pleader, 3 (M) 29. So if there be a justification of assault and false imprisonment, on the ground of a felony committed, and reasonable suspicion of the plaintiff, *Br. Abr. De Son Tort*, 49. So as to other justifications in the like action, *Ibid.* 18, 20. Under the precept of an admiralty court, or under a precept after plaint levied in a county or hundred court, *Rastell*, 668 a, many facts may be put in issue by the general replication, and there appears no question about the validity of such a replication, *Crogate's case*, 8 Coke, 132. The case of *O'Brien v. Saxon*, 2 B. & C. 908, is a further authority to the same effect, that many facts may be included in one issue; and if many facts may be traversed, it can be no valid objection that more than usual are denied in any particular case.

I must not, however, omit to notice, there is a dictum of Lord Chief Justice Willes in the case of *Bell v. Wardell*, Willes, 204, that the general replication of *de injuriâ* was bad on this ground, and also in that of *Cockerill v. Armstrong*, Willes, 100; but Lord Chief Justice Eyre, in *Jones v. Kitchin*, 1 Bos. & Pull. 80, disapproves of that dictum, and says that the reason is not that the replication puts two or three things in issue; and both these cases may *12] be supported on another ground, namely, that in one a right in the *nature of a right of way, in the other a seisin in fee, would be included in the traverse.

It seems clear to me, therefore, that this general traverse in actions of tort is not bad on account of the multiplicity of the matters put in issue, and unless there be some distinction between actions of replevin and actions of tort (a point I shall afterwards consider), the first ground of objection must fail.

The second ground is, that the avowry and cognizance claim an *interest* in the goods, and that for this reason the pleas in bar are not admissible. Upon the best consideration I have been able to give to the authorities on this sub-

(a) TAUNTON, J., delivered no judgment, having been consulted in the cause when at the bar.

ject which are (many of them) obscure and contradictory, I do not think that any interest is claimed in these pleadings, within the meaning of that word in the rules laid down on this subject. In Crogate's case, 8 Rep. 132, the principal authority, three cases are mentioned in which the general traverse is not allowed.

The first is, where matter of record is parcel of the issue; and that for the obvious reason, that if it were permitted, it would lead to a wrong mode of trial.

The second case is, where the defendant in his own right or as servant to another (who is by that decision put on the same footing as his master) claims an interest in the land, or any common, or rent going out of the land, or any way or passage upon the land.

The third case is, where, by the defendant's plea, any authority or power is mediately or immediately derived from the plaintiff. Under this description is included any title by lease, license, or gift from the plaintiff; Br. Abr. De Son Tort Demesne, 41, or lease *from his lessee; 16 Hen. 7, 3; Br. Abr. De Son Tort Demesne, 53. It is also added in Crogate's case, that the same law is of an authority given from the law, as to view waste; but in the case cited from the Year Book, 12 Ed. 4, 10 b, as supporting this position, the plea stated that the plaintiff claimed as tenant by statute merchant, and defendant justified his entry under his right to view waste, so that matter of record would have been in issue under the general replication. This explanation of the case was given at the bar in *Chancy v. Win*, 12 Mod. 582, and in the same case Lord Holt says, that the case of a right of entry to view waste, is upon a special reason, because the seisin of the lessor would be involved in the issue. As a general proposition, indeed, it is untrue that authority of law may not be included in the traverse, it being clear that an arrest by a private individual or a peace officer is by an authority from the law; and yet pleas containing such a justification may be denied by a general traverse.

Lord Coke says, after laying down these three rules, that the general plea, *de injuriâ, &c.*, is properly when the defendant's plea doth consist merely upon matter of excuse, and of no matter of *interest* whatever. By this I understand him to mean an interest in the realty, or an *interest* in, or *title* to chattels, averred in the plea, and existing prior to, and independently of the act complained of, *which interest or title would be in issue on the general replication*; and I take the principle of the rule to be, that such alleged *interest* or *title* shall be specially traversed, and not involved in a general issue.

It is contended, however, on the part of the defendants, *that the interest here meant, is one that the party would acquire by the seizure which forms the subject of complaint, and that the replication would be improper whenever the defendant justified under any proceedings by which, if rightful, he would acquire an interest or a special property.

If this were the meaning of the term "*interest*," a general replication would be bad to a plea to an action of trespass justifying seizure under process of the Admiralty Court, or of any inferior jurisdiction not of record. So, in case of a justification of taking beasts in withernam (16 Hen. 7, 2). So of a justification of seizure for salvage, Lilly's Entries, p. 349. And yet in all these cases it appears to be settled that the general traverse is permitted.

It seems to me, therefore, that the objection is applicable to those cases only where a party justifies *as having* an interest, or under one who has an interest, by title at the time of the act complained of, *which interest would therefore be put in issue by the general traverse*.

No case or precedent cited on the argument, or any that I am aware of, is against this construction of the rule. In *Cockerill v. Armstrong*, Willes, 101, indeed, before referred to, which was the case of a distress, damage feasant, and impounding, Lord Chief Justice Willes says (among other observations), that the taking away and impounding *seemed* to imply a *claim of right*; but

there the plea stated a seisin in fee in the bailiffs of Scarborough, which would have been in issue; and it is on that ground that the decision of the Court is to be supported; and so Lord Chief Justice Eyre seems to have thought in *Jones v. Kitchen*, 1 Bos. & Pull. 80.

*[15] It appears to me, then, that in an action of trespass *de bonis asportatis*, a similar justification to the present might be traversed by the general replication, as no matter of interest in the goods seized would be included in that traverse; and the only remaining question is, whether it makes any difference that the form of action is in replevin.

Some modern treatises lay it down as a general rule, that this form of pleading is inadmissible altogether in replevin, 1 Chitty on Pleading, 622, 5th edit.; but the authorities cited for this position do not bear it out. Finch's Law, 396, is one; after stating that in all actions of trespass merely transitory, although the defendant pleads any special matter, the plaintiff may reply generally, except where the justification is by matter of record or writing (by which he means writing in the like nature), or by some title or license from the plaintiff himself, he proceeds to state that in all local trespasses where title is claimed, the special matter must be answered; and "in replevin, which is *real*, the title or special matter must be always traversed." I do not think this means to include all replevins, but those only where the avowry claims title to the realty. In *Jones v. Kitchen*, 1 Bos. & Pull. 76, a case of replevin, the plea in bar was held bad, not because it was not pleadable in replevin, but because it would put in issue a title or interest in land; and the proposition in the judgment in that case, that this plea could only be allowed in actions for *personal injuries*, is certainly too limited, as many authorities have been cited to show that it is applicable to trespasses to goods.

*[16] Indeed, it was conceded in the argument, that in *some* cases of replevin, such a plea in bar would be admissible, and if admissible at all, there seems to me no reason why it should not be governed by the same rules as in an action of trespass to goods, viz., that it should not be admitted where matter of record, title, interest, or authority from the plaintiff, should be put in issue by that plea in bar, but it should be in all others.

And there are some precedents in actions of replevin, of such a plea in bar, which were cited on the argument. In Lilly's Entries, 349, there was an avowry for salvage, with a prayer of judgment of a return, and such a plea in bar. In *Wells v. Cotterell*, 3 Lev. 48, Lev. Entr. 185, there was a similar plea in bar, which was held bad on the ground that it traversed matter of title, but it does not appear to have been objected to for the general reason that such a plea was inadmissible in that form of action. Upon the whole, therefore, my opinion is, that the plea in bar is good in this case, as it puts in issue no matter of title or interest in the goods, and, therefore, that there should be judgment for the plaintiff.

Lord TENTERDEN, C. J. I consider the system of special pleading, which prevails in the law of England, to be founded upon and to be adapted to the peculiar mode of trial established in this country, the trial by the jury; and that its object is to bring the case, before trial, to a simple, and, as far as practicable, a single question of fact, whereby not only the duties of the jury may be more easily and conveniently discharged, but the expense to be incurred by the suitors may be rendered as small as possible. And experience has abundantly proved, that both these objects are better attained where the issues and matters of fact to be tried are narrowed and brought to a point by the previous proceedings and pleadings on the record, than where the matter is left at large to be established by proof, either by the plaintiff in maintenance of his action, or by the defendant in resisting the claim made upon him. I am sensible that this principle has not always been kept in view by the Courts, and that there have been, in practice, many instances of departure from it, founded upon very nice and subtle distinctions. The decisions of our prede-

cessors, the judges of former times, ought to be followed and adopted, unless we can see very clearly that they are erroneous, for otherwise there will be no certainty in the administration of the law; and if I had found the question in this cause distinctly decided in any former case, I should have thought it my duty to abide by the decision, especially in a matter regarding rather the course of proceeding than a question of pure law. But, after an attentive consideration of the cases quoted at the bar, and of such others as I have been able to meet with after a very diligent search, I do not find that this has been done. I find, indeed, many decisions and dicta not easily reconcilable with each other, founded, as I have already observed, upon very nice and subtle grounds, and not capable of being reduced to any plain, or, to my mind, any solid principle. There is one matter in which all the authorities in our books agree. If an action of trespass be brought for turning sheep or cattle to feed upon land in the possession of the plaintiff, and the defendant justifies the act by pleading that A. B., his landlord, was seised of certain lands, and demised the same to him for a term not yet expired, and that he thereupon entered and was possessed of the *demised lands; and then goes on to allege, in the ordinary [*18 form of prescription, that his landlord had right of common on the plaintiff's land for cattle levant and couchant on the demised land, and that he put the cattle on the plaintiff's land in the exercise of that right; in such a case, I say, it is agreed by all the decisions that the plaintiff cannot reply generally *de injuriâ sua propria absque tali causâ*, but must traverse some one of the facts alleged in the plea, admitting, for the purpose of the cause, all the others. In such a case at least three separate and distinct facts are alleged: the seisin of the landlord, the demise to the defendant, the immemorial right of common. Every one of these three is necessary to the defence; but the plaintiff must elect which of them he will deny, and when he has so done, the cause goes down to the jury for the trial of that single fact; the jury are not embarrassed by a multiplicity of matter, and the parties are relieved from much of the expense of proof, to which they would be subjected if all the facts alleged in the plea were to be matters of proof and controversy before the jury. In the case now before the Court, the avowry alleged that a poor-rate was made; that it was allowed by the justices; that the plaintiff was assessed in it for his messuage in which the distress was taken; that this messuage was within the parish; that payment of the assessment was demanded and refused; that a warrant of justices was issued to levy it, and that the goods were taken under the authority of that warrant. Many distinct and independent facts are thus alleged in the avowry, every one of which is necessary *to sustain the right to take the goods*, and to entitle the defendant to have them returned to him; and if this general plea in bar be good, the defendant *must prove every one [*19 of them at the trial, and the jury must consider and decide upon each before a verdict can properly be given. Now, I think I might safely venture to ask any plain and unlettered man, whether he could find any difference between the two cases that I have put, either in common understanding or in sound logic. For myself, I must say that I can find none. If no such distinction exists or can be found, why should a different rule prevail? why should all the matters of fact be sent together to the jury in the one case and not in the other? To this question I am persuaded that no satisfactory answer could be given to the mind of an unlettered man. To a judge, who is to act upon the decisions of his predecessors, a binding if not a satisfactory answer might be given, by showing that the matter had been already so decided; but this, as I conceive, has not yet been done.

I find it decided, that where, in an action of trespass, the defendant's plea contains merely matter of excuse, and not matter of right, a replication in this form may be good: and to this there may, perhaps, be no objection in principle, because the matter of excuse may, and generally will be, the only matter to be tried, any previous allegation being a matter of inducement only. I find it

also laid down, that where the defendant claims any interest in land by his plea, this general replication will not be good; but it is said, that it may be otherwise in the case of goods. Why there should be such a distinction I am not able to comprehend. The defendant in this case does, certainly, in one of the avowries, claim an interest in the goods, because he claims to have them returned to him; but I do not rely on this. For the reasons which I have thus, perhaps, imperfectly given, and which are founded upon what I conceive to be *20] principle, and not upon authorities, and which, therefore, render it unnecessary for me to advert to particular cases, I feel myself reluctantly bound to differ from my two learned Brothers; and it is a satisfaction to me to know that my opinion, which it is my duty to give as I entertain it, cannot prejudice the plaintiff, because, notwithstanding my opinion, the judgment of the Court on these demurrers must be given for the plaintiff. I would only add, that my view of the case would be the same if this were a replication to a plea in trespass, or if the defendant had pleaded instead of avowing, and so had not claimed a return of the goods.

Judgment for the plaintiff.

WELLS v. HOPWOOD.

A ship having on board goods which were insured on a voyage from London to Hull, but "warranted free from average, unless general, or the ship should be stranded," arrived in Hull harbour, which is a tide-harbour, and proceeded to discharge her cargo at a quay on the side of it: this could be done at high water only, and could not be completed in one tide. At the first low tide, the vessel grounded on the mud, but, on a subsequent ebb, the rope by which her head was moored to the opposite side of the harbour, stretched, and the wind blowing from the east at the same time, she did not ground entirely on the mud, which it was intended she should do, but her forepart got on a bank of stones, rubbish, and sand, near to the quay, and the vessel having strained, some damage was sustained by the cargo, but no lasting injury by the vessel: Held, by Lord TENNEN, C. J., LITLEDALE and TAUNTON, Js., PARKE, J., dissentiente, that this was a stranding within the meaning of that word in the policy.

INSURANCE upon the ship *Britannia* and the cargo at and from London to Hull, and until the goods should be discharged and safely landed. The declaration set out the policy, which was in the usual form, and contained a memorandum whereby corn, fish, fruit, flour, and seed were warranted free from average, unless general, or the ship should be stranded. Plea, the general issue. At the trial, before Parke, J., at the spring assizes for Yorkshire, 1830, the *21] plaintiff was non-suited, *subject to the opinion of this Court upon the following case:

The plaintiff, who is a merchant at Hull, in the month of June, 1829, shipped in London, on board the *Britannia*, for Hull, sixty-nine butts of Zante currants. Upon this cargo, the policy of insurance was effected by the plaintiff's agent, on behalf of the plaintiff, and the defendant subscribed the same for 300*l.*, at the premium of 5*s.* 3*d.* per cent. The butts of currants were properly stowed in the vessel, which was in every respect sound and seaworthy. The ship sailed from London in June, and arrived at Hull on the 26th of the same month; and in the afternoon of that day was, at high water, moored alongside the plaintiff's quay, which projects about fifteen feet into the Hull harbour, in front of the plaintiff's warehouse. The harbour is a tide-harbour. In the harbour, and to the south of the quay adjoining the plaintiff's warehouse, there is a bank of stones, rubbish, and mud, which had been there ten or fifteen years, and had, in the course of time, extended itself beyond the outer line of the plaintiff's quay, near the end of which it projects, sloping off so far into the river Hull, at that part of the harbour, as to make it necessary and usual for large vessels, when lying opposite the plaintiff's quay, to be hauled off ahead

from the quay shortly after high water, to avoid grounding on the bank. When the *Britannia* arrived at the plaintiff's quay, she was moored as usual; and as her bow projected beyond the south end of the plaintiff's quay, and was, at high water, immediately over the bank, her head was, according to the usual practice on such occasions, and in order to avoid grounding on the bank at low water, hauled off, at the time of the tide *falling, from the quay, by a rope [*22 being carried out from her head to the opposite side of the harbour, and there fastened to a post, and hove tight, the stem of the vessel remaining moored by a rope fastened to the plaintiff's quay. After this, she grounded in safety upon the soft mud in the harbour, and, soon after six o'clock the next morning, the delivery of her cargo was commenced. When she again floated, at high water, the rope which extended from her to the opposite side of the harbour was loosened, and her head was again hauled alongside the quay, and the delivery of her cargo continued. When the water subsided, the rope was again fastened, as before, to the opposite side of the harbour, and her head was, in like manner, hauled off, for the purpose of avoiding the bank, and the rope was then hove tight. On the evening of the 27th, after the vessel had been placed in this position, and had safely taken the ground, with her head from the bank, the captain sounded the pumps, and found all right. On the morning of the 28th, the tide having fallen, the ship had changed her position, and was found nearer the quay, with her forefoot on the said bank. This arose from the rope which was fastened to the opposite side of the harbour having stretched, and the wind at the same time blowing from the east towards the bank, and causing a strain on the rope. It was not broken, or injured, or loosened at either end. There was no shock or concussion felt by those on board. In consequence of the grounding with her forefoot on the bank, the vessel strained at the time, and her seams opened, and a quantity of water thereby found a passage into the hold, and damaged several of the butts of currants. Upon her floating again, the seams again closed, and *upon her being subsequently [*23 examined, no injury was discovered. The amount of damage was proved to be 25*l.* 5*s.* 4½*d.* upon the sum of 300*l.* insured. The question for the opinion of the Court was, Whether this was a stranding within the meaning of the memorandum in the policy. If the Court should be of opinion that it was, a verdict was to be entered for the plaintiff, otherwise the nonsuit to stand.

The case was argued in the course of last Trinity term by *F. Pollock* for the plaintiff, and *Holt* for the defendant. The arguments, and the several authorities cited, are so fully considered and commented on by the learned Judges in delivering their opinions, that it is deemed unnecessary to notice them further.

Cur. adv. vult.

There being a difference of opinion, the Judges, in course of this term, delivered their judgments seriatim.

TAUNTON, J. The question here is, whether there has been a stranding within the meaning of the memorandum in the policy. Upon the question, what constitutes a stranding, there have been many decisions within the last forty years, and the difference of circumstances is so minute in many cases wherein a different conclusion has been drawn, that it is not easy to reconcile them all. This distinction, however, appears to me to be deducible, that in instances where the event happens in the ordinary course of navigation, as for instance, from the regular flux and reflux of the tide, without any external force or violence, it is not a stranding; but where it arises from an accident, and out of *the common course of navigation, it is. The difficulty con- [*24 sists in the application of the rule. In *Dobson v. Bolton*, at Guildhall, after Easter term, 1799, 1 Marsh., Law Ins. 231, 3d edit., the ship ran on some wooden piles four feet under water, about nine yards from the shore; and Lord Kenyon held it to be a stranding. In what way the ship ran on the piles does not appear; but the word "ran" denotes some external force, and therefore some extraordinary cause is implied. So also, where the accident was

caused by the wind, which had been moderate, suddenly taking the ship ahead, and driving her ashore stern foremost, *Harman v. Vaux*, 3 Campb. 429; and in *Baker v. Towry*, 1 Stark. 436, by the ship being driven by the current on a rock; in each instance the occurrence was ruled to be a stranding. So also, in *Rayner v. Godmond*, 5 B. & A. 225, the like conclusion was come to, where the ship, in the course of her voyage upon an inland navigation, arrived at a place called Beal Lock, and while she was there it became necessary, for the purpose of repairing the navigation, that the water should be drawn off. The master placed the vessel in the most secure place he could find, alongside of four others. The water being then drawn off, all the vessels grounded, and the ship insured grounded on some piles in the river which were not known to be there, and the cargo received considerable damage. The part of the navigation where she took the ground was one in which vessels were usually placed when the water was drawn off. In that case Lord Tenterden, distinguishing it from *Hearne v. Edmunds*, 1 B. & B. 388, observed, "there the accident happened in the ordinary course of the voyage, and, on that ground, *the underwriters were held not to be liable. Here the loss did not so happen, for we cannot suppose that these canals are so constantly wanting repair as to make the drawing off of the water an occurrence in the ordinary course of a voyage. I think, therefore, that in this case the vessel was stranded." In *Carruthers v. Sydebotham*, 4 M. & S. 77, the ship insured having arrived opposite the dock at Liverpool, the pilot, in the absence of the captain, and contrary to his caution against letting the vessel take the ground, laid her aground in the Mersey, on a bank. When she floated, he took her to the pier of the basin, and made her fast there, with the intention that she should take the ground when the tide fell. Soon afterwards the vessel took the ground astern, and the water leaving her, she fell over on the side farthest from the pier, with such violence that she bilged, and broke many of her timbers. When the tide rose again, she righted, but with ten feet water in her hold, by which the cargo was wetted and damaged. The Court held that this was clearly a stranding, the ship having been taken out of the usual course, and improperly moored in the place where the accident afterwards happened. The same doctrine was holden in *Barrow v. Bell*, 4 B. & C. 736. There, the ship having been compelled by tempestuous weather to bear away for Holyhead, and, having struck on an anchor upon entering the harbour, whereby she sprang a leak, and was in danger of sinking, she was in consequence warped further up the harbour, where she took the ground. In *Bishop v. Pentland*, 7 B. & C. 219, which is the most recent decision on the subject, a ship was compelled, in the course *of her voyage, to go into a tide-harbour, where she was moored *26] alongside a quay, where ships of her burthen usually were moored, and in as safe a situation as could be found. It was necessary, in addition to the usual moorings, to lash her by a tackle fastened to her mast to posts upon the pier, to prevent her falling over upon the tide leaving her. The rope being of insufficient strength, the tackle by which the ship was lashed, when the tide was out, broke, and the ship fell upon her side, by which she was stove in and greatly injured; and this was held to be a stranding. This last case, I think, cannot be distinguished from the present, the only difference as to the immediate cause of the damage being, that there the rope broke, and here it stretched; but with respect to the circumstances which constitute a stranding, this case is much the stronger of the two; for here it is found, that the wind blowing from the east towards the bank, and causing a strain on the rope, the ship in consequence had changed her position, and was found nearer the quay, with her forefoot on the bank, so that there was a change in the position of the ship, and a stranding by her forefoot being on the bank, and this partly, if not wholly, effected by the easterly wind. This, I think, was an accidental circumstance, not necessarily incident to the course of navigation. On the authority

of these cases, therefore, I am of opinion that there was a stranding in this instance within the meaning of the memorandum.

With respect to the cases cited on the other side, namely, *Baring v. Henkle*, before Lord Kenyon, at Guildhall, after Trinity term, 1801, Marsh on Ins. 232, *M'Dougle v. The Royal *Exchange Assurance Company*, 4 M. & S. 508, [*27 and *Hearne v. Edmunds*, 1 B. & B. 388, it is sufficient that the law of the first is extremely doubtful; for there the ship was driven aground, and continued in that situation an hour; and although this happened in consequence of one brig running foul of her bow and another of her stern, yet it should seem that a ship taking the ground and remaining there a considerable time, must be considered as a stranding, whether it proceeds from the violence of the wind, or from any other accident out of the usual course of navigation. In *M'Dougle v. Royal Exchange Assurance Company*, it was only holden, that remaining upon a rock only a minute and a half, after striking on it, was not a settlement of the ship for a sufficient length of time to constitute a stranding. And with respect to the last, *Hearne v. Edmunds*, the decision was founded upon this; that the vessel was proceeding in the ordinary way, and took ground on the ebb of the tide, without any extraneous accident.

PARKE, J. This was an action on a policy of insurance on fruit from London to Hull, with the usual memorandum. The vessel arrived in Hull harbour, which is a tide-harbour, and proceeded to discharge her cargo at a quay on the side of it. This could be done at high water only, and could not be completed in one tide. At low water the vessel grounded on the mud; but on one occasion the rope by which her head was moored to the opposite side of the harbour stretched, and the wind blowing from the east at the same time, she did not ground entirely on the mud, which it was intended that *she should [*28 have done, but her forefoot got on a bank of stones, rubbish, and mud, near to the quay, and the vessel having strained, some damage was sustained by the cargo. Upon her floating again the seams closed, and, on examination, no injury to the vessel was discovered. The substance of the case is shortly this: that a vessel, which, according to the ordinary and usual course in that part of the voyage, was laid on the ground by the master and crew at low water, from an accidental cause did not ground in the place that they intended, but *sustained no damage*; and the question is, whether this was a "*stranding*" within the meaning of the memorandum; and I am of opinion that it was not.

In reading this memorandum, two things are clear; first, that according to its grammatical construction, the simple fact of "*stranding*" destroys the exception in favour of the enumerated articles contained in the memorandum, and includes them in the general operation of the policy, though no damage is thereby done to those articles; and the memorandum is not to be read as if it had contained a further condition besides the stranding of the ship—that such average should be occasioned *by the stranding*. This construction is now fully established by the decisions (*Nesbitt v. Lushington*, 4 T. R. 783, *Burnett v. Kensington*, 7 T. R. 210); and it follows that in all cases the inquiry is to be, what condition of the ship constitutes a stranding, and not whether the cargo be thereby injured or not.

Secondly, another thing may be as clearly collected from the terms of the memorandum; namely, that the underwriters, who are presumed to know the usual *course of the voyage insured, do not intend, under the term "*stranding*," to include an event which must be of occasional, and, in all proba- [*29 bility, of frequent occurrence in the course of the voyage insured. If the term is to be applied to such an event, the exception from average is nugatory, and might as well be omitted altogether. If, for instance, the grounding of a vessel, on a voyage in which she would have to navigate a tide-river or harbour, and must necessarily take the ground, be a stranding within the meaning of this memorandum, and puts an end to the exemption from average loss, the

clause containing that exemption could never take effect on such a voyage, and would have no operation. The underwriters must be presumed to have intended that the exemption *might* take effect, and, therefore, must have meant by this term an event which would not happen in the ordinary and usual course of the voyage—a grounding different from that which ordinarily and usually occurs to vessels navigating tide rivers and harbours. Upon this principle the case of *Hearne v. Edmunds*, 1 B. & B. 388, was decided, and it was there held, that the taking of the ground by a vessel in the ordinary and usual course of the voyage is not a stranding within the intent of the usual memorandum.

Now, to apply this rule to the present case, it was the ordinary and usual course of the voyage insured for the vessel to be laid on the ground in this harbour: she was laid on the ground according to that usage, though not precisely in the place intended; and the whole question in the cause is, whether that circumstance makes a difference. That circumstance cannot, as it seems to

*30] me, *constitute a *stranding*, unless it can be said, that whenever, from the influence of wind or tide, or from any accidental causes, the vessel takes the ground at a small distance from the place intended, though she sustains no damage thereby, she would be *stranded*. If the master and crew meant to place their vessel on one sand-bank, and, by accident, placed it on another, twenty feet off, and no damage was sustained in consequence, no one would say that the difference in situation constituted a stranding; and if the injury to the cargo is suggested as making all the difference, the answer is, that that circumstance must be omitted, for the reasons before given, from the consideration of the case. It follows, that it can make no difference, if the ship be laid on the ground voluntarily, in the course of a voyage where such a proceeding is usual, whether she be laid on a hard bank or a soft one, or partly on one and partly on the other: in neither case would there be any stranding. This will be more readily conceded if we look at the case, as we ought to do, stripped of the consideration of damage to the cargo. Suppose the precise circumstance in question to have occurred to this vessel, that the cargo was uninjured by this event, but had been injured in the course of the previous voyage: would the assured be entitled to recover an average loss? Or, suppose that the rope, instead of stretching from its dryness, had contracted from its wetness, and the wind had blown from the west instead of the east, and the vessel (as it would have done) had taken the ground at low water *further* from the quay, but equally far from the place intended by the crew: would it have been contended that she was thereby *stranded*, and the assured let in to claim for all the damage sustained

*31] by the cargo insured on a previous *part of the voyage? It appears to me that it would be a consequence resulting from the decision that the circumstances stated in this case constituted a stranding—that the vessel would be also considered as having been stranded in the supposed cases. Far as the decisions have carried the meaning of this term beyond its ordinary and usual signification, the effect of the present decision would be to carry it much further.

It seems to me better to hold, that no vessel can be considered as stranded when she is laid on the ground by the voluntary act of the master and crew, in the course of a voyage in which the usage is to lay vessels on the ground, and it is done in pursuance of that usage, and the vessel is uninjured thereby. The present case is, however, in some respects, different from all that have been decided, and on which reliance was placed by the counsel for the plaintiff on the argument.

The case of *Carruthers v. Sydebotham*, 4 M. & S. 77, is distinguishable, and was distinguished in that of *Hearne v. Edmunds*, 1 B. & B. 388, and also in that of *Rayner v. Godmond*, 5 B. & A. 225; for the vessel was laid on the ground against the wish of the master, and out of the usual course of the voyage. In *Rayner v. Godmond*, the vessel was considered as having been placed on the ground out of the ordinary course of that voyage; and in *Bishop v. Pentland*, 7 B. & C. 219, the vessel was held not to have been stranded, when placed on

the ground by the crew in a tide-harbour; but when she was thrown over by an unusual accident, the Court thought that a stranding took place. In that case also the vessel was stove in and greatly injured by falling over; *and I should feel a difficulty in saying, that the decision of that case would have [*32 been right if that circumstance had not occurred; I can hardly think the vessel would have been considered as stranded, if she had fallen over in a tide-harbour, where she took the ground in the ordinary course, and had sustained no damage at all.

For these reasons, I think that the judgment of the Court ought to be for the defendant.

LITLEDAL, J. I was one of the Judges who held, in the case of *Bishop v. Pentland*, 7 B. & C. 219, that what occurred there amounted to a stranding. Upon further consideration, I continue of the opinion that I then entertained, and that being so, I think it unnecessary to give any additional reasons in favour of that opinion. And then, the only question with me is, whether the circumstances of this case are so far similar to what occurred in that as to warrant the same judgment.

In the present case, the vessel arrived in Hull harbour (which is a tide-harbour) on the 29th of June, and was, at high water, moored alongside the quay. In order to avoid grounding on a bank at low water, she was, at the time of the tide falling, hauled off from the quay by a rope carried out from her head to the opposite side of the harbour, and there fastened to a post and hove tight, the stern of the vessel remaining moored by a rope fastened to the quay. This was her situation on the evening of the 27th of June, 1829; she was therefore then safely moored in a place where, in the ordinary course of her proceeding, she was intended to be. On the morning of the 28th, the tide having fallen, the ship *had changed her position, and was found nearer [*33 the quay, with her forefoot on the bank. This arose from the rope (which was fastened to the opposite side of the harbour) having stretched, and the wind, at the same time blowing towards the bank, causing a strain on the rope. She then grounded in a place where, in the ordinary course of proceeding, she was not meant to be, and she came to the ground by a peril of the sea, and by such grounding received some temporary damage. In *Bishop v. Pentland*, 7 B. & C. 219, the vessel was moored alongside the quay, where ships of her burthen and build coming into Peel harbour usually were moored. She was therefore in a place where, in the ordinary course of her proceeding, she was meant to be. It was necessary, however, to lash her, by tackle fastened to the mast, to posts upon the pier, to prevent her falling over on the tide leaving her. The state of the harbour where the vessel lay would have had no effect upon her if she had been properly lashed, and she would have sustained no damage in the harbour if the rope had not given way; which rope had been used contrary to the opinion of a person who had acted as pilot. When the tide was out, the tackle by which she was lashed broke, and she fell over upon her side, by which she was stove in and greatly injured. But for the breaking of the tackle the ship would have remained in the same situation as ships usually are in Peel harbour during ebb. In that case also, the vessel came to the ground in a place where, in the ordinary course of proceeding, she was not meant to be, and came there by a peril of the sea, and by the grounding received damage. In both cases *the damage arose from a rope, in the one instance breaking, in the other, stretching. In that case, it is true, the vessel fell over on her [*34 side, whereas in this, she grounded without falling over; in that case, too, she was materially injured; whereas here she was only injured for a few hours, and not permanently: but these differences do not appear to me to be of such importance as to warrant a different judgment. On the whole, therefore, I think that the case ought to be governed by the decision in *Bishop v. Pentland*, and, consequently, that there was a stranding, which entitles the plaintiffs to recover.

Lord TENTERDEN, C. J. Several of the cases hitherto decided on this subject

are, as to their facts, very near to each other, and not easily distinguishable. But it appears to me that a general principle and rule of law, may, although perhaps not explicitly laid down in any of them, be fairly collected from the greater number. And that rule I conceive to be this: where a vessel takes the ground in the ordinary and usual course of navigation and management in a tide river or harbour, upon the ebbing of the tide, or from natural deficiency of water, so that she may float again upon the flow of tide or increase of water, such an event shall not be considered a stranding within the sense of the memorandum. But where the ground is taken under any extraordinary circumstances of time or place, by reason of some unusual or accidental occurrence, such an event shall be considered a stranding within the meaning of the memorandum. According to the construction that has been long put upon the memorandum, the words "unless general, or the ship be stranded," are to be *35] considered as an exception out *of the exception as to the amount of an average or partial loss, provided for by the memorandum, and, consequently, to leave the matter at large according to the contents of the policy; and as every average loss becomes a charge upon the underwriters where a stranding has taken place, whether the loss has been in reality occasioned by the stranding or no, the true and legal sense of the word "stranding," is a matter of great importance in policies upon goods. In policies on ship, the memorandum is not found. In such policies the inquiry is, whether a loss arose by perils of the sea, and the question is consequently unfettered by any technical phrase. Upon the facts of this case, it appears to me that the event which happened to this ship is within the second branch of the rule as above proposed. If the rope had not slackened, and the wind had not been in such a direction as it was, the vessel would have remained safe during the night; for although raised by the influx of the tide, she would at its ebb have grounded again on the soft and even bottom over which she had been placed. The events that occurred, unusual and accidental in themselves, caused the vessel to quit that station, and go in part to another, where, upon the ebbing of the tide, her forepart rested on a stony bank, so as to be above her remaining part, and to cause the straining by which the cargo was injured from the influx of water through the opening of the planks.

I should observe that my judgment in this case is not founded upon the fact of injury to the cargo, or of the want of injury to the ship; I do not consider either of those circumstances as being properly an ingredient in question.

*36] The rule as proposed will probably be found consistent *with the cases quoted at the bar, and which it is not necessary for me to repeat. I will only observe, that the facts of the case of *Bishop v. Pentland*, 7 B. & C. 219, cannot, in my opinion, be distinguished in effect from those of the present case: it is the last decision on the subject. It cannot be decided that this is not a case of stranding, without overruling that decision. The rule as proposed upholds the judgment in that case: and for the reasons given I think this is a case of stranding; and the verdict must be entered for the plaintiff.

Judgment for the plaintiff.

HARRISON v. COURTAULD.

H. accepted a bill for the accommodation of B., the drawer, who endorsed it over as security for a debt, and afterwards became bankrupt. The endorsee entered into an agreement with the assignees, for purchasing part of the bankrupt's property, and for the arrangement of some claims which he, the endorsee, had upon the estate; and he afterwards gave them a release of all demands, no mention being made, during this transaction, of the bill, which had been dishonoured. He knew at the

time of the agreement, but not when he took the bill, that it was accepted for accommodation:

Held, that notwithstanding the above release, the acceptor was still liable at the suit of the endorsee.

THE Master of the Rolls sent the following case for the opinion of this Court:—

On the 26th of December, 1826, Harrison accepted a bill of exchange of that date for 298*l.*, drawn upon him by and payable to the order of Stephen Beuzeville, at three months after date. Harrison accepted the bill for the drawer's accommodation. Beuzeville afterwards endorsed and delivered it to Courtauld as a collateral security for a debt of 2000*l.*, which was the balance due upon certain transactions between them relative to the manufacturing of silk. Courtauld did not then know that the bill was accepted for accommodation; but he was informed of it by Beuzeville before entering into the agreement *next mentioned. The bill, when due, was dishonoured. Beuzeville *37 afterwards became bankrupt; and in October, 1827, an agreement was executed between his assignees (with the assent of the creditors) and Courtauld, whereby the assignees agreed to sell a certain mill and premises, lately occupied by Beuzeville, to Courtauld for 1,500*l.*, and to procure him a surrender thereof on his paying the price; and he promised to relinquish all claims which he had on certain goods upon the premises, on being paid a sum of 261*l.* due to him for his work bestowed on the said goods. He further engaged, on performance of this agreement by the assignees, to execute a release to them and to the bankrupt's estate of the said debt of 2000*l.*, which constituted the whole of his demand on the estate except his claim on the goods before mentioned for 261*l.* A release of the 2000*l.* and of all suits, causes of action, and demands, was accordingly executed in March, 1828, by Courtauld, who afterwards received a counter-release from the assignees. In none of these documents was any mention made of the bill of exchange. In Hilary term, 1828, Courtauld brought an action against Harrison upon his acceptance. The question for the opinion of this Court was,—Whether Courtauld was entitled to recover from Harrison upon the bill? The case was argued in Michaelmas term by

Hill, for the defendant in equity. Courtauld is entitled to recover on this acceptance. The present case appears to have been sent for the purpose of ascertaining whether *Fentum v. Pocock*, 5 Taunt. 192, and *Carstairs v. Rolleston*, 5 Taunt. 551, are still considered law by this court. *Now, there *38 is no authority for saying, that where an accommodation bill has been endorsed for value to a party who received it without knowing that the acceptance was for accommodation, the acceptor can be discharged as to such endorsee by anything passing between the endorsee and the drawer. If, indeed, the endorsee knew the circumstances of the bill when he received it, some question might, perhaps, be raised on the other side, whether *Laxton v. Peat*, 2 Campb. 185, was not still an authority for considering the acceptor in the light of a surety, who would be discharged by releasing the drawer. But that point does not arise here; nor did it necessarily arise in *Fentum v. Pocock*: and an acceptor, considered as the principal party, can only be discharged by express agreement between him and the holder. In *Carstairs v. Rolleston*, 5 Taunt. 551, the endorsees of a note given to the payee without consideration, released the latter from the note and from the debt; yet the Court of Common Pleas considered the maker liable to the endorsees. That case is in point. It is evident here that the value of the bill was not included in the agreement on the part of the assignees; nor do they stipulate for its being given up. Courtauld could have no reason for discharging the solvent acceptor. The agreement was only prospective: the acts which were to be done on both sides before the releases were completed, might never be performed; and, in fact, had not been done at the time when this suit was commenced. In *Farquhar v. Southey*,

1 M. & M. 14, and in *Nichols v. Norris*,^(a) decided in this court last Easter term, *Fentum v. Pocock*, 5 Taunt. 192, was recognised as an authority. Some *39] doubt, indeed, appears *to be thrown upon it by the judgment of Lord Eldon in *The Bank of Ireland v. Beresford*, 6 Dow. 233; but that learned judge seems to have been misinformed as to the facts in *Fentum v. Pocock*, and to have supposed that it was there known to all parties, when the holder took the bill, that the acceptance was given for accommodation; and he complains that the Court of Chancery has been misled as to the opinion of the common law courts on cases of this kind. At all events, the case then before Lord Eldon had circumstances of its own to warrant the conclusions come to by him, independently of any opinion he might entertain as to *Fentum v. Pocock*.

Adolphus, contra. Lord Ellenborough's decision in *Laxton v. Peat*, 2 Campb. 185, was certainly disapproved of by the Court of Common Pleas in *Fentum v. Pocock*; but their dissent must be taken as qualified by the observation of Sir James Mansfield, that in the last-mentioned case the holder did not know, when he took the bill, that it was accepted for accommodation; whereas, in *Laxton v. Peat*, that fact was known to the endorsee at the time of the endorsement. Here, also, it was confessedly known to Courtauld, before he executed his agreement with Beuzeville's assignees, that Harrison had not received value for his acceptance. In this case the accommodation bill (payable at three months) had been more than a year in the hands of the endorsee before he sued upon it. He made no mention of it to the acceptor till the drawer had become bankrupt. The whole course of his conduct had shown, almost *as *40] strongly *as could be done by express agreement, an understanding that this bill was not to be put in force. Then, if this be so, the opinion of Lord Eldon, intimated in *The Bank of Ireland v. Beresford*, 6 Dow. 233, and expressed more strongly in the subsequent case of *Ex parte Glendinning*, 1 Buck's Cases in Bankruptcy, 517, is an authority for saying, that where such indulgence is granted to the drawer of a bill, the acceptor, as his surety, is discharged. It is suggested that Lord Eldon might have been misled as to a case at common law; but it will be remembered that he himself had been a common law judge. [Lord TENTERDEN, C. J. And a very great one.] The agreement of October, 1827, appears to have been intended as a general settlement and satisfaction of demands among these parties: at any rate it must operate so as to Harrison.

Hill, in reply. In answer to *Ex parte Glendinning*, 1 Buck's Cases in Bankruptcy, 517, it is sufficient to say, that the holder in that case knew, when he received the bill, that it was accepted for accommodation. If, therefore, the distinction drawn from that circumstance in favour of *Laxton v. Peat*, 2 Campb. 185, be available, it distinguishes *Ex parte Glendinning* from the present case. Here the holder did not know, when he took the bill, the circumstances of the acceptance. He, therefore, had a right to look upon Harrison as an acceptor for value, whose liability could only be discharged by express agreement.

Cur. adv. vult.

The following certificate was afterwards sent.

This case has been argued before us by counsel, and we are of opinion, that *41] under the circumstances above *stated, the defendant is entitled to recover from the plaintiff upon the said bill of exchange.

TENTERDEN,
J. PARKE,
W. E. TAUNTON,
J. PATTESON.

(a) See the end of the present case.

NICHOLS and Another v. NORRIS.(a)

A. gave a promissory note, payable to B. (for which A. had received no consideration), as a security for goods to be sold to B. on credit; and B. endorsed the note over to the creditors. B. afterwards executed a deed of composition with the creditors, by which he undertook to pay his debt to them by instalments, and it was stipulated that they should not be prevented by that arrangement from suing on any securities which they held, and that on any default in paying the instalments the deed should be void:

Held, that the delay granted to B. by this agreement, did not discharge A.

ASSUMPSIT on a promissory note for 50*l.*, made by the defendant, June 6th, 1826, payable to Robert Johnston the younger, and endorsed by him to the plaintiffs. Plea, the general issue. At the trial before Lord Tenterden, C. J., at the sittings in London after Hilary term, 1830, it appeared that Johnston having requested the plaintiffs to supply him with coals, they refused to do so unless he would give them security for 50*l.* He accordingly induced the defendant, who was his father-in-law, to draw the note in question, and endorsed and delivered it to the plaintiffs, having told them that his father-in-law would be security: and about a week afterwards, he executed a bill of sale to the defendant, to secure him against his liability in respect of the note. The bill of sale never produced anything to the defendant. In 1829 Johnston, being indebted to the plaintiffs to the amount of more than 1000*l.*, executed a deed of composition with them, by which they agreed to accept a certain sum in discharge of their whole demand. A small part was paid in cash, and bills and notes given for the rest. It was stipulated in the deed that, as the plaintiffs held several securities for their demands on Johnston, they should not be debarred from suing on them by the arrangement then making; and, further, that if the bills and notes were not paid as they successively became due, the deed should be of no effect, and the original debt remain in force. The deed contained a general release, subject to these conditions. Some of the notes were paid, but one was not met when due, and Johnston shortly afterwards became bankrupt. At the trial it was contended that the plaintiffs, by entering into the deed of composition, had lost their remedy against the defendant. A verdict was found for the plaintiffs, but leave given to move to enter a nonsuit.

Campbell now moved accordingly. The defendant was only a surety, and was discharged when the creditors compounded with the principal. If this be not so, the surety is much injured by the transaction, for if the creditors had enforced their demand in the regular course, and the surety had, in consequence, been obliged to pay the amount of this note, he *might immediately have taken his remedy against the principal, but the effect of this [*42] deed is to tie up his hands for a length of time, after which it may be impossible for him to indemnify himself. [Lord TENTERDEN, C. J. Whatever was paid under the deed of composition was for his benefit pro tanto. PARKE, J. How is this case distinguishable from *Fentum v. Pocock* (5 Taunt. 192), and *Carstairs v. Rolleston* (5 Taunt. 551)?] Those cases were under consideration in *Price v. Edmonds* (10 B. & C. 578), and the Court there did not act upon their authority, but rested its judgment upon a different ground. Lord Eldon appears on one or two occasions to have inclined in favour of the decision in *Laxton v. Peat* (2 Campb. 185), against that in *Fentum v. Pocock*.

Lord TENTERDEN, C. J. Deeds of this kind are very common, and it is very usual to insert clauses like the present, reserving the remedy against sureties. If we were to hold that, notwithstanding such a proviso, the liability of a person in the situation of this defendant was gone, it might prevent such deeds from being entered into, which would often be against the interests of all parties. In other respects I think there is no material difference between this case and *Fentum v. Pocock*.

(a) This case was decided at the previous Easter term.

LITTLEDALE, J. Independently of the doctrine in *Fentum v. Pocock*, the special proviso here takes the case out of the common rule as to the discharge of sureties by giving time to the principal; for, in this case, the plaintiffs might have proceeded against the surety at any time, even though the instalments had been regularly paid; and he, in that event, might have taken his remedy against the defendant.

PARKE, J. I am of opinion that *Fentum v. Pocock* is sound law, and that the present case falls within its authority; independently of which, there is an answer to the present objection, in the proviso which reserves a power of enforcing the securities at any time.

PATTESON, J. *Thomas v. Courtney* (1 B. & A.) is an authority to show that the securities in this case could not be affected by the deed of composition. Rule refused.

(See, as to the effect of a special reservation of securities, *Ex parte Glendinning*, 1 Buck, 517., which agrees with the present case.)

*43]

*WILLCOCK v. WINDSOR and Others.(a)

A custom in a manor for the leet jury to break and destroy measures found by them to be false, is lawful. In a plea of justification grounded on such custom, it is enough to say that the measures were found by the jury to be false, without alleging that they were so. A court-leet holden on the 28th of April, was adjourned after the jury had been sworn in, till the 15th of December, which day was given them to make their presentments:

Held, that an adjournment of such duration (which was admitted to be according to the custom of the manor), was not necessarily unreasonable.

TRESPASS for breaking and entering the plaintiff's dwelling-house and yard, in the parish of St. James, Clerkenwell, and breaking, bruising, perforating, and destroying divers pots of the plaintiff there found, &c. Pleas, first, the general issue; secondly, that the defendant, Windsor, was the bailiff of a prescriptive court-leet holden in and for the manor of Clerkenwell, otherwise called St. John's, Clerkenwell, on Ascension Day in every year; that the other defendants, being inhabitants of the manor and suitors of the court, were, at the said court, holden on Ascension Day, the 28th of May 1829, sworn as a jury for the manor to inquire and make true presentment of all such matters and things as should be given them in charge, or appear to be the object of their inquiry, and particularly according to the custom of the said manor from time immemorial, to examine weights and measures, and see they were just and according to the legal standards in that behalf; and for the purpose of making such inquiry and examination, the said court was then and there, according to the usage and custom of the said manor, adjourned: and the said jurors, so sworn as aforesaid, had a day given them to bring in their presentments until the 15th day of December in the said year 1829: and it was averred that there was and had been within the manor from time immemorial *44] an ancient and laudable custom, viz., "That the jurors of the jury of the said court leet to the number of twelve or more, for the time being, after they were and are so sworn as aforesaid, and during the adjournment of the said court, from time whereof, &c., have entered, and have been used and accustomed to enter, and of right ought, &c., and still of right ought, &c., with or without the bailiff of the said manor for the time being, into any dwelling-house with the appurtenances of and belonging to any person being an inhabitant and resident within the said manor, and selling goods there by weights and measures, and having weights or measures in his custody therein used and to be used by him in and for the sale of goods within the said manor, at seasonable times in

(a) This and the following case were decided in Michaelmas term, but could not be inserted in their proper place.

the daytime by the outer door or doors of such dwelling-house, with the appurtenances, the same being respectively open, for the purpose of searching for and examining, and to search for and examine such weights or measures, and to see that they were and are just, and according to the legal standards in that behalf; and if upon such examination any of the said weights or measures have been or shall be found by the said jurors to be false, deceitful, or deficient, and not according to the legal standards in that behalf, then the said jurors for all the time aforesaid have broken and destroyed, and have used and been accustomed to break and destroy, and of right ought, &c., and still of right ought, &c., such last-mentioned weights or measures so being false, deceitful, or deficient, to prevent the same from being afterwards fraudulently, deceitfully, and unlawfully used within the said manor." The plea then stated, that before and at the time when, &c., the plaintiff was a resiant within the manor, and carried on the *business of an alehouse-keeper there, in the said dwelling-house and yard; that the pots mentioned in the declaration were measures used by him in the sale of beer and ale there; that Windsor, being bailiff of the manor, and the other defendants being the leet jury, in the execution of their duty, during the said adjournment, entered into the said dwelling-house at a seasonable time by the outer doors, which were then open, to search for and examine measures, and did examine the measures in question (they not having been previously examined by the defendants), and upon such examination the said jurors did find that the same were false, deceitful, deficient, and less than the legal standard; wherefore the said jurors, according to the custom, broke and destroyed them to prevent their being afterwards fraudulently used within the manor, as they, the defendants, lawfully might, &c.; and they traversed being guilty in any place out of the manor. There were other pleas, setting up a similar justification. The plaintiff demurred generally to the special pleas. The defendants joined in demurrer.

This case was argued in last Trinity term by *Platt* in support of the demurrer, who contended, that a custom to break deficient measures could not be valid, inasmuch as the duty of the jury was only to examine and present, and by breaking the vessels they destroyed that which ought regularly to be the evidence for or against their presentment; that it did not appear on these pleadings that the measures were, but only that they were found by the jury to be, defective; and, lastly, that the adjournment stated in the pleadings was unreasonable, and could not be grounded on valid custom. *D. Pollock* argued in support of the pleas. The principal arguments *used and authorities cited are so fully observed upon in the judgment, that it is unnecessary to state them separately. *Cur. adv. vult.*

Lord TENTERDEN, C. J., in Michaelmas term, delivered the judgment of the Court as follows:—

The demurrer in this case is founded on two objections to the several pleas, the one to the custom set forth (which his Lordship read as stated in the pleadings); the other to the adjournment of the court, and the time given to the jury to bring in their presentments, until the 15th day of December 1829, which was said to be an unreasonable length of time on the face of the plea, the court having been holden on the 28th day of May in the same year. The objection to the custom was principally founded on the case of *Moore v. Wickes*, Andr. 47, 191. In that case, which was an action of debt in the court-leet of the manor of Stepney, to recover the amount of an amercement affeered, the plaintiff declared that he was lord of the manor, and prescribed for a court-leet, and set out a custom that the jurors sworn and charged at any such leet to present have presented, and used at such leet to present, after their being sworn, all such things as have been before or after their being sworn presentable, and that such jury had been used to be adjourned, &c. The plaintiff further declared that the defendant was a cheesemonger within the jurisdiction, and obstructed the jurors, then in the execution of their duty, from

entering into his shop and trying his weights and balances; that the jury at a subsequent court presented this obstruction, *whereupon the defendant was *47] amerced, and the amercement affeered to 4*l.* 19*s.* There was a verdict for the plaintiff, and a writ of error brought, wherein several errors were assigned; of which the second was, that the presentment was ill, because the jury have no authority to enter into the shops of persons to examine their weights and measures; if the jury of a leet have such a power, it must be by custom, and none was set out on that record; and if it was, it was a question whether it would be reasonable. On the argument the Judges threw out their several impressions on the points raised, the only one of which relating to the present question is that of Probyn, J., who is reported to have said, that a custom for the jury of a leet to enter into houses for examining weights and measures, they being sworn only to present, he thought would not be good. But the case was adjourned, all the Court intimating an opinion that the proceeding was erroneous in not setting out the time of the obstruction, and afterwards when the case was stirred again, no one appearing for the defendant in error, the judgment was reversed, the Court saying there was a strong objection in the case, but not intimating what it was. We do not consider that decision any authority against the validity of the custom here, because there no such custom was pleaded, and there was no judgment of the Court against it. On the other hand, there is a case in which a similar custom was adjudged good. In *Vaughan v. Attwood and Others*, 1 Mod. 202, the custom justified under was, that the homage used to choose every year two surveyors to take care that *48] no unwholesome victuals were sold within the manor, and *that they were sworn to execute their office truly for the space of one year, and that they had power to destroy whatever corrupt victuals they found exposed to sale. The plea then stated that the defendants being chosen surveyors and sworn to execute the office truly, examining the plaintiff's meat, found a side of beef corrupt and unwholesome, and that therefore they took it away and burned it. North, C. J., it seems, doubted; but the other three Judges said, "It is a good reasonable custom. It is to prevent evil, and laws for prevention are better than laws for punishment. As for the great power it seems to allow to these surveyors, it is at their own peril if they destroy any victuals that are not really corrupt, for in an action, if they justify by virtue of the custom, the plaintiff may take issue that the victuals were not corrupt. But here the plaintiff has confessed it by the demurrer." We think the reasons alleged in support of that custom were sound and good, and for the like reasons we hold the present custom to be valid. Such customs prevail in many manors, and they are in our opinion very useful to the public, as affording a protection against fraud and deceit. They are also recognised by the statute 35 G. 3, c. 102, s. 6; and 55 G. 3, c. 43, s. 12; two statutes making provision for preventing the use of false weights and measures, and containing a proviso that they shall not lessen the authority of persons appointed at a leet for the examining, breaking, and destroying weights or balances, or measures.

An objection was taken with reference to this part of the case, that the averment was, not that the plaintiff's pots were, in fact, false, deceitful, and deficient, and not according to, but less than the legal standard, but only that the *49] jury found them to be so; and for this *Palmer v. Barfoot*, Lutw. 440, may be cited. But in that case the custom alleged was, that the inspectors should seize, and take as forfeited, the bread of foreign bakers, if it should not be of just weight, or should be deceitfully or insufficiently made or baked; and the averment was, that the defendant found it, on view and inspection, to be insufficiently baked. The justification, therefore, did not bring the case within the words of the custom, and the plea was holden to be bad, without the Court throwing out any opinion against the custom itself, which seems to have been acquiesced in as good. But here the custom laid and the justification coincide. The custom is, if any of the said weights and measures

shall be found to be false, &c., and the averment corresponds. We think, also, that the objection arising out of the adjournment cannot prevail. It is averred to have been made according to the usage and custom of the said manor; and nothing appears to prove that the length of time for which it was made was of necessity unreasonable, or disproportioned to the occasion. In large and populous manors, such as this of Clerkenwell, it would be impossible for a jury to execute this function of examining all weights and measures within a day, or even within a short space of time. An adjournment, therefore, must in such cases be necessary, and the period of it must be governed by circumstances, and, in some degree, be left to the discretion of the court-leet, that discretion being, of course, to be exercised duly and subject to control. The case of *Davidson v. Moscrop*, 2 East, 56, is very distinguishable from the present. All that was decided there was, that a custom for the jurors to be charged and sworn at one court, to inquire and present, and to return such their presentments at the then *next court*, was bad. But here the adjournment is of the same court; and if the jury present the plaintiff's offence on the adjournment day, the presentment will not be made to another court.

We are of opinion, therefore, that there must be judgment for the defendants. Judgment for the defendants.

SIMONDS and Another v. HODGSON.(a)

(Error from the Common Pleas.)

An instrument executed in a foreign port by the master of a ship, reciting, that his vessel bound to London, had received considerable damage, and that he had borrowed 1077*l.* to defray the expenses of repairing her, proceeded as follows:—"I bind myself, my ship, her apparel, tackle, &c., as well as her freight and cargo, to pay the above sum, with 12*l.* per cent. bottomry premium; and I further bind myself, said ship, her freight and cargo, to the payment of that sum, with all charges thereon, in eight days after my arrival at the port of London; and I do hereby make liable the said vessel, her freight and cargo, whether she do or do not arrive at the port of London, in preference to all other debts or claims, declaring that this pledge or bottomry has now, and must have, preference to all other claims and charges, until such principal sum, with 12*l.* per cent. bottomry premium, and all charges are duly paid:"

Held, upon error, that this was an instrument of bottomry, for an intention sufficiently appeared from the whole of it, that the lender should take upon himself the peril of the voyage; that the words *my arrival*, must be understood to mean *my ship's arrival*; and that the words, "*I make liable the said vessel, her freight and cargo, whether she do or do not arrive at London,*" were intended only to give the lenders a claim on the ship, in preference to other claims, in case of the ship's arrival at some other than the destined port, and not to provide for the event of a loss of the ship.

THIS was an action on a policy of insurance. The declaration stated in the first count that W. Adams, commander of a schooner brig called the *Clarence*, of Bristol, being at Copenhagen on the 29th of March 1823, according to the custom of merchants made his certain writing obligatory, or bottomry bond, sealed with his seal, in these words:—

"I, the underwritten W. Adams, commander of the schooner brig *Clarence* of Bristol, burthen 105 tons, now lying in the harbour of Copenhagen, having on my passage from St. Petersburg to London had the misfortune to run the said schooner brig on shore upon Fosterboure Reef, coast of Sweden, where she received considerable damage; and being unable to proceed in that state on her voyage, was compelled to put into this port to discharge and repair the damage. To pay the charges and expenses attending these repairs, unloading and reloading, and putting said ship in a state to proceed

(a) See 6 Bingh. 114.

on her voyage, &c., I have borrowed and received from Balfour, Ellah, Rainals, & Co., of Elsineur, 1077*l.* 17*s.* 9*d.* sterling, to pay for the above-mentioned repairs, &c., without which having been paid and done, the said schooner brig could not proceed on her voyage, and having received the above-mentioned sum, which, with the due and ordinary annual rent of the same from the date hereof to the term of payment after mentioned, *I bind myself*, my heirs, administrators, and assigns, particularly the above-mentioned schooner brig, together with all the apparel, tackle, boats, and stores of every kind belonging to the same, as well as her present freight and cargo, consisting of tallow, lathwood, &c., thankfully to content and pay to Balfour, Ellah, Rainals, & Co. the above-mentioned sum, with 12*l.* per cent. *bottomry premium*, all postages and reasonable charges attending recovering the same. I do further hereby bind myself, said schooner brig, her freight and cargo, to the full and complete payment of the said sum, with all charges thereon, in eight days after my arrival at the afore-mentioned port of London; and I do hereby make liable the said vessel, *52] her freight and cargo, whether she *do or do not arrive at the above-mentioned port of London, in preference to all other debts or claims, declaring hereby that the said vessel is at present free from all incumbrances whatsoever, and that this pledge or bottomry has now and must have preference to all other claims and charges in any shape or manner, until such sum of 1077*l.* 17*s.* 9*d.* sterling, with 12 per cent. bottomry premium, making together 1207*l.* 4*s.* 8*d.* sterling, with lawful interest, and all charges, are duly paid, or until the said Balfour, E., R., & Co., or their assigns, have declared themselves in writing fully satisfied with security given for such payment."

The declaration then stated that Balfour & Co. advanced the money to W. Adams on account of the plaintiffs and out of their moneys on bottomry, on the conditions above mentioned. That afterwards the plaintiffs effected a policy of insurance with the defendant to the amount of 200*l.* upon the goods and merchandises, and also upon the ship Clarence, at and from Elsineur to London, which policy was in the usual form; and it was thereby declared that "the said ship, &c., goods and merchandises, &c., for so much as concerned the assured by agreement between the assured and assurers in that policy were and should be valued at 1*l.* on bottomry, free from average, and without benefit of salvage." The declaration averred that the ship in the policy mentioned, and the 200*l.* insured, were the ship and part of the 1207*l.* 4*s.* 8*d.* mentioned in the bond, and the bottomry in the policy was also the same bottomry as in the bond. That the ship sailed on her voyage, and that the plaintiffs were interested in the said bottomry to the full amount insured; that the ship, *53] cargo, and freight, were lost by *the perils of the sea, and did not arrive at London, whereby the defendant became liable to pay the said sum of 200*l.* so insured. To this there was a general demurrer, and on argument in the court below judgment was given for the defendant. Upon that judgment a writ of error was brought. The case was argued in Michaelmas term.

Campbell for the plaintiffs. This was either a bottomry bond properly so called, or, even if it were not, the plaintiffs possessed in this case such an interest as was insurable. Instruments of this kind, which are often made on great emergencies, ought to receive a liberal interpretation, in order to effectuate the intention of the parties. It is evident that a bottomry bond was intended here, and there is no necessity to insert in the bond an express provision that the money shall be lost if the ship perish; the use of the word bottomry alone will be sufficient for that purpose. In the precedent of the bottomry bond for the ship *Gratitudine*, in *Abbott on Shipping*, Appendix No. IV., there is no such clause. By the bond in this case the captain bound himself, and the ship and cargo, to pay 1077*l.*, with 12 per cent. *bottomry premium*; and further bound himself, his ship and cargo, to pay in eight days after his arrival at the port of London. By these latter words it is said the money is not subject to the sea risk, because the payment is made to depend

on the captain's arrival in London, and not upon that of the ship. But the captain manifestly identifies himself with the ship here; and when he used the words "my arrival," must have meant "my ship's *arrival." The captain was not to go to London without the ship. That was her destination, [*54 though she belonged to Bristol. It would be absurd to suppose the meaning to be, that if the ship were lost, and the captain took care never to come to London, he was not to be liable; but that after the loss if he accidentally came into that port, he was to be liable. Where money is lent on bottomry it is understood that if the ship be lost, the lender loses also his whole money; but if the ship returns in safety, then he shall receive back his principal, and also the premium or interest agreed upon, however it may exceed the legal rate of interest, *Wesket on Insurance*, 44. If the ship, therefore, is mortgaged, that is essentially a contract of bottomry. In *Sayer v. Glean*, 1 *Lev.* 54, the bond was conditioned to be void on the safe return of the ship, or the goods, or the borrower, yet it was held a valid bottomry bond. So in the case of the *Nelson*, 1 *Hagg. Adm. Rep.* 169, it was contended that the bond was invalid, because it bound the owners personally, as well as the ship and freight; but Lord Stowell held that to be no objection. The case of the *Atlas*, *Ibid.* 48, may be cited on the other side; but there it was decided that the Court of Admiralty would not entertain the suit, because there was an express stipulation in the instrument that, if the ship were lost, the money should be paid within thirty days after the account of such loss should have been received in Calcutta or London. Secondly, supposing there is no sea risk, and that this instrument is void as a bottomry bond, yet it is a valid hypothecation of the ship, her cargo, and her freight. And although the Court of Admiralty might not have interfered, yet our law would give a remedy against the matters so hypothecated. That court, indeed, would only have applied itself to the ship [*55 and tackle, but the common law would give redress against the cargo. The lender, therefore, had such an interest in the safety of that ship, cargo, and freight, as any mortgagee has in the security of his loan, and that is an insurable interest. Any qualified property is insurable, as a reasonable expectation of profit, *Grant v. Parkinson*, 2 *Park. on Ins.* 402, *Flint v. Le Mesurier*, *Ibid.* 403. [*PARKE, J.* In the policy it is stated to be bottomry.] If there be a maritime risk, this cannot be deemed an essential misdescription. In common parlance, this interest would be treated as bottomry, and that is sufficient; as the interest which a shipowner has when he carries his own goods in his own ship, may be named freight, *Flint v. Fleming*, 1 *B. & Ad.* 45. The plaintiffs, then, have shown an insurable interest; and it sufficiently appears by the declaration that they have sustained a loss. If the payment of the money due to them depended on the arrival of the ship, the loss is evident. If not, still it is shown that the plaintiffs have lost their security; they need not aver that the money secured has not been paid; that would be matter of defence.

F. Pollock, *contra*. If this, though not bottomry, was some other insurable matter, the plaintiffs ought to have shown that they have been damaged, in respect of the interest alleged in their declaration; and this they have not done; for non constat that the loss of the ship was a loss of the money due to them. The only question then is, whether this is a bottomry bond or not. If it *be, it is well described in the declaration; if otherwise, it is not. In [*56 the case of the *Atlas*, which it has been attempted to distinguish, the instrument was less like a bottomry bond than this; but still that is an authority against the plaintiffs. Here, the repayment was not conditional upon the arrival of the ship at her port of destination. It is true, there was a sort of charge upon the ship, making her liable if she arrived, but still the lenders were sure of their money. They had a right to take the vessel, whether she did or did not arrive at the port of London, for their claim, in preference to all other charges. If she were stopped at any intermediate port, they might take possession of her. The essence of a contract of bottomry is, that the money lent shall depend

wholly on the existence of the ship, and that the only security shall be on the ship when it arrives at the port of destination. It is urged, that the use of the word *bottomry* in the bond gives it its character; but that is not so where provisions inconsistent with the character of such a bond are introduced, as in this instrument. Where the captain makes liable his vessel, freight, and cargo, whether the ship do or do not arrive at London, the latter words alone must prevent this from being considered as a *bottomry* transaction. It is a loan charged upon the ship, but not to fail in case she should be lost.

Cur. adv. vult.

Lord TENTERDEN, C. J., now delivered the judgment of the Court.

This case came before us by writ of error from the Court of Common Pleas, wherein, upon a demurrer to the declaration, judgment was given for the defendant Hodgson.

*57] *The declaration was upon a policy of insurance in the common form, upon the ship *Clarence* at and from *Elsinore* to *London*, declared to be on *bottomry*, free from average, and without benefit of salvage. The declaration set forth the instrument of *bottomry* with proper averments, to connect that with the policy and show the interest in the plaintiffs. The ship was lost on the voyage.

Upon the argument before us, it was insisted on behalf of the plaintiffs, first, that the instrument set forth in the declaration was an instrument of *bottomry* in the proper and legal sense of that word, in which the lender of the money takes upon himself the risk of the voyage; and, secondly, supposing that not to be so, still the instrument gave to the lenders a security upon the body of the ship which would answer the declaration in the policy.

Upon the second point I must say for myself, that I entertain very great doubt whether such an instrument as is there supposed would answer the description of the interest insured, but it is not necessary to give any opinion upon this point, because, upon the first point, we are all satisfied that our judgment ought to be for the plaintiffs.

Instruments of *bottomry* are in use in all countries wherein maritime commerce is carried on. The lender of the money is entitled to receive a recompense far beyond the rate of legal interest; this recompense is very properly called in the civil law "*periculi pretium*," and of course no person can be entitled to it who does not take upon himself the peril of the voyage; but it is not necessary that his doing so shall be declared expressly, and in terms, though this is often done; it is *sufficient that the fact can be collected from the *58] language of the instrument considered in all its parts. It has been said, that such instruments being the language of commercial men, and not of lawyers, should receive a liberal construction to give effect to the intention of the parties. Here, the words of the instrument are, "I bind myself, my ship and tackle, &c., to pay the sum borrowed with 12 per cent. *bottomry* premium in eight days after my arrival at the port of *London*." Now, if the words, instead of *eight days after my arrival*, had been *eight days after my ship's arrival*, there could have been no doubt that the lender took upon himself the peril of the voyage, if there be not, in some part of the instrument, some matter denoting a contrary intention. Now, the personal arrival of the master unconnected with the ship, is a matter which it cannot be supposed that either party contemplated; it cannot be supposed that the lenders looked to him personally, or to his personal means, nor that he intended to pledge himself personally and absolutely for the payment without regard to the means with which he might be furnished by the ship and her freight.

And we are therefore of opinion, that the words, "*my arrival*," must be understood to mean *my arrival with the ship*, or *my ship's arrival*. We are then to consider whether there be anything in the instrument denoting an intention contrary to the interpretation we have given to this very unusual phrase, "*my arrival*." The sentence relied upon by the learned counsel for the defendant

as denoting such an intention is in these words:—"And I do hereby make liable the said vessel, her freight and cargo, whether she do or do not arrive at the above mentioned port of London," &c.

*But we think that these words were intended to provide only for the ship's arrival in some other than the destined port, and, in such an event, to give the lenders a claim on the ship in preference to other claims; it cannot be intended to provide for the case of the loss of the ship, because, in that event, there would be nothing upon which a pledge could operate or a preference be claimed.

For these reasons, we are of opinion that the judgment of the Court below must be reversed. Judgment reversed.

The ATTORNEY-GENERAL v. The Master of the Grammar School of ANTHONY BROWNE, Serjeant at Law, in Brentwood, Essex, and the Wardens of the Lands, &c., of the same School, CHRISTOPHER THOMAS TOWER, and WILLIAM TOWER.

A grammar-school was founded and endowed by virtue of letters patent, which ordained that the school should be altogether of the patronage and disposition of the founder and his heirs, by whom the schoolmasters and guardians should be nominated for ever:

Held, that such right of nomination might lawfully be aliened.

THE Master of the Rolls sent the following case for the opinion of this Court:—

King Philip and Queen Mary in the fourth and fifth year of their reign, upon the application of Anthony Browne, Serjeant at Law, gave, by letters patent, their license to him and to Joan his wife, and to the heirs and executors of the said Anthony, "That they or either of them, or the heirs or executors of the said Anthony, might found and establish a grammar school in Brentwood, to endure for all future times, to consist of one master being a presbyter, and two guardians of the lands, tenements, and possessions of the same school, of the inhabitants of the parish of Southweald, in the said county of Essex, to be ordained, named, and appointed by the aforesaid Anthony Browne, and Joan his wife, during their lifetime, and by the survivor of them, and after their decease, by the heirs of the said Anthony, by deed in all future time according to the statutes, orders, and constitutions of the said Anthony or his executors, to be made and declared in writing; and that such school should be called the grammar school of Anthony Browne, Serjeant at Law, and that such schoolmaster and guardians and their successors should be a body corporate to endure for all future times, and that they should plead and be impleaded, &c., by the name of The schoolmaster of the grammar school of Anthony Browne, Serjeant at Law, in Brentwood, in the county of Essex, and the guardians of the lands, tenements, and possessions of the same school; and should have a common seal. And that the said A. B. and Joan his wife, and also the said A. B., or his heirs or executors (without the said Joan), or any other person or persons to be named by the said A. B. in his lifetime, or by his will might, after the said school should have been so founded and established, give and grant manors, messuages, lands, tenements, rectories, parsonages, tithes, rents, and hereditaments to the clear yearly value of 36*l.* beyond all yearly charges and reprises, to the said schoolmaster and guardians; to hold to them and their successors for ever, to fulfil and execute the orders, statutes, and constitutions to be made by the said A. B. or his executors, and to be corrected when to them should seem meet, without any fine for license of alienation or mortmain, &c. And it was by the said letters patent further granted to the said A. B. and

*61] Joan *his wife, and the heirs of the said A. B., that the said A. B. during his life, and after his decease the said Joan (if she should survive), during her lifetime, and after their decease the heirs of the said A. B. and the heirs of the same heirs should be the undoubted patrons of the said school, and that the said school should be altogether of the patronage and free disposition of the said A. B. during his life, and after his decease of the said Joan during her life, and after the decease of the said Joan, of the heirs of the said A. B. as aforesaid, and that all and singular the schoolmasters of the said school should be named and perfected by the free disposition of the said A. B. during his life, and after his decease, by the said Joan during her life, and after their decease, by the free disposition of the heirs of the said Anthony, and the heirs of the same heirs by deed sealed for ever; and that every schoolmaster so named and perfected should hold the said school without any other presentation, institution, or investiture to be therefore made for the term of his life." The guardians were to be perfected by the like nomination and disposition of the said respective parties, and to be removable only at the will of the patron of the school for the time being according to the orders and statutes. The letters patent further declared, that the said school should be altogether donative and collative, and not presentative; yet that if the school be deficient of a schoolmaster or guardian for two months, and the patron should be informed of it, and should have been remiss in making the proper nomination, and should not have named a fit person for the space of another month, it should be lawful for the Bishop of London for the time being, within one month next following, to *62] constitute and perfect *a fit person to be schoolmaster or guardian, for that time only.

By indenture of the 28th of July, 5 & 6 Phil. & M., the said Anthony Browne and Joan his wife appointed a master and guardians; to whom, by indenture of feoffment of the 31st of the same month, they granted certain lands and tenements in the parish of Chigwell, Essex, habendum to them and their successors, to the intent that they should perform and fulfil the statutes, ordinances, &c., of the said A. B. made, or by him or his executors in writing to be made, ordained, and declared, and when to the said A. B. and Joan his wife, or to the heirs of the said A. B. should appear expedient, to be by them corrected. And by his will, dated December 20th, 1565, the said A. B., then Sir Anthony Browne, Knight, devised a messuage and lands, &c., to the master and guardians and their successors, to the like intents; and also other property for the maintenance, by the master and guardians, of five poor folks in Southweald, to be nominated by A. B. during his life, and after his decease by Joan B.; and after her decease by one Dorothy Hudleston during her life; and afterwards by such persons and their heirs as should possess the manor of Southweald (then held by A. B.), in manner and form as A. B. and his executors should in writing declare. Sir A. B. died without issue, leaving Wystan Browne his heir at law.

In pursuance of a decree of the Court of Chancery, made in the twelfth year of Queen Elizabeth, the said Wystan Browne gave a deed of assurance to the master and guardians of the lands and premises above mentioned; and he afterwards executed a conveyance of the same to them. By his will, dated in 1580, *63] reciting that *the patronage of the grammar school, and the gift and disposition of the schoolmastership and of the two guardians, and also the nomination and placing of the almsfolk, was descended to him and his heirs in fee-simple as next cousin and heir to Sir A. Browne, his great uncle, the founder, he, the said Wystan Browne, devised the said patronage, &c., to his son Anthony Browne and the heirs male of his body; remainder to the heirs male of his, the testator's, body; and for default of such issue, to his brother John for life, with remainder to the heirs male of his body; and for default of such issue, to the testator's right heirs. Wystan Browne died shortly after the date of his will, leaving a son, Anthony, who did not long survive, and two

daughters, who, upon their brother's death, were the coheirs at law of the founder. On the death of the last-mentioned Anthony Browne, the right of patronage was claimed and exercised by Anthony, son of John Browne, according to the will of Wistan Browne.

In 1622, in pursuance of the before-mentioned decree in Chancery, a body of statutes was ordained and declared for the school, under the hands and seals of the Bishop of London, Dr. Donne, Dean of St. Paul's, and Sir Anthony Browne, Knight, therein described as cousin and heir of Anthony Browne the founder, and also cousin and heir at law of the said Wistan Browne, and patron of the said school. These statutes contained similar ordinances to those of the letters patent above mentioned, respecting the constitution of the school; and, as to the patronage, it was provided, that the said Sir A. B. during his life, and after his decease Elizabeth his wife, and after her decease the heirs of the said Sir A. B. should be the true and undoubted patrons of the school, *foundation, and body corporate for ever. Certain advantages were given [*64 by these statutes to the scholars who should be of kin to the said founder or patron; and particularly, that no scholar who should be of kin to the patron should be removed without the patron's consent. No other scholar brought to the school was to be refused or put away without the consent of the patron or guardians. The schoolmaster was not to absent himself beyond a certain time without leave from the patron under his hand, except on urgent occasion. If he were unduly absent, a substitute during such absence was to be appointed by the patron. There were other ordinances for the good government of the school; and regulations respecting the almspeople.

In 1632, Dame Elizabeth Browne, to whom a life interest in the patronage was given by the statutes of 1622, and Peter Latham, her then husband, acted as patrons of the school; and there was reason to suppose, that in 1645 they appointed a schoolmaster. In 1655 a schoolmaster was appointed by John Browne, son of Sir Anthony, whose widow the said Elizabeth was.

The case then set out an indenture of release and an indenture of bargain and sale, bearing date the 25th of February, 1684, between Sir Anthony Browne of St. Martin's-in-the-Fields, Middlesex, and his wife, Wistan Browne of Gray's Inn, Esq., and his wife, Waller Bacon, Sir William Scroggs of Weald Hall, in the county of Essex, Knight, son and heir of Sir William Scroggs, late Chief Justice of the King's Bench, deceased; and Mary, wife of the first-mentioned Sir William, Dame Ann Scroggs, relict of the late Sir William, and Sir Robert Clayton of London, Knight, of the first part; Edmund King and Simon Norwich, of the second part; and Erasmus *Smith of St. James's, Clerkenwell, Esq., of [*65 the third part; whereby, after reciting that Sir Anthony and his wife, Wistan Browne and his wife, Francis Bacon and Henry Reeve, by indenture of the 13th of May in the 20th Car. II., made between them of the one part, and the late Sir William Scroggs of the other, and by fine therein covenanted to be levied, did convey to the said Sir William Scroggs, deceased, together with the manor of Southweald and other manors and hereditaments, the patronage and right of placing the schoolmaster in Brentwood school, together with the gift and power of placing five poor people in the almshouses before mentioned; which said indenture was lost; and that the said Sir William Scroggs, deceased, in his lifetime, conveyed the hereditaments in the said indenture mentioned to the said Sir Robert Clayton and another person, since deceased, and their heirs, for further securing 4000*l.* and interest to Nicholas Vanacker, Esq., deceased; and that all the estate of the said Sir William Scroggs, deceased, in the premises, had come to or descended upon Sir William Scroggs, party to this indenture, and his heirs in fee-simple: To the intent, therefore, and for the purposes in this indenture particularly mentioned, it was witnessed and agreed between the several first-mentioned parties, that the fine in the said recited indenture mentioned, should enure to the use of Sir William Scroggs, deceased, his heirs and assigns for ever: and it was further witnessed, that in consideration of 11,000*l.* paid to

Sir William Scroggs, party to this indenture, by the said Erasmus Smith, and of 10s. paid as therein mentioned, Sir William Scroggs, party to this indenture, and his wife, and the other parties thereto of the first part at the request and by the direction of the *said Sir William, did grant, bargain, sell, alien, release, *66] and confirm, at the nomination of the said Erasmus Smith, all the manors, lordships, messuages, lands, tenements, rectory, hereditaments, and premises by the former indenture and fine mentioned to be conveyed, habendum, to the use of King and Norwich, their heirs and assigns, upon trust (subject to certain annuities) for Erasmus Smith, his heirs and assigns.

An Erasmus Smith, claiming under these deeds, afterwards appointed a schoolmaster. It did not appear that the right of patronage to the school had ever been exercised by any person claiming as heir general of Wystan Browne.

By indenture of feoffment and indenture of bargain and sale of the 21st of January, 1752, between Richard Draper, Esq., one of his Majesty's Serjeants at Law, of the first part; Henry Kirkham, Esq., and Anne his wife (one of the two surviving daughters of Erasmus Smith), Smith Kirkham, their only son, and the several children of Mary, the other daughter (also deceased) of Erasmus Smith, of the second part; and Thomas Tower, of the Inner Temple, Esq., of the third part; in consideration of 11,453*l.* paid to the said Richard Draper by the said Thomas Tower, by the directions of the said parties of the second part, the said Richard Draper, by the like direction, enfeoffed and confirmed, and bargained and sold, and the said parties of the second part granted, ratified, and confirmed to the said Thomas Tower, his heirs and assigns for ever, the manor of Southweald, &c., the patronage and right of placing the schoolmaster in Brentwood school, and the gift and power of placing poor people in the almshouses, and all other the premises before conveyed (in November, 1751) *67] to the said Richard Draper by *lease and release, to which the co-heiresses of Hugh, last surviving son of Erasmus Smith, the executors of Hugh and devisees in trust of his real estates, the said Henry and Anne Kirkham, and the said several children of Mary, Erasmus Smith's second daughter, were parties; and also by virtue of a fine referred to in the last-mentioned conveyance.

Since the conveyance of 1752, the rights of patronage have been claimed and regularly exercised by the said Thomas Tower; and after his death by Christopher, his nephew and heir; and upon his decease by the present defendant, Christopher Thomas Tower, who was Christopher's son and heir, and in whom all the rights conveyed in 1752 legally vested.

From the foundation of the school the persons claiming and exercising the above rights of patronage have always been the persons who for the time being held the manor of Southweald, formerly the possession of the founder.

Christopher Thomas Tower was not the heir of Anthony Browne, the founder, but claimed the right of patronage either as a right of patronage in gross duly conveyed and vested in him, or as appurtenant to the manor of Southweald, of which he was seised.

The questions for the opinion of this Court were, first, Whether the right of appointing the master and wardens vested in the heirs of Anthony Browne, the founder, by the letters patent of Philip and Mary was, in point of law, capable of alienation? And, secondly, if it were, Whether it had been legally conveyed to and were now vested in the defendant Christopher Thomas Tower? The second point was not discussed. The case, as to the first point, was argued in Michaelmas term.

*68] *Amos, for the informant. The patronage of this school, though it has for some time been aliened, could not legally be so disposed of. The right of foundership is not capable of alienation: it is inseparable from the blood, and could not be granted to the king, *Magdalen College case*, 11 Rep. 77 *a*, 78 *a*. It is said in *Englefield's case*, 7 Rep. 13 *a* (referring to Bro. Abr. tit. *Corodies*), that in the time of Henry VIII. it was held that a foundership, which is

a thing annexed inseparably to the blood of the founder, should not be forfeited by attainder. In the report of Englefield's case, Moor, 322, Coke, in argument, refers to a case decided in 10 H. 8 (which is not comprised in the year-books), as showing that a foundership is not forfeitable. In Co. Litt. 99 a, it is said that tenure in frankalmoigne is an incident to the inheritable blood of the grantor, and cannot be transferred or forfeited, no more than a foundership of a house of religion, homage ancestral, or any other incident to their inheritable blood. In Bro. Abr. *Corodies*, 5, a case is cited in which it was laid down that "foundership (of an abbey) is annexed to the blood, and cannot be granted to any one; and if the church be dissolved the founder shall have the land, yet, it seems, the foundership cannot escheat," that is, by death without heir; nor, as it seems, can it be forfeited by felony; "for it is a thing annexed to the blood, which cannot be separated as it is said. Quod nota. For a man who is heir of another cannot make another to be heir." In the case of The Earldom of Oxford, Sir W. Jones, 123, Dodridge, J., instances a foundership as one of the things granted in fee-simple, which cannot be aliened. Where a person *seised in fee of a manor granted a rent-charge in fee thereout for the support of poor persons, and afterwards made a grant in fee of the manors [*69 so charged, and died, it was held notwithstanding that the heir of the grantor should have the nomination of persons to partake of the charity, for this was incident to the founder and his heirs, or those appointed by him, and did not pass with the lands, Attorney-General v. Rigby, 3 P. Wms. 145. In the present case the letters patent which give license to endow the school contain nothing to connect the right of patronage with the manor of Southweald, which is not referred to in them.

If the right of patronage were alienable it would be subject to the same legal liabilities with other real property capable of being separated from the inheritance, in particular cases, as for instance to dower. But it is never reckoned among the kinds of property subject to dower, though there may be dower of an advowson; nor, again, is it assets in the hands of an heir, though an advowson is.

The patronage (after the deaths of the founder and his wife), is given by the letters patent to the *heirs* of the founder; and the expression is strengthened by adding, "and the heirs of the same heirs." It cannot be said that the word "heirs," in this instance, includes assigns. The contrary may be inferred from the rule prevailing in analogous cases. Thus, in Com. Dig. *Officer* (C), the result of the authorities collected is, that an office of trust granted by the crown, though in fee, is not assignable, unless there be the word "assigns," or something equivalent in the grant. This is laid down, in particular, by Dodridge, J., in the case of the Earldom of *Oxford, Sir W. Jones, 12, &c., before [*70 referred to: and he there observes, that the king may be presumed to repose a confidence in the posterity of the first grantee, which would not extend to his or their assigns. So, where a power is of a kind which indicates a personal confidence, it must, *prima facie*, be understood to be confined to the individual to whom it is given; and will not, except by express words, pass to others: a power given to heirs, for instance, cannot be transferred to devisees. *Cole v. Wade*, 16 Ves. jun. 27, cited, Sugden on Powers, 180, 5th edit. (He then proceeded to argue, that in the present case, the duties and authorities imposed upon and intrusted to the patron in various parts of the letters patent and statutes, indicated a personal trust and confidence in the parties upon whom, by the specific words of those documents, the right of patronage was conferred.)

Sir James Scarlett, for the defendant, C. T. Tower, and Preston, for the other defendants. No direct authority has been adduced against the alienation under which the defendant, C. T. Tower, claims; and this is a strong argument in his favour; for there are in fact many instances in which the patronage of schools has been originally given or reserved to an individual and his heirs, but

has since been aliened, and is still enjoyed by the alienee. The school of Wragby, in Lincolnshire, is an example; Carlisle's Description of Endowed Grammar Schools, vol. i. p. 857; and others will be found in the same work, vol. i. p. 430; vol. ii. p. 299, 316. The case of the school of Wotton-under-Edge, mentioned in the 17th Report of the Commissioners of Charities, is nearly *71] in *point. The patronage of that school was granted by James I. to Lord Berkeley and his heirs. Lord Berkeley granted it to a person named Smith and his heirs; and in a suit afterwards instituted in Chancery respecting the charity generally, to which a Lord Berkeley was party, it was decreed that an heir of Smith, who claimed by virtue of the alienation, was entitled to the patronage.

Upon principle, what distinction is there between the *jus patronatus* enjoyed by the founder of a church, and that vested in the founder of an hospital or a school. If the rights are analogous in other respects, why should they differ only as to the power of alienation? They are both, in a sense, trusts to be exercised with a regard to the public interest; and in this point of view, the church patronage, which is alienable, is a more important trust than the others. In the statute Westm. 2, c. 5, s. 4, the rights with respect to advowsons of churches and of hospitals, are treated indiscriminately, and the remedy given for disturbance in either, is by *quare impedit*. See *The Mayor, &c., of Bedford v. The Bishop of Lincoln*, Willes, 608. In the statute 31 Eliz. c. 6, the rights of patronage to churches, colleges, schools, and hospitals, are considered as of the same nature; and in 39 Eliz. c. 5, the patronage of an hospital is expressly treated as assignable. In *Williams v. The Bishop of Lincoln*, Cro. Eliz. 790, *quare impedit* was brought for a presentation to the hospital or parish church of Bedford; and no question was made of the patronage being in itself grantable: and so it was lately held, in *King v. Baylay*, 1 B. & Adol. 761, that a prebend may be aliened by the crown, and annexed to an archdeaconry. The *72] hospital of St. Catherine, *was founded by charter of Queen Eleanor, dowager of Hen. 3 (confirmed by charters of Edw. 2 & 3), which reserved the appointment of a master to the queen, and to all succeeding queens of England. It was held that such a "desultory kind of inheritance" might be specially limited in the patronage of an hospital newly founded. *Atkins v. Montague*, Cases in Chanc. 214. And see *Skinn.* 14; 2 Keb. 808; and *The Lessee of Lord Brouncker v. Atkins*, Sir T. Jones, 176. In the act 1 W. & M. c. 26, s. 4, it is assumed that the patronage of a free-school may be mortgaged; and enactments are made to meet such a case. The case of the Earldom of Oxford, cited on the other side, to show that an office implying trust is not assignable, related to an office of a very peculiar kind, that of Great Chamberlain of England; and Crew, C. J., was of opinion that even that might be aliened: and a case is there cited, *Sir W. Jones*, 110, from the Year Book, 18 Ed. 3, where it was held, that the office of serjeanty in the cathedral church of Lincoln, though an office of trust, was grantable. And the same doctrine will apply to all cases of patronage, except where there is some peculiarity which necessarily renders it personal to the individual, or limits it to the blood.

The right here in question is not (except in the particular sense before adverted to) a trust. A *jus patronatus* at common law is a part of the old and absolute dominion which the founder had over the property, which he has never granted away, and in which his heirs acquire as ample a right as he himself originally had. If he has not expressly appointed any person to exercise the patronage as vacancies occur, it comes to the heir, not as a trust, for it was not *73] a trust in the *hands of the ancestor, but as a part of the original inheritance, and upon the same terms as an ordinary reversion of which no disposition has been made. It was so in the present case: and the charter of Philip and Mary, of which the main purpose was to give a corporate character to the master and guardians of the school about to be founded, did not alter these general rights. And, in fact, the case affords several instances in which

a right has been assumed and exercised of transferring the patronage out of the regular line of inheritance, before the alienation in 1752, under which Mr. Tower claims. And it is remarkable that one of the alienees was Sir William Scroggs, chief justice of this court, who was a lawyer of considerable learning, and not likely, it may be supposed, to take an invalid conveyance.

Then as to the authorities cited on the other side, none of the dicta supply any definition of "foundership." If it meant *jus patronatûs*, the doctrine laid down would apply as well to the patronage of churches and hospitals as of schools. But this is not so: and where it is said that foundership cannot be transferred, it is clear that the original foundership is signified: the meaning is, that the character of founder cannot be conveyed by one person to another. It will be found by reference to the cases in which this doctrine has been laid down, that it relates to the question of the king's right to a corody; i. e., a reasonable sustenance for one of his servants out of any house of religion founded by himself or his ancestors. If the house was not so founded, there could be no corody; the patronage might pass to the king by forfeiture or alienation, but this could not make him founder, or *descendant of the founder, and therefore no claim to a corody could arise. This is fully explained by a [74 case in Bro. Abr. *Petition*, 26, from the Year Book, 5 Ed. 4, 118. William Millam founded the Abbey of Leicester, before the time of memory; the seignory descended to Simon de Montfort, who was attainted (temp. Hen. 3) for levying war against the king; whereupon the advowson and patronage of the abbey passed to the king; and the question arose, on petition of right, in the time of Edward 4, whether the king could insist upon a corody for his servant, it being admitted that he had the patronage, but denied that he was patron in jure coronæ, or that the abbey was founded by him or his progenitors; and it was held that foundership may come to the king by escheat or forfeiture for treason; but he shall not therefore have a corody, as he shall where he or his ancestors were the founders. The blood of the founder could not be transferred to the king, though the patronage might. So, where land was held in frankalmoigne, if the seignory were transferred, the service, which was to pray for the souls of the grantor and his heirs, could not pass with it. The same observation applies in the case of homage ancestral. And a power given to a man and his heirs, where a personal confidence is implied, falls within the same reasoning. None of these cases afford any ground for questioning that the *jus patronatûs* of a foundation like the present may be transferred, though the personal quality of foundership is unalienable.

Amos in reply. As to the distinction attempted between foundership and patronage, it appears from the case of the Abbot de Lyra, cited in the case of Sutton's *Hospital, 10 Rep. 33, that they both mean the same thing. In [75 *The Attorney-General v. Rigby*, 3 P. Wms. 145, there was no corody in question; it was there held that the nomination to a charity was incident to the founder and his heirs. The writ of *contra formam collationis* which was given to the founder or his heir when lands held in frankalmoigne had been aliened, was for a restoration of the lands; these, therefore, and not merely the service, were incapable of alienation. As to the act 39 Eliz. c. 5, which gave the patronage of hospitals to the founders, their heirs or assigns, that statute was passed at a time when the state of the poor was very urgent, and extraordinary legislative provisions might seem desirable to facilitate every endeavour to provide for them. And it may be argued from the introduction of the word assigns, that without that word the patronage would not have been assignable. *Williams v. The Bishop of Lincoln*, Cro. Eliz. 790, was subsequent to this act: and the *hospital or parish church* there seems to have been considered an ecclesiastical benefice. *Atkins v. Montague*, Ca. in Chanc. 214, shows that an original founder may make a peculiar limitation of patronage, but not that such limitation may be departed from at pleasure afterwards. The act of 1 W. & M. c. 26, s. 4, does not show that the dispositions of patronage there referred to were

at that time legal. Its object was to guard against particular modes of evading the law which might be attempted in future. No analogy can be drawn from church patronage to that now in question. The rights of ecclesiastical patronage, especially with regard to alienation of advowsons, have always *been considered an anomaly in our law: but in that case there is some control, by the intervention of the bishop to whom the clerk is presented; and even where the advowson is donative, the incumbent must be a priest, subject as such, to the superintendence of the ordinary, and liable to ecclesiastical censures in case of misconduct: whereas in the present instance, if the patronage is alienable, there is no restriction as to the party, and no control over his conduct. The supposed alienations of this patronage before that in 1752, are by no means conclusive. One of them was in the case of Sir Anthony Browne, who is styled cousin and heir of the founder; and there is no proof that he was not so. It is true there was a deviation from the line of inheritance in giving a life estate to Dame Elizabeth, after the death of Sir Anthony, her husband, but this was an error, probably occasioned by a similar estate having been granted to the founder's widow, in the original letters patent. *Cur. adv. vult.*

The following certificate was afterwards sent:—

This case has been argued before us by counsel, and we are of opinion that the right of appointing the master of the said grammar school and the wardens of the lands, tenements, and possessions of the same school, vested in the heirs of Anthony Browne, the founder of the said school, by the letters patent of the 5th of July, in the fourth year of the reign of King Philip and Queen Mary, was, in point of law, capable of alienation.

The second question stated in the case was not debated before us, it having been admitted by the counsel for the Attorney-General, that if the right was *77] capable of alienation, it was legally conveyed to, *and is now vested in the defendant Christopher Thomas Tower.

TENTERDEN.
J. PARKE.
W. E. TAUNTON.
JOHN PATTESON.

The MAYOR and BURGESSES of LYME REGIS v.
— HENLEY, Esquire.(a)

(In Error.)

By letters patent, the king granted to the mayor and burgesses of Lyme Regis, the borough or town so called, and also the pier, quay, or cob, with all liberties and profits, &c., belonging to the same, and remitted also twenty-seven marks of their ancient rent, payable to the king; and he willed, that the mayor and burgesses and their successors, all and singular the buildings, banks, sea-shores, &c., within the said borough, or thereunto belonging, or situate between the same and the sea, and also the said pier, &c., at their own costs and charges thenceforth for ever, should repair, maintain, and support, as often as it should be necessary.

Held, first, that the mayor and burgesses of Lyme having accepted the charter, became legally bound to repair the buildings, banks, sea-shores, and mounds.

Secondly, that this obligation being one which concerned the public, an indictment would lie, in case of non-repair, against the mayor and burgesses for their general default, and an action on the case for a direct and particular damage sustained in consequence by an individual.

DECLARATION stated that on the 20th of June, 10 Car. 1, to wit, at, &c., that king by his letters patent did (amongst other things) give, grant, and

(a) This case was decided in last Michaelmas term.

confirm to the mayor and burgesses of Lyme Regis, and their successors, the borough or town of Lyme Regis, and also all that building called the pier, quay, or cob of Lyme Regis, with all and singular the liberties, privileges, profits, franchises, and immunities, to the same town or to the said quay or cob in any wise belonging, to have, hold, &c., to the said mayor and burgesses, and their successors, to the only and proper use and behoof of them and their successors in fee farm for ever; yielding of fee farm to our said late King Charles the first, his heirs and successors, of and for the aforesaid borough or town, with its liberties and *franchises, as in the said letters patent was in that behalf mentioned; and our said late king did further, pardon, remise, [*78 and release to the mayor and burgesses, and their successors for ever, twenty-seven marks, parcel of thirty-two marks of the farm of the same borough, and the liberties thereof, anciently by letters patent, or in any other manner due; our said Lord the King, willing not that the same mayor and burgesses, or their successors, should be charged of the further portion of the aforesaid farm besides the said five marks, but that they should be acquitted and for ever discharged of the twenty-seven; and that the mayor and burgesses, or their successors, all and singular the buildings, banks, sea-shores, and all other mounds and ditches within the aforesaid borough of Lyme, or in any wise belonging or appertaining, or situate between the same borough and the sea, and also the said building there called the pier, quay, or the cob, at their own costs and expenses thenceforth from time to time for ever should well and sufficiently repair, maintain, and support as often as it should be necessary or expedient: and the king then granted that the mayor should be clerk of the market, and that the mayor and burgesses should have the fines and amerciaments forfeited before the clerk of the market, and should have full power and authority, and license, from time to time for ever, to dig stones and rocks in any places whatsoever within the borough and parish of the town aforesaid, out of the sea and on the sea-shore in the borough and parish aforesaid, adjoining to the said borough or town, for the reparation and amendment of the port and building aforesaid, called the pier, quay, or cob, and other necessary reparations and common works of the same town and borough, which said letters patent the mayor and *burgesses aforesaid duly accepted, and the same thence hitherto [*79 have been and still are one of the governing charters of the said borough; and the said mayor and burgesses from thence hitherto have held and enjoyed all the benefits, profits, and advantages granted to them by the said letters patent.

The declaration then stated that before and at the time of the committing of the grievances, &c., the plaintiff was lawfully possessed of certain messuages, closes, &c., in the borough aforesaid, and was the reversioner of certain other messuages, &c., there, all which were abutting on and near the sea-shore. That before and at the time of the sealing of the letters patent, and acceptance thereof as aforesaid, and at the time of the committing of the grievances, &c., divers, to wit, &c., buildings, banks, sea-shores, and mounds had been and were respectively standing and being within the borough of Lyme Regis aforesaid, and divers, to wit, &c., other buildings, banks, shores, and mounds, had been and respectively were belonging and appertaining to the said borough, and divers, to wit, &c., other buildings, banks, sea-shores, and mounds had been and were respectively standing, being, and situate between the said borough and the sea; all which said buildings, &c., were near to and then and there constituted and formed a protection and safeguard, and still of right ought to form and be a protection and safeguard to the messuages, cottages, buildings, and closes of land, with the appurtenances before mentioned, and then and there prevented and still of right ought to prevent the sea from running or flowing in, upon, against, or over the said messuages, &c., and all which buildings, banks, &c., the defendants at the times of committing the said grievances were by virtue of the letters patent, and their acceptance thereof, *liable to [*80 repair, and ought at their own proper costs and charges, well and suffi-

ciently to have repaired, maintained, and supported, and still are liable, &c., when necessary or expedient, so as to prevent damage or injury to the said messuages, &c., of the plaintiff by the sea.

Breach, that the defendants knowing, the premises, wrongfully suffered the said buildings, banks, sea-shores, and mounds, to be and continue ruinous, prostrate, fallen down, out of repair, and in decay, for want of needful reparation, &c.; that by means of the banks and sea-shores being ruinous, prostrate, fallen down, and in great decay, for want of due, needful, proper, and necessary repairing, maintaining, and supporting the same, the sea and waves thereof ran and flowed with great force and violence in, upon, under, over, and against the plaintiff's messuages, cottages, buildings, and closes, and thereby greatly inundated, damaged, injured, undermined, washed down, beat down, prostrated, levelled, and destroyed the said messuages, cottages, and buildings; and the materials of the same, together with the earth and soil, and part of the said closes, were washed and carried away, to the injury of the plaintiff in his possession of, and reversionary estate in, the said premises respectively. There were other counts which it is unnecessary to state. The defendants pleaded the general issue.

The jury found a verdict for the plaintiff on the first count of the declaration, and were discharged from giving a verdict on the other counts. The Court of Common Pleas (see 5 Bing. 91) having given judgment for the plaintiff, the cause was removed by writ of error into this Court. The case was argued last Hilary term by

*81] *Sir James Scarlett for the plaintiffs in error. The first count does not show any cause of action. A corporation may be charged with repairs by prescription; but an individual cannot, unless in respect of something which may have existed from time immemorial, as of land which has been immemorially charged with such repairs; and then he is liable only by reason of the tenure of his land; as corporations also may be charged directly by reason of the tenure of lands, if they purchase land to which the obligation to repair is annexed. But, except in this latter case, corporations can only be charged by prescription. The reason why they are so chargeable is, that they may have existed before the time of memory, and if they have done the repairs so long, it is needless to inquire into the consideration. The consideration may arise from tenure, or the repair charged upon them may have been the very object of their incorporation. In the present case the charge stated in the first count is founded simply on the charter and the acceptance of it. But a grant to a corporation or an individual within the time of memory, even upon a condition to repair a sea-wall or other subject-matter, cannot make them liable to an action by a stranger for not repairing, whether the grant be from the crown or from a private person. That can be done by the legislature only. The consequence of a default in performing the condition might be, where the grant was from a private individual, a forfeiture, or a suit by the grantor or his heirs to enforce performance; or if the grant were from the crown, the king might revoke it if the condition were not performed, Roll. Abr. tit. *Franchise*, Com. Dig. *Franchises*, (G) 3; or might proceed under the statute 43 Eliz. c. 4, which *82] enables the chancellor, where lands *have been granted for (inter alia) the repairs of sea-walls, to issue a commission, under which the lands may be appropriated to such uses as were appointed by the donors.

But, assuming that a condition annexed to a grant of land as late as the time of Car. 1, would give a stranger a right of action for an injury sustained by him by breach of that condition; it does not appear from this charter that any such condition was annexed to the grant. This charter does not make the grant upon any condition to repair, but is a simple declaration of the king's will that the corporation shall repair; that alone cannot create an obligation of this kind. Besides, the condition to repair is confined to the clause remitting twenty-seven out of the thirty-two marks, and does not extend to the other

specific grants, as of toll, &c. The construction of the charter, therefore, is, at all events, only that the king remits part of the fee-farm rent to the corporation on condition that they repair; and where there are several distinct grants by one charter, one may be forfeited without the rest, *Rex v. The Corporation of Maidenhead*, Palmer, 82. Then, if the charter itself does not give a right of action to a stranger, the fact alleged that the corporation accepted the charter and enjoyed the benefits granted by it, will not have that operation; for the mere possession or title to land under a charter accepted cannot create an obligation to repair, or give a right of action to an individual injured by reason of non-repair. The obligation must be alleged to be *ratione tenuræ*, *Rex v. Kerrison*, 1 M. & S. 435. An attempt was there made, as in this case, to establish that ownership *was sufficient to charge the individual, but it failed. Besides, the declaration does not allege that the corporation were ^[83] in possession of any land, though that was assumed in the Court of Common Pleas, but merely that they were in possession of the benefits granted by the charter. The cob, &c., may have been in the possession of tenants, and then an action could not be maintained against the owner. *Cheetham v. Hampson*, 4 T. R. 318, shows that an action will not lie against an owner for not repairing fences, but against the occupier only, and the latter must be charged by prescription, *Star v. Rookesby*, 1 Salk. 335. Another objection is, that the declaration contains no allegation that the mayor and burgesses ever did any repairs. Now, if the declaration had alleged a prescriptive obligation to repair, it would not have been sufficient without alleging further the fact that they had repaired, *Rex v. Broughton*, 5 Burr. 2701. Besides, it is not sufficiently shown by the declaration that the repairs were necessary or expedient, according to the intention of the charter, and that the defendant in error suffered immediate injury from the neglect of such necessary repairs. He alleges that his own estate was injured, but it might be for the general benefit that his property should be sacrificed. Further, it is not alleged in the declaration that the walls, mounds, &c., were still the property of the corporation. They may have parted with all the property granted by the charter, to which the obligation of repairing was annexed.

Follett, contra. It must be assumed after verdict that proof was given that repairs had been done by the corporation, for there would otherwise have been a verdict *in their favour. A township is liable to repair roads by usage, ^[84] and not by tenure, and the fact of having repaired is that which fixes the charge. Where a party is charged with the repair of roads by reason of tenure, it is sufficient to allege the obligation, without stating actual repair, though it be usually alleged. The repairing is evidence of the obligation. In the present case, a duty, the neglect of which may affect the public, is imposed on a corporate body by the king's charter, which charter, and certain benefits conferred by it, have been accepted by the grantees: if they do not perform the duty imposed, an indictment will lie against them for the general injury to the public, and an action at the suit of any individual who has sustained a particular injury: and a declaration, founded on such duty, need not state that the corporation has actually repaired before. The grant here must be presumed to be one for the benefit of the public, and the individuals composing the public have a right to require performance of that duty, and although there may be other remedies as between the king and the grantee, the public are not bound to wait till the king chooses to enforce them. The king may get rid of the franchise, but so long as the grantee holds, it is his duty to perform the conditions on which he holds; and if he neglects so to do, the law gives a remedy to any one injured by it. If a man be owner of a ferry to which toll is attached, either by prescription (which supposes a grant before legal memory), or by a grant made since legal memory, and neglects to keep a boat, or refuses to take a passenger without more than the legal toll, or suffers the ferry to fall into decay for want of repairing the access to it, the king may repeal the grant by

*85] scire **facias* or *quo warranto*, *Peter v. Kendal*, 6 B. & C. 708, but until he does so the grantee may continue in possession, and though negligent, may have an action against any one who disturbs him. But then an indictment will lie against the grantee for the public injury, or an action on the case by any individual sustaining a particular injury. In *Payne v. Partridge*, Show. 255, Carth. 191, it was held that a custom, that the inhabitants of a particular district have used, and have a right to pass a certain ferry *toll free*, is good, and if toll be extorted from such an inhabitant, he may have an action on the case; but no action will lie against the ferryman for not keeping a boat for the purpose of the ferry, *unless some special damage ensue*; though he may be indicted for this neglect. If, then, there be a particular damage, as it is there said, an action will lie. In *Churchman v. Tunstal*, Hard. 163, which was an action by a common ferryman for disturbance, it was stated in argument, as a ground of the plaintiff's right to recover, that against a common ferryman, an action upon the case lies if he refuse to carry passengers, or if he exact excessive prices; and he is indictable if he do not keep his ferry in good repair, &c.; but a private ferryman is not. For all purposes connected with the sea-shore, and protecting land against the sea, the king would have been charged by law to make repairs. This appears from the form of the commission of sewers, Callis, p. 2. Here it appears, that the land between the borough and the sea originally belonged to the king; for he grants the corporation license to dig rocks there. He might, therefore, grant the land with the burden of repair attached. This case is analogous to those where an officer is intrusted by com-
 *86] mon law or by **statute*, and an action lies against him for neglect of the duty of his office. Thus in *Lane v. Cotton*, 1 Salk. 17, it was held by three judges (Holt, C. J., contra), that an action would not lie against the postmaster-general for exchequer bills lost out of a letter; but it was conceded that the action would lie against the inferior officer to whom the letter had been delivered. So, if a *custos brevium* keep records in his office so negligently that they are altered, though they do not appear to have been so by his consent, and the attorneys of the court had privilege to view the records without control, still he is liable, on the ground that he has taken upon himself to keep the records, *Herbert v. Pagett*, 1 Lev. 64; and in general an action lies against a man for neglecting to do that which by virtue of his office, or by other legal obligation, he ought to do, Com. Dig., tit. *Action on the Case for Negligence*, A. 2, A. 3; as if a parson is bound by prescription to find a bull and boar yearly for the increase of the cattle within his parish, and does not do so, 1 Roll. Abr. 109, Moore, 355; or if a person be bound to repair a bridge, by the neglect of which damage is sustained, *Steinson v. Heath*, 3 Lev. 400; or to repair a bank, and does not do it, whereby the land of another is surrounded, 1 Roll. Abr. 105. It may be said these are cases of prescription, but that is immaterial, because every prescription is supposed to be founded on a grant to which the obligation was originally annexed, *Mayor of Lynn v. Turner*, Cowp. 86. The obligation may begin within the time of legal memory, as appears from Callis, 117 a, and the case from the Year-book; 11 Hen. 7, f. 12,
 *87] and *Porter's case*, 1 Rep. 25 b, there cited. Whether the burden is **thrown* on a party by prescription, which supposes an adequate consideration, or by existing grant showing the consideration, still, if the party bound do not repair, an action equally lies by any one injured, *Keighley's case*, 10 Co. 139 a, and the Year-book, 18 Ed. 3, 23, there cited. The latter was an action on the case brought for not repairing a sea-wall, whereby the water entered and drowned the plaintiff's land, for which the plaintiff recovered damages, and a writ was awarded to the sheriff to distrain B. to repair the wall where there was need and default. Lord Coke adds, "Nota reader, this judgment in an action on the case, and the reason thereof, is *pro bono publico*, for *salus populi est suprema lex*, and therefore it is part of the judgment in this action on the case, that the defendant shall be distrained to repair the wall." The public

duty is stated by Lord Coke, to be the reason of the judgment, and no distinction is made by him between cases where the obligation is *ratione tenuræ* by prescription, and where it is created by grant within the time of legal memory. In *Rex v. Kerrison*, 1 M. & S. 435, the judgment proceeded on the ground that a party was not by law chargeable merely as the owner of a navigation, to repair a bridge, that there must be some contract or obligation annexed to the original grant under which he took to induce such liability, and that there was no allegation in the indictment of such obligation, or of any grant from which it might be presumed to result, the averment being simply "*by reason of his being owner and proprietor*;" and it was said that the words *ratione tenuræ*, by the technical sense which had been given to them, imported an obligation resulting from an original grant, and therefore embodied the condition upon *which the land was granted. That case is in favour of the defendant in error; for, here, the grant and the terms annexed to it, appear on the face of the declaration; the condition on which the charter was granted is shown. The *Earl of Devonshire v. Gibbons*, Hardr. 169, establishes that the obligation to repair a sea-wall, when it arises by agreement with the crown, is of a nature which regards the commonwealth, in which every individual is interested, and, therefore, a party to it, and entitled to a remedy by bill in equity. In *Russell v. The Men of Devon*, 2 T. R. 667, it seems to have been admitted that the action, which was there brought against the inhabitants of a county for an injury sustained in consequence of a county bridge being out of repair, would have been maintainable against a corporation. Then, it sufficiently appears from the present charter, that the entire subject-matter of the grant is the consideration for the charge; that the latter is referable to all the preceding matter, and not merely to the release of arrears. It is clear from the whole, that all the benefits of the charter are taken, subject to the condition of repairing. It is not necessary that the obligation to repair should be coupled with lands. But if that were so, the charter grants land; for the borough and the cob are granted. The corporation is not to judge of the necessity or expediency of repairs. The party injured may prove the necessity. The corporation is bound to protect all the individuals within the sea-banks, &c., and if so, an individual complaining need only show the necessity so far as regards his own property. It was not requisite to allege that the mounds or banks belonged to the corporation, any more than it would be to state in an indictment that a road or bridge belonged to the party bound to repair it. The *Court will not assume that they have parted with the property. [88]

Sir *James Scarlett* in reply. The authorities cited do not prove that a charge imposed by charter within memory is equivalent to one *ratione tenuræ*. Land which is granted, is taken with the burden upon it: but the burden must be a pre-existing one. In *Churchman v. Tunstal*, Hardr. 163, the ferry had existed time out of mind. In *Payne v. Partridge*, Show. 255, Carth. 191, both the ferry and the alleged custom to pass toll free, were ancient. The like answer may be given to other cases of the same description. In *The Earl of Devonshire v. Gibbons*, Hardr. 169, a bill was filed claiming to be relieved from an assessment of the commissioners of sewers, by an order upon persons who held lands chargeable to the maintenance of the sewers. That does not show that an action would have lain against those persons. In the case cited from 11 Hen. 7, fo. 12, the only question was, whether the grant was void. It is not contended in this case that the charter is void, but only that it does not give any right of action. In *The King v. The Mayor of Liverpool*, 3 East, 86, it was admitted that a corporation could not subject itself to an indictment by agreement to repair a road. To make this case analogous to those of public officers, it ought to have appeared clearly on the record that the duty neglected, and from the neglect of which the damage arose, was one of public concern. [89]

Lord TENTERDEN, C. J., in Michaelmas term last, delivered the judgment of the Court.

90*] "There are two questions in this case: first, Whether the declaration shows any legal obligation on the plaintiffs in error to repair the buildings, banks, sea-shores, and mounds, for the non-repair of which the action is brought; and secondly, if it do, Whether it be competent to the defendant in error, a private individual and a stranger, to sue them for their default, in respect of the damage which he states himself to have sustained.

With respect to the first, we have no doubt but that a sufficient obligation is disclosed. It appears that King Charles the First, by his letters patent granted to the Mayor and burgesses of Lyme Regis, the borough or town of Lyme Regis (probably anciently so called because it belonged to the king), and also the pier, quay, or cob, with all liberties and profits, &c., belonging to the same, and remitted also twenty-seven marks of their ancient rent, abating it from thirty-two marks to five; being willing, as the charter expresses it, that they should not be charged of the further portion of the aforesaid farm of thirty-two marks, besides the aforesaid five, but that they should be acquitted of the twenty-seven; and that the aforesaid mayor and burgesses, and their successors, all and singular the buildings, banks, sea-shores, and all other mounds and ditches within the aforesaid borough of Lyme, or to the aforesaid borough in any way belonging or appertaining, or situate between the said borough and the sea, and also the said building called the pier, quay, or the cob, at their own costs and expenses, thenceforth from time to time for ever should well and sufficiently repair, maintain, and support as often as it should be necessary or expedient. Grants of other matters are also set forth as contained *in the

91] charter, such as, that the mayor shall be clerk of the market, and that the mayor and burgesses shall have the fines and amerciaments forfeited before the clerk of the market, and also shall have full power and authority and license, from time to time for ever, to dig stones and rocks in any place within the borough and parish of the town out of the sea, and on the sea-shore, in the borough and parish aforesaid, adjoining to the said borough or town, for the reparation and amendment of the port and building aforesaid, and other reparations and common works of the same town and borough, belonging and appertaining to the building aforesaid. These letters patent differ greatly from a common grant from one subject to another. What effect such an instrument might have we are not called on to say. But this is a grant from the sovereign, who is the *parens patriæ*, and guardian of the realm; and the objects of the royal bounty are a body corporate, endowed with perpetual succession. We think, looking at the whole instrument, that the things granted were the consideration for the repairing of the buildings, banks, sea-shores, &c., and that the corporation, by accepting the letters patent, bound themselves to do those repairs. Such an obligation may exist by covenant, as well as by tenure; *Callis*, 117; and here both concur. In *Sir J. Brett v. Cumberland*, Cro. Jac. 399, 521., the case was, that Queen Elizabeth let unto William Cumberland a water-mill for thirty-one years by her letters patent, wherein were these words:—"Et prædictus Willielmus executores et assignati sui prædictum molendinum et domus

92] et ædificia inde sufficienter reparabunt;" and *shall leave them sufficiently repaired. "The first question was, whether these words in the patent, to which the queen's seal only was affixed, should enure as a covenant to bind the lessee and his assigns; and it was resolved that it should; for the lessee takes thereby, because it is a matter of record; although, in show, they are the words of the lessor only, yet he accepting thereof, and enjoying it, it is as well his covenant, in fact, and shall bind him as strongly as if it had been a covenant by indenture." So here, though the letters patent import only that it be the king's will that the corporation should repair, yet the plaintiffs in error, having, as it is averred in the declaration, accepted the

letters patent, and having, from the time of their acceptance, hitherto, had, held, received, and enjoyed all the benefits, profits, and advantages granted to them thereby, have testified their assent that this shall be considered as a condition or obligation, and must be bound accordingly. In this way of considering the instrument, it becomes immaterial to inquire, whether or not, before the grant of Charles the First, the king himself was bound to keep these banks and sea-shores in repair.

This point, respecting the obligation on the plaintiffs in error to repair, was not much disputed by their counsel. It was argued rather that the grant from the crown could not give to a third person, a stranger, a right of action, and that the remedy lay solely with the king, either by seizure for non-performance of the condition, or by information at the suit of the Attorney-General, or under the statute 43 Eliz. c. 4. But we think the obligation to repair the banks and sea-shores is one which concerns the public, in consequence of which an indictment might have been maintained against *the plaintiffs in error [†93 for their general default; from whence it follows that an action on the case will lie against them for a direct and particular damage sustained by an individual, as in the ordinary case of nuisance in a highway by a stranger digging a trench, &c., or by the act or default of a person bound to repair *ratione tenuræ*. An indictment may be sustained for the general injury to the public, and an action on the case for a special and particular injury to an individual, *Pain v. Partridge*, Carth. 191; *Com. Dig. Action upon the Case for Negligence* (A), 3. In the Year-Book 12 Hen. 7, fo. 18, it is laid down by Fineux, speaking of suit at a court-leet, that "it is not against reason that one man should hold of another to do service for the profit of a stranger; as one may hold to make and repair a bridge, or to guard and repair a highway. In these cases the services are for the *profit of all people*; and so it is also if one holds to keep a beacon at his costs and charges, for this is to guard the country in time of war, when enemies come." In the present instance it cannot be said to be of less common concern that the sea should be kept out, and prevented by adequate banks and mounds from overwhelming the land. It appears from many instances which may be put, that where a liability exists to discharge an obligation which concerns the public, the common law will enforce the obligation by the usual remedies, although the liability may not have existed from time immemorial. As, where a highway is straitened by inclosure, an obligation to repair is created on the owner of the adjoining land, so long as the enclosure continues, *The King v. Stoughton*, 2 Saund. 160. A county is bound to repair *a modern bridge, if adopted by the public; so [†94 a parish a highway recently made common. So the owners of a navigation, who are not *primâ facie* bound at common law, may, by particular circumstances, contract a liability to erect and keep up a bridge. *The King v. The Inhabitants of Kent*, 13 East, 220; *The King v. The Inhabitants of Lindsey*, 14 East, 317; *The King v. Kerrison*, 3 M. & S. 526. These decisions were cases of implied liabilities arising out of acts of Parliament, but they prove the proposition just laid down.

Some smaller objections against the sufficiency of the declaration were raised by the counsel for the plaintiffs in error, which admit of a ready answer. It was urged that they may have parted with the property granted by the letters patent; that there is no sufficient averment that the repairs were necessary or expedient; and that the defendant in error does not appear to have sustained a damage sufficiently immediate and peculiar to entitle him to an action. But we think that after verdict, it cannot be intended that the corporation have alienated any part of their property (even supposing such alienation would relieve them from liability), where the declaration expressly alleges that they still have, hold, receive, and enjoy all the benefits, profits, and advantages granted to them by the letters patent: and as the breach charges that by means of the banks and sea-shores being ruinous, prostrate, fallen down, and in great

decay for want of due, needful, proper, and necessary repairing, maintaining, and supporting of the same, the sea and waves thereof ran and flowed with great *95] force and violence in, upon, under, over, and *against the plaintiff's messuages, cottages, buildings, and closes, and thereby greatly inundated, damaged, injured, undermined, washed down, beat down, prostrated, levelled, and destroyed the said messuages, cottages, and buildings, and the materials of the same, together with the earth and soil, and part of the said closes, were washed and carried away, we are of opinion that enough is averred both of the necessity of repairs and the private injury sustained by the defendant in error. This judgment must, therefore, be affirmed. My learned Brother Littledale having expressed some doubts on the subject, this must be considered the judgment only of my Brothers Taunton, Patteson, and myself.

Judgment affirmed.

The KING v. The DEAN and CHAPTER of ROCHESTER. Jan. 13th.

An Archdeacon of Rochester, when instituted and inducted into that office, is ipso facto inducted into the prebend annexed to it by royal grant, and may claim to be sworn in as prebendary, without being installed.

By the judgment of this Court in the case of King v. Baylay, Hilary term, 1831, 1 B. & Adol. 761, Archdeacon King was declared entitled to the prebend annexed by Charles I. to the Archdeaconry of Rochester, and he thereupon presented himself to the dean to take the oath required by the statutes of the cathedral from prebendaries on their admission. The dean refused to administer the oath, alleging, that although Archdeacon King had been regularly instituted and inducted into the archdeaconry, it was also requisite that he should produce a distinct institution to the prebend, and be admitted and installed thereto (all which he denied to be *necessary), before he could *96] take the oaths. On application to this Court a rule nisi was obtained for a mandamus, calling upon the dean or his deputy to administer the oath.

The affidavits in opposition to the rule stated the constant practice to have been, that the archdeacon produced to the dean his letters of institution from the ordinary, not only to the archdeaconry but to the prebend, and was separately admitted and installed to each before taking the oath required from canons and prebendaries. They set forth some of the statutes of the cathedral, one of which, respecting the admission and swearing in of a canon, was as follows:—"*Canonicum sic nominatum, &c., decanus, post episcopi institutionem, coram canonicis presentibus adsumat atque admittat. Qui quidem ad hunc modum in canonicum admissus, coram decano aut ejus vicem-gerente cum aliis presentibus canonicis, in hanc formam jurabit,*" &c. The form of the oath was, "*Ego, &c., qui in canonicum hujus ecclesiæ cathedralis nominatus electus et institutus sum, tactis, &c., juro,*" &c. The direction in the case of a dean, was, "*Quem quidem decanum sic nominatum, &c., post episcopi institutionem presentes canonici adsument et admittent in decanum perpetuum, &c., atque in hac sua admissione decanus ipse, antequam ullam ecclesiæ administrationem suscipiat, aut ullis ecclesiæ negotiis sese ingerat, in hanc formam jurabit,*" &c. The statutes make no particular provision for the case of the archdeacon; he has no voice in the chapter, but has a stall in the church apart from those of the prebendaries or canons. After the annexation of a prebend to the provostship of Oriol College, Oxford (see 1 B. & Adol. 778), by Queen Anne, *97] *the first provost was instituted by the ordinary, and admitted and installed before he took the oath. The next provost disputed the necessity

of such institution, inasmuch as the prebend had been annexed to his office by charter confirmed by act of Parliament, 12 Ann. st. 2, c. 6, s. 7, and he obtained a mandamus to the dean and chapter to admit and install him ("stallum in choro et vocem in capitulo assignetis") without institution (see 1 Barnard. 40), which was complied with. The form used was, "Installo te in realem, actuallem et corporalem possessionem canonicatus sive præbendæ ecclesiæ cathedralis," &c. And "Assigno tibi locum et vocem in capitulo," &c. The subsequent provosts were always admitted and installed before they took the prebendary's oath.

Campbell and Dampier now showed cause. It is true the Court, in *King v. Baylay*, 1 B. & Adol. 761, decided that a separate institution and induction to the prebend were not requisite in the case of an archdeacon; but the question did not necessarily arise in that case, where the issues were merely whether the prebend had been lawfully annexed to the archdeaconry, and if so, who was entitled to it. And the case there cited from Plowden, 500, is not conclusive on the present point. The statute which prescribes the canon's oath, says that the canon "ad hunc modum *admissus*," jurabit; which evidently refers to a previous induction; and this statute, as well as the oath itself, implies a distinct institution to the prebend. In the case of the second provost of Oriel who was prebendary, the mandamus was to install, not to swear in: and if this was necessary for a person who took the prebend as *annexed to his office by charter with a parliamentary confirmation, à fortiori is it so in the case of an archdeacon. *98

Bere, contrd. This point was decided, on a consideration of all the facts, in *King v. Baylay*, and the question now is, whether the Court will adhere to that decision? As it was observed there, the practice of going through separate institutions and inductions cannot weigh if the law does not require them. The argument from those expressions in the statutes which imply an institution to the prebend, is answered by the fact, that institution to the archdeaconry is, in effect, institution to the prebend. If the word "institutus" in the oath could lead to any general conclusion, it would show that a provost of Oriel, as well as an archdeacon, required institution; which is allowed not to be the case. Nor does it follow, because the provosts of Oriel are installed, that the archdeacon should be so too. Induction, like livery of seisin, is for the purpose of notoriety, and may, therefore, be necessary in the case of the provost, who is a stranger, though it is superfluous in that of an archdeacon, whose title, by the nature of his office, and its connexion with the cathedral, must of course be notorious to the dean and chapter. This case stands on the same grounds as that put in Co. Litt. 49 a, where it is said, "In some cases a freehold shall pass by the common law without livery of seisin: as if a house or land belong to an office, by the grant of the office by deed the house or land passeth as belongeth thereto."

Lord TENTERDEN, C. J. The case of *King v. Baylay*, 1 B. & Adol. 761, was decided on great consideration by the *Judges, after a very learned argument; though it must be observed, my Brother Patteson took no part in the decision, and the judgment must therefore be considered as mine and that of my Brothers Littledale and Taunton. We certainly held there that a distinct institution and induction to the prebend were not necessary, and, therefore, unless we were prepared to overrule the case of *King v. Baylay* on that point, we must now say that Archdeacon King, by his institution and induction to the archdeaconry, was, ipso facto, prebendary, and nothing remained to be done by him but taking the oath. It has been well observed in argument, that an archdeacon is very differently situated, with regard to the church, from a provost of Oriel; the one is a stranger, the other not. The institution and induction of the archdeacon to that office must be well known to the dean and chapter. Induction into the prebend seems an insensible ceremony in his case; and it would be placing him in a stall which would not be his proper seat in *99

the church afterwards. I am therefore of opinion, both on the authority of *King v. Baylay*, and on the reason of this case, that the mandamus ought to go.

PARKE, J. I took no part in the decision of *King v. Baylay*; but I heard a very learned argument in that case, and have fully considered it, and I concur in the judgment there given. It would, in my opinion, be idle to install the archdeacon in a seat where he would not afterwards be entitled to sit; and I think that he became prebendary in fact, when he was made archdeacon.

PATTESON, J. I took no part in *King v. Baylay*, but I entirely agree in *100] the decision; and I think, both on the authority of that case, and on principle, that the mandamus ought to go. I also concur in the distinction drawn between an archdeacon and the provost of Oriel, who, when he takes the prebend, is a stranger to the church. Rule absolute.

The KING v. The Justices of MIDDLESEX. Jan. 14.

The stat. 55 G. 3, c. 50, s. 10, abolishes all fees payable to sheriffs on liberate granted to a debtor upon his discharge from prison, and authorizes the justices of the peace for each county, &c., assembled in quarter session, *subject, however, to the approbation of the justices of assize*, to make such compensation to the sheriff out of the county rate, as shall to them seem fit. The justices of Middlesex have jurisdiction to award compensation to the sheriff of Middlesex under this clause, the Judges of the Courts of King's Bench and Common Pleas being judges of assize for that county.

A RULE nisi had been obtained for a mandamus calling on the defendants to make such compensation to C. R. and H. W., late sheriffs of the county of Middlesex, in lieu of the gaol fees abolished by the 55 G. 3, c. 50, s. 10, as to them (the justices) should seem fit. It appeared by the affidavits in support of the rule that during the year the applicants had served the office of sheriff, 1100 debtors had been discharged from White Cross Street prison, and that before the statute 55 G. 3, c. 50, (a) it had been customary for the sheriff to receive a fee of 4s. 6d. for the liberate granted on the discharge of each *101] prisoner; that the late sheriffs had applied to the justices of Middlesex, in sessions assembled, for an order for payment to them, out of the county rate, of such a sum as to them, the justices, should seem meet, in lieu of the said fees, and that the justices refused to make such compensation, upon this, among other grounds, that the sheriffs of Middlesex were not entitled to such compensation by the above-mentioned statute, because there were no judges of assize for that county, and that section authorized the justices in quarter session, *subject to the approbation of the judges of assize*, to make compensation out of the county rate. The affidavits in answer to the rule stated that the justices at quarter sessions had taken the matter into their consideration, and decided that no compensation should be made; but it was not distinctly shown that they had not so determined partly on the ground of the supposed want of jurisdiction alleged in the affidavits in support of the rule.

Campbell and *Addison* now showed cause. The justices at quarter sessions are authorized to make compensation to the sheriff out of the county rate, *subject to the approbation of the judges of assize*; and there being no judges of

(a) Section 10. "Whereas it has been customary in some places for the sheriff or under-sheriff to demand for the liberate granted to any debtor on his discharge, a fee or gratuity: be it enacted, that such liberate shall be granted to such debtor free of all expenses; and that it shall be in the power of the justices of the peace for each county, city, or town, assembled in quarter session, *subject, however, to the approbation of the judges of assize*, to make such compensation to the sheriff or under-sheriff, out of the county, city, or town rate, as shall to them seem fit."

assize for the county of Middlesex, the justices had no authority to make compensation in this case.

Burchell, contra. The Judges of this Court and of the Court of Common Pleas are justices of assize in the county of Middlesex, for these courts have an original jurisdiction for taking an assize without any patent or commission, 4 Inst. 158, Fitzh. N. B. 177 (E), and Com. Dig. Assize, (B) 21.

*Lord TENTERDEN, C. J. It seems that the court of quarter sessions refused to award compensation to the parties now applying to the Court, [*102 partly on the ground that in the county of Middlesex there were no persons who satisfied the description of judges of assize; but it is clear that the Judges of this Court and of the Court of Common Pleas are judges of assize within the meaning of the act of parliament. That being so, the rule must be made absolute.

PARKE, J. The justices at quarter sessions may have acted under the supposition that they had no jurisdiction, under this act of parliament, because there are no judges of assize for the county of Middlesex. But I am of opinion that they have such jurisdiction, because at common law the Judges of this Court and of the Court of Common Pleas are judges of assize. Then the justices at quarter sessions having jurisdiction, must exercise it fairly and according to the statute, by inquiring what was the legal fee before the statute, in respect of which the sheriff is entitled to compensation, and awarding such compensation as to them shall seem meet.

PATTESON, J., concurred.

Rule absolute.

*SLOWMAN v. BACK. Jan. 16.

[*103

Order of the Court, under the statute 1 & 2 W. 4, c. 58, where goods had been taken by the sheriff under a fi. fa. and sold by him, another fi. fa. having issued in the mean time against the same goods; and where a party claimed title to the property against both the plaintiffs, the defendant and the sheriff, and complained that the goods had been sold improvidently and in spite of notice from the owner.

THE officer of the sheriff of Middlesex seized goods which he was told were the property of the defendant, on his premises, on the 13th of June, 1831, under a fi. fa. at the suit of the plaintiff, endorsed to levy 101*l.*; and while the same were in the officer's possession (July, 1831) another fi. fa. against the defendant's goods, at the suit of Charles Prentice, was lodged in the sheriff's office, returnable November 2*d.*, to levy 34*l.* On the 6th of August, while the officer still had the goods under the first fi. fa., one Lloyd gave notice (dated August 6th) to the sheriff and to the plaintiff, that the goods were his, Lloyd's, property, and that if they were removed or disposed of he would sue the sheriff. On the 10th of August the officer sold the goods for 110*l.* (a sum alleged to be much below their value), and paid the proceeds to the sheriff. The sum levied was at that time sufficient to satisfy both executions, part of the debt claimed in the first action having been paid. Lloyd commenced an action in Michaelmas term last, against the sheriff for seizing and selling the goods; after which, in this term, a rule was obtained on behalf of the sheriff, calling upon the plaintiff and defendant, and Prentice, and also upon Lloyd, to show cause why the sheriff should not be at liberty to pay into court the sum levied under the first-mentioned fi. fa., to abide the further order of the court pursuant to the statute (1 & 2 W. 4, c. 58, s. 6), and why Lloyd should not be restrained from prosecuting his action against the sheriff, *and all proceedings against the latter be stayed, and he be allowed the costs of this [*104 application; or why the court should not make such order in the premises, pursuant to the statute, as to them should seem meet.

Platt, on behalf of *Prentice*, and *Austin* for *Lloyd*, now showed cause. This application, if it could be made at all, comes too late. The sheriff had notice not to sell; he has elected to disregard the notice, and turn the goods into money, and has deferred coming to the court till an action was brought against him by *Lloyd*. After the notice (which it is to be observed was from a party claiming, not the proceeds, but the goods themselves) he should have gone no further in disposing of the property. Nor was he justified in disposing of it, if he could only obtain a price so much below the real value, *Keightley v. Birch*, 3 Campb. 521. At all events, he might have applied to the court last term. But the sheriff in this case is not entitled to avail himself of the act, for it is entirely prospective in its words: "When any such claim shall be made to any goods or chattels taken," &c. Here the goods were claimed by *Lloyd* in August, 1831, and the act did not pass till October. [Lord TENTERDEN, C. J. A claim is made by bringing the action. This is a case precisely within the terms of the statute.]

Burchell, *contrâ*. The delay in making this application may be accounted for by the act having only passed in October. There is nothing to show that the sheriff made an improvident sale. If he had not sold he must have kept the goods on hand at his own expense.

*105] *Per Curiam*. (a) Unless the goods are *Lloyd's*, he cannot complain of any misconduct in the sale: and all that is proposed by this application is, that it should be ascertained whose the goods are. But if the plaintiff or *Prentice* are made defendants, they can only be answerable to the amount they may respectively have claimed, whereas the sheriff, if he has sold improperly, may be liable beyond that amount. The rule may be drawn up in this form. That the plaintiff *Slowman*, and *Prentice*, have liberty to defend the action brought or to be brought against the sheriff by *Lloyd*, or to abandon their or his claims or claim in the event of their or either of their declining to defend within one week next ensuing: and that the sheriff be at liberty to appear on the trial of the said cause by himself or his counsel, to protect his own interests; the sheriff hereby undertaking to pay to the plaintiff *Slowman*, and to *Prentice*, respectively, the amounts of their respective executions, in the event of *Lloyd* failing in his action. Rule absolute as above.

(a) Lord Tenterden, C. J., Littledale, Taunton, and Patteson, Js.

PARKES v. RENTON. Jan. 16.

The cause assigned at the end of a writ of pone, for removing the plaint from the county court, is mere form, and not traversable by the sheriff.

MILNER, in the last term, obtained a rule calling upon the sheriff of Yorkshire to show cause why an attachment should not issue against him for his contempt in not returning into this court the plaint mentioned in the writ of pone issued in the above cause. The action was brought in the county court for a nuisance, and the plaintiff had declared. On the 14th *of last *106] November, a writ of pone, sued out by the defendant, was transmitted to the sheriff. It contained the usual clause:—"And because E. F., clerk of —, sheriff of the county aforesaid, who frequently, in the absence of the sheriff of that county, holds the pleas of the same county, is the kinsman of the said A. B., for which the same sheriff favours him the said A. B., in the plea aforesaid, as it is said; let this writ be executed, if the cause be true, and the said C. D. require it, otherwise not." At the next county court after the receipt of the writ (at which court the defendant's plea ought to have been filed), the county clerk caused the writ to be openly read, and the plaintiff's

attorney traversed the truth of it, requiring the clerk to record such traverse; and he insisted that the plaint should not be removed, the cause alleged not being true. The clerk, believing (as he stated by his affidavit in opposition to this rule) that the words at the foot of the writ were not mere words of course, recorded the traverse, and the writ was returned with an endorsement "that the cause therein alleged for the execution thereof is not true." By the practice of the Court, as stated by the county clerk, the defendant would be compellable to join issue on the traverse at the next court-day, and the issue would be there triable by a jury.

Alexander now showed cause. When the defendant removes a plaint by pone he ought "to put an evident cause in the writ, after the teste," *Fitz. N. B.* 70. He cannot remove the plea without showing such cause, *ibid.* 119; and "the cause may be traversable," *ibid.* 70, note (b), 9th ed. In *Gilbert on Replevins*, 122, 4th ed., it is said that "the defendant cannot remove *the plea without cause shown; for, since it is in delay of the plaintiff, a just cause ought to appear upon record for such removal." And this [*107 doctrine appears to have been recognised in *Ward v. Creasy*, 2 B. Moore, 642. The question whether good cause has been shown or not, must be determinable somewhere, and the county court is the proper place.

Milner, contrâ. The dicta which have been cited only mean that some cause must appear upon the writ itself. *Ward v. Creasy* is not inconsistent with this; and in *Rex v. Morgan*, W. Bla. 397, the objection was taken to a writ of *tolt*, that no cause was shown in the body of the writ; upon which one of the Judges observed that the cause alleged is always imaginary and fictitious; but it was replied that some cause must be assigned upon the face of the writ; and to this no answer was given. But the cause when alleged, as it is here, is no more traversable than the *latitat* clause in the writ of *latitat*. Anciently the cause of action was examined in Chancery before the granting of original writs, *Gilb. Replev.* 123, 4th ed.; but such examination has long been discontinued both in this instance and in that of the writ of *pone*. A distinction is indeed drawn by *Gilbert, Replev.* 123, in the case where a suit is removed out of the lord's court, so that he would be ousted of the profits of his jurisdiction; but here the removal is from one of the king's courts to another, and there is no authority for saying that, in such a case, the cause of removal was ever traversable in the inferior court. In *Talbot v. Binns*, 8 Bingham 71, decided last term, the Court of Common *Pleas held that the cause assigned at the end of a writ of *pone* is mere form, and cannot be traversed by the sheriff. [*108

Jones, Serjt., amicus curiæ, stated this case (which was not then reported); upon which

The Court(a) ordered the return to be taken off the file, and that the sheriff should return the proceedings forthwith. Rule as above.

(a) Lord Tenterden, C. J., Littledale, Taunton, and Patteson, Js.

The KING v. The Inhabitants of the Lower Division of CUMBERWORTH and CUMBERWORTH HALF.

Where by an act of parliament trustees are authorized to make a road from one point to another, the making of the entire road is a condition precedent to any part becoming a highway repairable by the public; and, therefore, where trustees empowered by act of parliament to make a road from A. to B. (being in length twelve miles), had completed eleven miles and a half of such road to a point where it intersected a public highway, it was held that the district in which the part so completed lay, was not bound to repair it.

THIS was an indictment against the defendants for not repairing part of a certain common king's highway, leading from the township of Clayton, in the West Riding of the county of York, to the township of Denby in the said West Riding, into, through, and over a certain district called the Lower Division of Cumberworth and Cumberworth Half, in the several parishes of High Holyand and Emley in the said Riding. At the trial before Littledale, J., at the Spring assizes for the county of York, 1881, it appeared that the road described

*[109] in the indictment was part of a road made by trustees under an act (6 G. 4, c. 88), for making and maintaining a turnpike road from Wakefield, to join the Shepley Lane Head turnpike road in Denby Dale in the parish of Penistone, with certain branches. The line of road described in the map or plan referred to in the act was to extend twelve miles in length. The trustees had completed only eleven miles and a half of the road, to a point where the new road intersected another public highway, there being half a mile at the western extremity of the intended road leading to Shepley Lane Head turnpike road unmade; so that there was no thoroughfare from Wakefield to the Shepley Lane Head turnpike road. The preamble of the act recited, "that the making of a turnpike road from Market Street, in the town of Wakefield, in the West Riding of the county of York, through the several townships therein mentioned, and within the several parishes therein mentioned, all within the West Riding of the county of York, to and into, and communicating with a certain turnpike road, called the Shepley Lane Head turnpike road, at or near a place called Heartcliffe, in the township of Denby, in the parish of Penistone,"—"would be a great advantage and accommodation to the inhabitants of the manufacturing towns and places in the neighbourhood, and to the public at large." It was contended at the trial, that the trustees not having completed the road which the act of parliament authorized them to make, the burden of repairing any part of it could not be thrown on the public. Littledale, J., directed the jury to find a verdict of acquittal, but reserved liberty to the prosecutors to move for a new trial. A rule nisi having been obtained for that purpose,

*[110] *Blackburne and Tomlinson* now showed cause. The trustees not having completed the road which the act of parliament authorized them to make, have not performed that duty which the legislature has required of them. The making of a road from Wakefield to join the Shepley Lane Head turnpike road, may be of great convenience to the public, but the making of a road to an intermediate point may be of no convenience whatever. The act itself contains no clause, expressly declaring when the line of road is to become a public highway. In the absence of such direction, the reasonable implication is, that it was to become a public road as soon as the whole line should have been completed. The formation of the entire line may have been the consideration which induced the different landowners to consent to the making of the road. Besides, it is a general rule, that where a special authority is delegated to particular persons, affecting the property of individuals, it must be strictly pursued, *Rex v. Croke*, Cowp. 26. In *Rex v. Hepworth*(a), an indictment charged a township with non-repair of a highway, and it appeared in evidence that the road in question was begun six years before, under a local turnpike act; that the trustees had finished it all but about three hundred yards at one end of the line, and one mile at the other (both out of the township), fenced what they had made, put up two turnpike gates, and taken toll; that the road was convenient, much used by the public, and leading at each end into old, open, and public highways: but it was held by Hullock, B., that the indictment was premature, the trustees not having finished their road according to the act

*[111] of parliament, and, consequently, that it was no public highway. Besides, here the particular district is not liable to repair this road, unless it be

shown that it acquiesced. In *Rex v. St. Benedict*, 4 B. & A. 447, a road was set out by commissioners under a local act, and certain persons only were by the act to use it; but, in fact, it had been used by the public for many years; it was held, that this was not sufficient evidence of a dedication to the public; and that if it was, there being no evidence that the parish had acquiesced in that dedication, it was not a public road which the parish were bound to repair.

F. Pollock and Wightman, contra. The road, as far as it was completed, having been made under an act of parliament, and having been used by the public, was to all intents and purposes a public road. The township, therefore, is liable to the public for the non-repair, though there are trustees who have the charge of the road. *Rex v. Netherthong*, 2 B. & A. 179. The public have nothing to do with the question, whether the whole line is completed or not. They find a public road out of repair, and have a right to indict the township. If, indeed, this were a question between the trustees and the township, the case would be different, as the township might then insist upon the non-performance by the trustees of the condition precedent, that the road should be finished.

Lord TENTERDEN, C. J. This case is not distinguishable in fact from *Rex v. Hepworth*. If there had been no decision on the subject I should have entertained some doubt. It seems to me, however, to be a wholesome doctrine that trustees who are empowered to *make a road from one place to another, [*112 should be bound to make the whole of that road before they throw on the public the burden of repairing any part of it. If that were not so, they might, when empowered to make a road extending several miles, make a mile of road, and then throw upon the parish or district the burden of repairing, though the part of the road so made might be of no use to the public. Turn-pike roads often produce great public burdens, which ought not to be extended by implication. Besides, here there was no act of acquiescence by the defendants, and according to *Rex v. St. Benedict*, 4 B. & A. 447, and *Rex v. Mellor*, 1 B. & Adol. 32, some such act was necessary at all events, to make them liable.

LITTLEDALE, J. I am of opinion that this rule ought to be discharged. The act of parliament having directed a road to be made extending in length twelve miles, the completion of the entire line of road was a condition precedent to its becoming a highway repairable by the parish or district in which it is situate, for the act may be considered as containing a bargain between the public and the persons who applied for the act, that in consideration of the latter making the entire line, the road should become a public highway repairable by the parish or district in which it lies. The consideration which induced the land-owners to consent to the road passing through their lands is entire and not divisible. There may be cases where the public would have no benefit whatever until the whole line was completed. Besides, to make the district liable, some act of acquiescence ought to be shown on their part. Here nothing of the kind appears.

*TAUNTON, J. It struck me, at one time, that as the new road was completed to a point where it intersected another public road, it might [*113 be considered a public road to that extent; but at all events, to make the district liable to repair, there ought to have been an adoption by it, *Rex v. St. Benedict*, 4 B. & A. 447. Here, although the road was made under the provisions of an act of parliament, and was used by the public because it was convenient, there was no acquiescence by the inhabitants of the district. I also think it was the duty of the trustees to finish the road from one terminus to the other; and that if they could, without finishing the whole line, throw the burden of repairing a part on the public, it might lead to great fraud, for persons might then obtain an act of parliament for making a road from A. to B., and only make one mile of it, which might be of no use to the public, and yet chargeable to them. The preamble here recites, that the making of a road from the terminus a quo to the terminus ad quem will be of great advantage to the manufacturing towns and places in the neighbourhood, and to the public

at large. The making of the entire road, therefore, seems to be the public advantage contemplated by the legislature; and if so, the making of that entire road was a condition precedent to its becoming public, so as to render the parish or district liable to repair.

PATTERSON, J. I am of opinion that this rule should be discharged. There is great weight in the argument that the act of parliament contained a bargain *114] between the persons who applied for it and the public, that, in *consideration of the former making the whole line of road, the latter should allow it to become a public highway repairable by those parishes or districts in which it was situate, so that the making of the *whole* line of road was a condition precedent to its being repairable by the public; and that is conformable to the decision in *Rex v. Hepworth*. I am disposed to decide the case rather on that principle than on the necessity of adoption, although there is some authority for that.

Rule discharged.

POLHILL v. WALTER. Jan. 20.

A bill was presented for acceptance at the office of the drawee, when he was absent. A., who lived in the same house with the drawee, being assured by one of the payees that the bill was perfectly regular, was induced to write on the bill an acceptance as by the procuration of the drawee, believing that the acceptance would be sanctioned, and the bill paid by the latter. The bill was dishonoured when due, and the endorsee brought an action against the drawee, and, on proof of the above facts, was nonsuited. The endorsee then sued A. for falsely, fraudulently, and deceitfully representing that he was authorized to accept by procuration; and on the trial the jury negatived all fraud in fact:

Held, notwithstanding that A. was liable, because the making of a representation which a party knows to be untrue, and which is *intended*, or is calculated, from the mode in which it is made, to induce another to act on the faith of it so that he may incur damage, *is a fraud in law*, and A. must be considered as having intended to make such representation to all who received the bill in the course of its circulation.

Held also, that A. could not be charged as acceptor of the bill, because no one can be liable as acceptor but the person to whom the bill is addressed, unless he be an acceptor for honour.

DECLARATION stated, in the first count, that J. B. Fox, at Pernambuco, according to the usage of merchants, drew a bill of exchange, dated the 23d of April, 1829, upon Edward Hancorne, requesting him, sixty days after sight thereof, to pay Messrs. Turner, Brade, and Co., or order, 140*l.* 16*s.* 8*d.* value received, for Mr. Robert Lott; that afterwards the defendant, well knowing the premises, did falsely, fraudulently, and deceitfully represent and pretend *115] that he was duly authorized by Hancorne to accept the said bill of *exchange according to the usage of merchants, on behalf and by the procuration of Hancorne, to whom the same was so directed as aforesaid, and did then and there falsely and fraudulently pretend to accept the same by the procuration of Hancorne: that the said bill of exchange was endorsed over, and by various endorsements came to the plaintiff, of which the defendant had notice; that the plaintiff, relying upon the said pretended acceptance, and believing that the defendant had authority from Hancorne so to accept the bill on his behalf, and in consideration thereof, and of the endorsement, and of the delivery of the bill to him the plaintiff, received and took from the last endorsers the bill as and for payment of the sum of money in the bill specified, for certain goods and merchandises of the plaintiff sold to the endorsers; that when the bill became due, it was presented to Hancorne for payment, but that he, Hancorne, did not nor would pay the same, whereupon the plaintiff brought an action against Hancorne as the supposed acceptor thereof; and that by reason of the premises, and the said false representation and pre-

tence of the defendant, the plaintiff not only lost the sum of money in the bill of exchange mentioned, which has not yet been paid, but also expended a large sum, to wit, 42*l*. 7*s*. in unsuccessfully suing Hancorne, and also paid 17*l*. to him as his costs. The second count, after stating the drawing of the bill according to the custom of merchants, by Fox, as in the first count, alleged that the defendant, well knowing the premises, did falsely and deceitfully represent and pretend that he, the defendant, was duly authorized by Hancorne to accept the bill according to the said usage and custom of merchants, on behalf and by *the procuration of Hancorne, to whom the same was directed, and did accept the same in writing under pretence of the procuration aforesaid; [*116 that by various endorsements the bill came to the plaintiff; that he, the plaintiff, relying on the said pretended procuration and authority of Hancorne, and in consideration thereof, and of the said acceptance, received and took the bill as and for payment of a sum of money in the bill specified, in respect of goods sold by the plaintiff. The count then stated the presentment of the bill to Hancorne and his refusal to pay, and averred that it became and was the duty of the defendant to pay the sum in the bill specified, as the acceptor thereof, but that he had refused. There was a similar allegation of special damage as in the first count. Plea, not guilty. At the trial before Lord Tenterden, C. J., at the London sittings after Hilary term, 1831, it appeared in evidence that the defendant had formerly been in partnership with Hancorne, but was not so at the time of the present transaction. The latter, however, still kept a counting-house on the premises where the defendant carried on business. The bill of exchange drawn upon Hancorne was, in June, 1829, left for acceptance at that place, and, afterwards, a banker's clerk, accompanied by a Mr. Armfield, then a partner in the house of the payees, called for the bill. The defendant stated that Hancorne was out of town, and would not return for a week or ten days, and that it had better be presented again. This the clerk refused, and said it would be protested. Armfield then represented to the defendant that expense would be incurred by the protest, and assured him that it was all correct; whereupon the defendant, acting upon that assurance, accepted it per procuration of Mr. Hancorne. *After this acceptance, it was endorsed [*117 over by the payees. On the return of Hancorne, he expressed his regret at the acceptance, and refused to pay the bill. The plaintiff sued him, and, on the defendant appearing and stating the above circumstances, was nonsuited. The present action was brought to recover the amount of the bill, and the costs incurred in that action, amounting in the whole to 196*l*. The defendant's counsel contended that as there was no fraudulent or deceitful intention on the part of the defendant, he was not answerable. Lord Tenterden was of that opinion, but left it to the jury to determine whether there was such fraudulent intent or not; and directed them to find for the defendant if they thought there was no fraud, otherwise for the plaintiff; giving the plaintiff leave to enter a verdict for the sum of 196*l*. if the Court should be of opinion that he was entitled thereto. The jury found a verdict for the defendant. In the ensuing Easter term Sir James Scarlett obtained a rule nisi, according to the leave reserved, against which in the last term cause was shown by

Campbell and F. Kelly. The jury having negatived all fraud and deceit, it must now be assumed that the defendant, when he represented that he had authority to accept the bill, bona fide believed that he had such authority; and if that be so, he is not liable in this action by an endorsee. Where there is a contract and warranty, the party may declare in tort, if it be broken, without proof of fraudulent intent, *Williamson v. Allison*, 2 East, 449; but here was no contract *and warranty. As to the first count, striking out the allegation of fraud, the charge remaining is, that the defendant falsely represented that he had authority to accept the bill for Hancorne, and did accept it in the name of the latter as by his procuration; and that the bill being afterwards endorsed to the plaintiff, Hancorne refused payment, whereby the

plaintiff was injured; and then the question is, whether a party who accepts a bill in the name of another, representing that he has authority so to do, which he has not, but which he believes he had, makes himself liable to every person who takes that bill. There is no authority to support such a position. Would the defendant, if he had acted under a power of attorney, purporting on the face of it to be executed by Hancorne, but which turned out to be forged, have been liable to any person who afterwards took the bill? If he be liable at all, he must be so by some contract, or by reason of the custom of merchants. Here there was no contract between the plaintiff and defendant, and there was no proof of any custom of merchants which would make him liable. But the second count will probably be relied upon. It alleges "that Fox drew the bill directed to Hancorne, and requested the latter to pay the sum mentioned in it; that the defendant, well knowing the premises, falsely (for the words *fraudulently and deceitfully* must, after the finding of the jury, be rejected) represented that he was authorized to accept the bill by procuration of the drawee, and did accept it in his name; that the bill was endorsed to the plaintiff; that the drawee refused to pay it; and that it then became the duty of the defendant to pay it as the acceptor thereof. The latter allegation is an allegation of *119] matter of law, and the duty must arise, *by law, from the facts previously stated in the court, *Max v. Roberts*, 12 East, 89; *Rex v. Everett*, 8 B. & C. 114. Then, is it by law the duty of a person who accepts a bill in the name of another, believing that he has authority from that other to do so, to pay that bill as the acceptor, in default of payment by the other party? Here was no contract between the plaintiff and defendant, upon which such a duty could be grounded; and the declaration does not allege that the defendant became liable as acceptor by the custom of merchants, nor was there proof of any such custom. By the general custom of merchants a person may accept in his own name for the honour of the drawer or endorser; but, in that case, the person so accepting is not liable, unless the bill be first presented to the drawee when due.

Sir *James Scarlett* and *Lloyd*, *contrâ*. First, assuming that the defendant was not guilty of fraud, in any sense of that word, he was liable, as acceptor, on the facts stated in the second count. That count, even rejecting the allegation of fraud and deceit, contains a statement of a cause of action. The law will imply a contract, by the person who accepted the bill under the circumstances there stated, to pay it. The defendant having accepted in the name and by the procuration of Hancorne, must be considered to have undertaken to pay the bill if Hancorne did not. If a person assumes to act as the agent of another, and, in fact, has no authority, any contract which he may have made, may be treated as made by him personally. And the defendant accepting per *120] procuration, and knowing that he had no authority, must be *taken to have meant that the bill should be paid by somebody, either by the party in whose name it was accepted or by himself. That is, in substance, the acceptance of a bill of exchange. A case is mentioned in *Roscoe on Bills of Exchange*, p. 383, n. 9, where, in the American Courts, a pretended agent who signed a note for another as having authority, was held personally liable as maker. But, secondly, the first count of the declaration was proved. The jury have, indeed, negatived fraud in fact; they have found that the defendant thought Hancorne would pay the bill, and that he did not mean to cheat any person; but still there was in this case that which constitutes fraud in law, for the defendant, by accepting a bill per procuration of another, has represented to all the world that he had authority from that other to do so, whereas he had no such authority. That representation being false to his knowledge, is a fraud in law, *Pasley v. Freeman*, 3 T. R. 51; *Tapp v. Lee*, 3 Bos. & Pull. 367; *Haycraft v. Creasy*, 2 East, 92. In the late case of *Foster v. Charles*, 7 Bingh. 105, *Tindal*, C. J. says, "It is fraud in law if a party makes representations which he knows to be false, and injury ensues, although the motives

from which the representations proceeded may not have been bad ; the party who makes such representations is responsible for the consequences." Here, the false representation has misled the plaintiff ; he has a bill for which he has given a valuable consideration, and which has not been paid. He is consequently damnified ; and he may recover against the defendant.

Lord TENTERDEN, C. J., now delivered the judgment of the Court.

*In this case, in which the defendant obtained a verdict on the trial before me at the sittings after Hilary term, a rule nisi was obtained to enter a verdict for the plaintiff, and cause was shown during the last term. The declaration contained two counts : the first stated, that a foreign bill of exchange was drawn on a person of the name of Hancorne, and that the defendant *falsely, fraudulently, and deceitfully* did represent and pretend that he *was duly authorized* to accept the bill by the procuration, and on behalf of Hancorne, and did falsely and fraudulently pretend to accept the same by the procuration of Hancorne. It then proceeded to allege several endorsements of the bill, and that the plaintiff, relying on the pretended acceptance, and believing that the defendant had authority from Hancorne to accept, received the bill from the last endorsee in discharge of a debt ; that the bill was dishonoured, and that the plaintiff brought an unsuccessful action against Hancorne. The second count contained a similar statement of the false representation by the defendant, and that he accepted the bill in writing under pretence of the procuration from Hancorne : and then proceeded to describe the endorsements to the plaintiff, and the dishonour of the bill, and alleged, that thereupon *it became and was the duty of the defendant to pay the bill as the acceptor thereof*, but that he had not done so.

On the trial it appeared, that when the bill was presented for acceptance by a person named Armfield, who was one of the payees of the bill, Hancorne was absent ; and that the defendant, who lived in the same house with him, was induced to write on the bill an acceptance as by the procuration of Hancorne, Armfield assuring him that the bill was perfectly regular, and the defendant *fully believing that the acceptance would be sanctioned, and the bill paid at maturity, by the drawee. It was afterwards passed into the plaintiff's hands, and being dishonoured when due, an action was brought against Hancorne ; the defendant was called as a witness on the trial of that action, and he negating any authority from Hancorne, the plaintiff was nonsuited. I left to the jury the question of deceit and fraud in the defendant, as a question of fact on the evidence, and the jury having negatived all fraud, the defendant had a verdict, liberty being reserved to the plaintiff to move to enter a verdict, if the Court should think the action maintainable notwithstanding that finding.

On the argument, two points were made by the plaintiff's counsel. It was contended, in the first place, that although the defendant was not guilty of any fraud or deceit, he might be made liable *as acceptor* of the bill ; that the second count was applicable to that view of the case ; and that, after rejecting the allegations of fraud and falsehood in that count, it contained a sufficient statement of a cause of action against him, as acceptor. But we are clearly of opinion that the defendant cannot be made responsible in that character. It is enough to say that no one can be liable *as acceptor* but the person to whom the bill is addressed, unless he be an acceptor for honour, which the defendant certainly was not.

This distinguishes the present case from that of a pretended agent, making a promissory note (referred to in Mr. Roscoe's Digest of the Law of Bills of Exchange, note 9, p. 47), or purchasing goods in the name of a supposed principal. And, indeed, it may well be doubted if the defendant, by writing this acceptance, entered into any *contract or warranty* at all, that he had authority to *do so ; and if he did, it would be an insuperable objection to an action as on a contract by this plaintiff, that at all events there was no contract with, or warranty to, *him*.

It was in the next place contended that the allegation of *falsehood and fraud* in the first count was supported by the evidence; and that, in order to maintain this species of action, it is not necessary to prove that the false representation was made from a corrupt motive of gain to the defendant, or a wicked motive of injury to the plaintiff: it was said to be enough if a representation is made which the party making it *knows to be untrue*, and which is intended by him, or which, from the mode in which it is made, is calculated, to induce another to act on the faith of it, in such a way as that he may incur damage, and that damage is actually incurred. A wilful falsehood of such a nature was contended to be, in the legal sense of the word, a *fraud*; and for this position was cited the case of *Foster v. Charles*, 6 Bingham. 396, 7 Bingham. 105, which was twice under the consideration of the Court of Common Pleas, and to which may be added the recent case of *Corbet v. Brown*, 8 Bingham. 33. The principle of these cases appears to us to be well founded, and to apply to the present.

It is true that there the representation was made *immediately* to the plaintiff, and was *intended* by the defendant to induce the plaintiff to do the act which caused him damage. Here, the representation is made to *all* to whom the bill may be offered in the course of circulation, and is, in fact, intended to be made **124]* to *all*, and the plaintiff is one of those; and the defendant must **be* taken to have *intended*, that all such persons should give credit to the acceptance, and thereby act upon the faith of that representation, because that, in the ordinary course of business, is its natural and necessary result.

If, then, the defendant, when he wrote the acceptance, and, thereby, in substance, represented that he had authority from the drawee to make it, knew that he had no such authority (and upon the evidence there can be no doubt that he did), the representation was untrue to his knowledge, and we think that an action will lie against him by the plaintiff for the damage sustained in consequence.

If the defendant had had good reason to believe his representation to be true, as, for instance, if he had acted upon a power of attorney which he supposed to be genuine, but which was, in fact, a forgery, he would have incurred no liability, for he would have made no statement which he knew to be false: a case very different from the present, in which it is clear that he stated what he knew to be untrue, though with no corrupt motive.

It is of the greatest importance in all transactions, that the truth should be strictly adhered to. In the present case, the defendant no doubt believed that the acceptance would be ratified, and the bill paid when due, and if he had done no more than to make a statement of that belief, according to the strict truth, by a memorandum appended to the bill, he would have been blameless. But then the bill would never have circulated as an *accepted* bill, and it was only in consequence of the false statement of the defendant that he actually had authority to accept, that the bill gained its credit, and the plaintiff sustained a loss.

**125]* For these **reasons* we are of opinion that the rule should be made absolute to enter a verdict for the plaintiff. Rule absolute.

DUNSTON AND CLARKE, Assignees of JOHN DUNSTON v. THE IMPERIAL GAS LIGHT AND COKE COMPANY.(a)

A gas light company was incorporated by act of Parliament, which provided that eighteen shareholders should be directors, and as such should use the common seal, manage the affairs of the company, lay out money, purchase lands, &c., and make contracts for lighting and for the sale of materials. The company was empowered to

(a) This case was decided last Michaelmas term.

make *by-laws under seal* for its government, and for regulating the proceedings of the directors, officers, servants, &c. At a meeting of the company a resolution was passed, *not under seal*, that a remuneration should be allowed to every director for his attendance on courts, committees, &c., viz., one guinea for each time :

Held, that a director who had attended courts, &c., could not maintain an action for payments according to the above resolution, for that it was not a by-law within the statute, nor a contract (if such could have been available) to pay the directors or any of them for their attendances, and the directors could not be considered as servants to the company, and, as such, entitled to remuneration for their labour according to its value.

Quære, Whether a company incorporated for the purpose of manufacturing, can contract otherwise than under seal, for service, work, and the supply of goods for carrying on the business.

DEBT for fees due to the bankrupt as director of the company, for his labour and services in attending courts, committees, and deputations of the company, for them and at their request; and generally for work and labour. Plea, the general issue. At the trial before Lord Tenterden, C. J., at the sittings in London after Hilary term, 1831, the following facts appeared :—The company was incorporated by statute 1 & 2 G. 4, c. 117, and by section 52 of that act it was provided that there should be one of the proprietors of shares in the company, qualified and to be appointed as in the act was mentioned, who should be governor, and eighteen of such proprietors, qualified and to be appointed as in the act was mentioned, who should be directors of the said company; that other proprietors should be appointed deputy-governor and auditors; and that there should be one other person, to be appointed *as in the act was mentioned, to be the clerk of the said company. By sect. 53, directors [*126 were to be holders of ten shares in the joint stock of the company. By sect. 56, it was enacted, that at the first general meeting of the company there should be an election of eighteen proprietors, duly qualified, to be directors of the affairs of the company for certain periods there mentioned, and of another fit person to be clerk, and who, as such, was, by sect. 60, to attend the meetings of the company, and register the orders and proceedings. The directors were, by sect. 69, to meet once a week at least, and at such other times as they should think proper; but no business was to be transacted unless four directors and the governor or deputy, or in their absence six directors, should be present. By sect. 71, it was enacted, that the directors for the time being should have the custody of the common seal of the company, and should have full power and authority to use the same for the company's affairs and concerns; to meet and adjourn from time to time, and from place to place; and to direct, manage, and transact the affairs and business of the company, as well in issuing, laying out, and disposing of money for the purposes of the company, as in contracting for and purchasing messuages, lands, &c., for their use, and entering into contracts for the lighting of any streets, &c., within the limits of the act, and in ordering, directing, employing the works and workmen, and selling and disposing of messuages, lands, &c., and articles produced by the company in their manufacture of gas, and in making and carrying into effect all contracts touching or concerning the same, subject to such orders, by-laws, rules, and regulations as should at any time be *duly made by the company in restraint, control, or regulation of the powers by this act granted. Some particular [*127 powers were specifically given them by subsequent sections. By sect. 76, it was enacted, that the company should have power at general or special general meetings duly called, to make such rules, orders, and by-laws as to them should seem meet, for the good government of the company, and for regulating the proceedings of the directors, and for regulating all officers, workmen, and servants to be employed about the company's affairs and business, and for the superintendence and management of the said company in all respects, and from time to time to alter or repeal such rules, orders, and by-laws; and that all such rules, orders, and by-laws (being reduced into writing, and the common seal of

the company thereto affixed, countersigned by the clerk) should be binding upon all such persons, and a justification to them in any court of law or equity, provided the same were not repugnant to the laws of England. By 4 G. 4, c. 95, the number of directors was reduced, and some other regulations were made respecting them; and by 10 G. 4, c. 12, the proprietors were enabled to remove any director, &c., for negligence or misconduct, a power not previously given.

The first directors, of whom the bankrupt was one, were elected in July, 1821. On the 15th of August, 1822, the following resolution was agreed to at a general meeting of the company, and entered in their books, but never passed under their common seal. "Resolved, That the following remuneration be allowed to the governor, deputy-governor, and directors from the time of their appointment after the passing of the act thenceforth, viz., that the sum of two *128] guineas each *be allowed to the governor and deputy-governor for every attendance at a court of directors, and to every director for the like attendance, one guinea. That the governor and deputy-governor, and each director, be allowed the sum of one guinea for every attendance at a committee or on a deputation of the company. That the chairman of the several committees be allowed one guinea and a half for every attendance."

The bankrupt, with other directors, attended the meetings and transacted the business of the company from the time of his election till the year 1829, when he ceased to be a director. His fees were paid down to the end of 1827, but those accruing afterwards were withheld on the ground of alleged misconduct, and the present action was brought to recover them. It was contended at the trial, that the above resolution, not being under seal, was not a by-law within the meaning of the statute, and could, therefore, be no legal foundation for the present claim: and that the plaintiffs could not avail themselves of a contract for remuneration, independently of a by-law (supposing such contract to have existed, which was denied), since the company, being a corporation, could only bind themselves under seal. Lord Tenterden thought the action not maintainable, and directed a nonsuit, giving leave, however, to move to enter a verdict for the plaintiffs. A rule nisi was accordingly obtained, and at last Michaelmas term,

Sir James Scarlett and R. V. Richards showed cause. The sum claimed was a mere gratuity, and could not in itself be the subject of an action. The directors are not in the situation of servants to the company; they are themselves *129] the masters, and their labour is nothing *more than they are bound to give by their duty as pointed out by the statute, when they accept the office of directors. It cannot, therefore, be argued with success, that the mere fact of their having bestowed their services will establish a title to remuneration, the amount of which is ascertained by the vote of a guinea for each attendance. If, indeed, the company think proper, as a matter of compliment and favour, to give a gratuity to any director, they must do so according to the powers with which the act invests them, namely, by a resolution under seal, which alone, according to sect. 76, can be a valid by-law, and obligatory upon such members as are absent when the vote is passed. And, independently of the statute, this company, being a corporation, could not contract with a director for services in that capacity except by deed under their common seal. A corporation may, it is said, in some small matters, contract without deed, as in hiring a cook or butler; but it was held in *Horne v. Ivy*, 1 Ventr. 47, that the Canary Company could not, without deed, empower a person to seize goods as forfeited to their use, this being an extraordinary, and not a common service. Besides this, another objection arises to the right of a director at common law to sue the company for remuneration, inasmuch as he is himself a partner, and immediately interested in the funds against which he seeks to recover.

Campbell, F. Pollock, and Thesiger, contra. It is quite clear that for ordinary and trifling services an incorporated company may contract without seal,
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Com. Dig. *Franchises*, (F) 13, as if this company had hired a man to be employed in making coke, or in any menial occupation. It cannot be said that a manufacturing *company like this shall be obliged to make every contract for work, and every purchase, by deed. They must have, incidentally, a power of contracting in the ordinary way for the carrying on of that business which was the object of their incorporation. It is evident the clerk of this company, mentioned in sect. 52, and elsewhere in the statute, was meant to be a stipendiary officer; he is appointed in the same manner as the directors are (by election at a general meeting), and there is nothing to show that they were not also intended to be stipendiary. They could not be compelled to act, if the company would not agree with them for a remuneration. Their being shareholders (which the clerk is not) can make no difference, if they are in effect servants to the company; nor is there any real distinction between a servant in a higher, and one in a lower capacity. The company may engage either without deed. The directors are so far considered servants, that by the act 10 G. 4, c. 12, power is given to the proprietors to remove them for negligence or misconduct. [PARKE, J. It appears from several cases that in some instances where a thing has been done by the authority of a corporation, though not given under seal, it may be considered as their act, but is there any case where their contract, without seal, has been held a sufficient ground for an action?] It would be so in the case put in some of the books, of hiring a cook or butler. There can be no question that they would be liable for coals or other materials supplied, under an ordinary contract, for the carrying on of their business. [TAUNTON, J. In *Yarborough v. The Bank of England*, 16 East, 6, and see *Rex v. Bigg*, 3 P. Wms. 419, 6th edit., Lord Ellenborough seems to have thought *that the Bank might have been liable in trover for the detention of notes by their authorized agent, even though it had not been presumed, as it was there, that the authority was given under seal.] The section (76) of the act 1 & 2 G. 4, c. 117, which provides for the making of by-laws under seal, is for the purpose of giving greater force to the regulations so made, but does not necessarily render all others invalid. A vote of remuneration to officers does not properly fall within the words of that section. As to the objection that a director could not recover against the company, because he is himself a member, the corporation and an individual shareholder in it are, for this purpose, wholly distinct, and either may sue the other. The very act now in question, in s. 58, contemplates the possibility of a director contracting with the company to execute work or supply materials for their use, unless such contract were expressly avoided, which it is by that clause.

Lord TENTERDEN, C. J. I am of opinion that this action was not maintainable. I wish, however, to be understood as by no means deciding the question, whether third persons, who may sell coal or other materials to the company, or who may be employed by them as servants or workmen, may or may not maintain an action against them for remuneration, though the contract was not under seal. This is a corporation established for the purpose of carrying on trade and manufactures, and may therefore differ from others as to its powers of contracting, and its remedies upon contracts relating to the purposes for which the company is formed. On this point I give no opinion. But here is a statute which provides, that certain persons in this *corporation shall be directors, and, in sect. 71, points out some of their duties and powers: and they are duties and powers as unlike those of a servant as they can well be. They are, in fact, those of managers or governors. The act itself says nothing of remuneration; and I cannot see how, in point of law, persons in the situation of these directors could maintain any action for a recompense, at least unless there had been a resolution under seal in the nature of a by-law. Looking at the character of their duties, I am of opinion that these directors, however convenient it might be that some remuneration should be awarded them for

their services, were not entitled to it by the resolution given in evidence in this cause.

PARKE, J. As to the objection, that the bankrupt in this case was a member of the corporation, and, therefore, could not sue them; a member of a corporation is, for this purpose, as distinct from the corporate body as any third person. It is not necessary to decide, whether an action would lie at the suit of a clerk or servant employed in the trade of a company like this, under a contract not sealed. Here, the character of the party for whom remuneration is claimed, is not that of a servant, but of a manager. He can, therefore, recover no recompense from the company, unless by virtue of an express resolution in the nature of a by-law according to the directions of the statute. And even supposing the seal of the company were not absolutely requisite, I do not see any contract with the bankrupt in this case; the resolution only amounts to a determination by those who pass it, that a certain gratuity shall be given to the directors.

*133] *TAUNTON, J. I do not consider it necessary to give an opinion, whether or not this resolution was a by-law within the meaning of the statute, though I am inclined to think that it could not be valid in any other character, and therefore ought to have had the common seal affixed. Nor are we called upon to decide the abstract question, whether a corporation has the power of contracting otherwise than under seal, with a stranger or a member of its own body; whether, for instance, in the present case, the company might so have contracted for filling gasometers or laying down pipes, for the purchase of goods, or for services to be performed; and whether, upon such contract when executed, they would be liable to an action at the suit of the party contracted with, on general grounds of moral obligation. My decision rests upon this one point; that the resolution of the company was, at all events, nothing more than an announcement to the gentlemen who then were or who might become, directors, that if they attended punctually, they would receive a gratuity, or compliment, in proportion to the quantum of attendance. I think that was not a contract upon which a right of action could be founded.

PATTESON, J. Looking at the character in which the bankrupt makes his claim, and the nature of the resolution passed by the company, I think that nothing like a contract appears in this case, and consequently that the whole foundation of the action fails. It is therefore unnecessary to give any opinion upon the other points.

Rule discharged.

*134]

*SIMPSON v. UNWIN.

The statute 2 G. 3, c. 19, s. 1 and 4, enacted, that no person should take, kill, destroy, carry, sell, buy, or have in his possession or use any partridge, between the 12th of February and the 1st of September, in any year (altered by the 39 G. 3, c. 34, to the 1st of February and the 1st of September), or any pheasant between the 1st of February and the 1st of October, under a penalty:

Held, that a qualified person who had in his possession on the 9th of February, partridges and a pheasant killed before the 1st, was not guilty of any offence against the statute.

DEBT for penalties under the statutes 2 G. 3, c. 19, and 39 G. 3, c. 34. The first count of the declaration alleged, that the defendant, within six months before the commencement of the suit, and between the 1st day of February and the 1st day of September, 1830, (to wit) on the 9th day of February in that year, within that part of the United Kingdom called England, to wit, at, &c., had in his possession two partridges, contrary to the form of the statute, &c. The second count alleged that the defendant, within the same period of

six months, and between the said 1st day of February and the 1st day of October in the same year, and within that part, &c., to wit, at, &c., had in his possession one pheasant, the said pheasant not having been taken in the season allowed by the statute in that behalf, nor kept in any mew or breeding-place, contrary to the form, &c. At the trial before Tindal, C. J., at the York Summer assizes, 1830, a verdict was found for the plaintiff, subject to the opinion of this court, on a case which stated, that the partridges and pheasant in the declaration mentioned were on the 9th of February in the possession of the defendant, who was at that time, and before the 1st of February, a qualified person, and that they had been killed and in the defendant's possession on or before the 1st of February.

Starkie for the plaintiff. The statute 2 G. 3, c. 19, s. 1, enacts, "that no person shall, upon any pretence *whatsoever, take, kill, destroy, carry, sell, buy, or have in his possession or use, any partridge between the 12th [*135 day of February" (altered by the 39 G. 3, c. 34, s. 3, to the 1st of February) "and the 1st day of September in any year, or any pheasant between the 1st day of February and the 1st day of October in any year." Here the defendant had in his possession partridges and a pheasant within the time so specified. This is a case, therefore, within the very words of the enacting clause. There is an exception as to pheasants taken in the proper season, and kept in a mew or breeding-place, but no exception whatever as to partridges, and none as to partridges or pheasants killed in the season, and kept afterwards. It may be said, that it is hard if a party may kill game till the end of a certain day, and yet shall not have such game in his possession on the following day; but it is not necessary that he should continue killing game to so late a period.

Alexander, contra. The statute being highly penal, a case, to be brought within it, must not only be within the literal sense of the enacting words, but within the intent. A thing which is within the letter of the statute is not within the statute, unless it be within the intent of the maker; Bacon, Abr., tit. *Statute*, I. 5; *Bridger v. Richardson*, 2 M. & S. 568; and the construction ought to be consonant to the intent, although it may seem contrary to the letter of the statute; Plowden's Comm. 205. Where words will bear an absurd signification if literally understood, the received sense must be a little deviated from, 1 Blackst. Comm. 61. Now, if this case be within *the statute, [*136 the absurd consequences will follow, that a party who lawfully killed a pheasant or partridge at the close of the 1st of February, would be guilty of a crime by having it in his possession in the beginning of the second. The manifest intent of the legislature in this act was, to prevent the killing or destroying of the game at particular seasons of the year; and the birds which the defendant is charged with having unlawfully in his possession, were killed within the period allowed by law. The object of the legislature, therefore, was not contravened by his having those birds in his possession afterwards. In *Warnford v. Kendall*, 10 East, 19, the possession of game by a servant employed to detect poachers, who took it up after it had been killed by strangers on the manor, in order to carry it to the lord, was held not to be an unlawful possession so as to subject the party to a penalty.

Lord TENTERDEN, C. J. I think this is not a case within the statute 2 G. 3, c. 19, s. 1 & 4. It clearly is not within the object which the legislature had in view; and although it may be within the literal meaning of the words, taken by themselves, we must not give to them a construction which will not only be contrary to the general intention of the legislature, but which will lead to this absurd consequence, that a party who might at the last moment of the day of the 1st of February, lawfully kill a partridge or pheasant, would be guilty of an offence by having the same partridge or pheasant in his possession at the earliest moment of the second. And I am strongly inclined to think, that the first section *applies to living birds only, both on account of the absurdity which would otherwise follow, and because section 2 con- [*137

tains an express exception as to living pheasants; and all the objects of the statute are satisfied, if the meaning be restrained to living birds only.

LITTLEDALE, J. It is true that the defendant in this case had in his possession partridges and a pheasant beyond the period specified in the statute, and the words of the act may apply to persons then having in their possession birds killed before the expiration of that time. But the true meaning must be ascertained by looking at the object which the legislature had in view. That undoubtedly was, to prevent the killing or taking of the birds within the periods mentioned, in order that they might breed in the interval. As to *living* birds, it may be said that the statute applies whether they be taken before or after the 1st of February, because the taking them may prevent their going wild and breeding. With regard to one species of living birds (pheasants) it is expressly provided that the statute shall not extend to them in certain cases. But as to birds killed before the day mentioned, they are clearly not within the intention of the statute, and that being so, the meaning of the words in the enacting clause must be restrained in construction to such birds as are killed subsequently to the period specified. Besides, if a man may lawfully kill birds on the last moment of the day on the 1st of February, it would be absurd to hold that he would be guilty of an unlawful act by having the same birds in his possession on the 2d.

TAUNTON, J. The fourth section of 2 G. 3, c. 19, enacts, "that if any *138] person shall transgress the act in *any of the aforesaid cases, and shall be lawfully convicted thereof, every such person shall, for every partridge, pheasant, &c. so taken, killed, or found in his possession contrary to the true intent and meaning of this act, forfeit the sum of 5*l*." The penalty is limited to the case of a person killing a partridge or pheasant, or having it found in his possession, contrary to the meaning of the act. I am of opinion that a man who kills a partridge or a pheasant on the 1st of February, but keeps it to be eaten after that day, does not commit any offence contrary to the true intent of the act, for that the possession of a partridge or pheasant so killed, after those days, is lawful possession, which the act does not contemplate (see 1 & 2 W. 4, c. 32, s. 3, 4).

PATTESON, J. I am inclined to think that the statute applies to living birds only, but at all events, it must receive a reasonable construction, and the object of the legislature being to prevent the destruction of game out of particular seasons, I think it would be absurd to say that a party who kills the game within the time when he may lawfully do so, must consume it all upon the last day. I agree that the possession meant by the act is an unlawful, not an innocent possession. The judgment of the Court must, therefore, be for the defendant.

Judgment for the defendant.

*139] *The KING v. The Undertakers of the AIRE and CALDER NAVIGATION. Jan. 21.

Persons in whom the navigation of a river is vested, but who have no interest in the soil, are not rateable to the poor for a dam which upholds the water of such river, and renders it navigable.

THE appellants were rated in 1828, to the relief of the poor of the township of Brotherton, in the West Riding of Yorkshire, as the owners and occupiers of "a cut or canal, and that part of the river Aire lying within the township of Brotherton; the dams, locks, and weirs, and tolls, dues, or rates." They appealed against the rate, to the sessions for the Liberty of St. Peter of York, and a case was thereupon stated for the opinion of this Court, which, on argument, decided that the appellants were not rateable as owners or

occupiers of part of the river, *Rex v. The Aire and Calder Navigation Company*, 9 B. & C. 820. Another rate having in the mean time been made in the same terms, and appealed against, the sessions, after the above-mentioned decision (namely, in January, 1830), amended this latter rate by striking out the words "and that part of the river Aire," subject to the opinion of this Court upon the following case:—

The rivers Aire and Calder were rendered navigable by the statute 10 & 11 W. 3, c. 19, amended by 14 G. 3, c. 96, 1 G. 4, c. 39, and 9 G. 4, c. 98. The river Aire forms the boundary between the respondent township and those of Ferrybridge and Knottingley, as far as the mills after-mentioned. Opposite these it divides itself into two branches, the northern branch separating Brotherton from Knottingley, the southern passing through *Knottingley. On the Brotherton side of the northern branch is an ancient [*140 mill, called Brotherton Mill, with a mill-dam across that branch of the river, forming in part the head and fall of water by which the mill, when in operation, was worked. Half of the dam is in Brotherton, and half in Knottingley, abutting on one side upon the mill, on the other upon land held to the use of the undertakers. The mill and dam existed before the navigation, and were leased to trustees for the undertakers of the navigation fifty years ago, but are now dilapidated, out of use, and unoccupied. On the Knottingley branch of the river are other ancient mills (vested in trustees for the undertakers in fee), to which belongs a second dam, extending across the southern division of the river. This, the Knottingley dam, lies near the Brotherton dam before described, and the two together form a pond or head of water. Since the Brotherton mills were dilapidated, the Knottingley dam has been substantially repaired by the appellants, for the use of the Knottingley mills and of the navigation in common.

A side cut, mentioned in the rate, but concerning which no dispute arose, was made by the undertakers, with a lock, in the respondent parish, for passing vessels from the level above to that below the Brotherton and Knottingley dams. There is a similar cut, for the same purpose, on the Knottingley side.

The water of the river Aire is held up, and the river rendered navigable, by the above-mentioned dams, from the lock in the side cut in Brotherton township, for 9823 yards upwards, within which distance it runs through six townships (including Brotherton), each maintaining its own poor. No tolls or dues are specifically taken for passing a dam or lock; the only toll is *an [*141 equal mileage toll, charged according to the length of river or canal, or both, actually navigated, and whether any locks or dams be passed or not. No tolls are actually received in the respondent township.

The appellants contended that they were rateable only in respect of the canal and lock in Brotherton. The respondents maintained, that as the water of the river was upheld, and the river made navigable, for 9823 yards, by the two dams above mentioned; and as one-half of one of the dams was in the respondent township, they were entitled to rate the undertakers for one-fourth of the tolls upon the whole line so made navigable, or at least upon that portion of the line which lay within their township. The sessions considered the appellants rateable for a fourth of the tolls upon the whole line, as well as for the cut and lock in Brotherton. This case was now argued by

John Williams and *Bliss* in support of the order of sessions. It is no objection to the rate in this case that the tolls, which form the profit of the navigation, are not collected within the township. *Rex v. The Trent and Mersey Navigation Company*, 1 B. & C. 545; *Rex v. Palmer*, 1 B. & C. 546; nor is it material that the company take the tolls as mileage, and not in respect of the dam, if that be in law the source of the benefit accruing. Here is a profit received, and a subject-matter within the township, upon which a rate may be imposed in respect of such profit. [Lord TENTERDEN, C. J. Suppose water is turned into a canal from a river by means of a wear, are the profits of the canal

*142] to be rated where the wear is? If a *wear in parish A. turns water to a mill in parish B., are the returns of the mill in B. to be rated in A.?] The difficulty there would be in ascertaining how much of the tolls or profits were earned by the wear, and how much by the canal or mill independently of it. If that difficulty were obviated, as if the dam or wear were rented, the objection would no longer prevail; the occupier would be rateable in the parish where the dam or wear lay, and the value of the occupation would be measured by the rent. The questions here are, Whether the dam in Brotherton is in the occupation of the company? and what is the value of the occupation? On the first point there can be no doubt, since the dam abuts at each end upon land of which they are the owners, Callis on Sewers, p. 74, 4th ed.; and even if this were not so, still, according to *Dyson v. Collick*, 5 B. & A. 600, they have a property in the dam in respect of which they might maintain trespass, and are therefore the occupiers.

Then as to the measure of benefit derived from the occupation. The general rule in cases like this appears to be, that where the profits derived from any incorporeal hereditament or right, or even from a contract, are incident to and connected with a corporeal tenement, without which they would not accrue, there, for the purpose of rating, the measure of benefit resulting from the occupation of such corporeal tenement is the aggregate amount of its own value, and of the clear profits derived from it, *Rex v. Hogg*, 1 T. R. 721; *Rex v. St. Nicholas, Gloucester*, Cald. 262. It is not necessary that the profits should be strictly appurtenant to the corporeal tenement; it is enough if they could not

*143] subsist without it. This was *the case in *Rex v. Bradford*, 4 M. & S. 317, where a party was held rateable for a canteen and building occupied by him, and also for the privilege of using the same as a canteen, though there was no necessary connexion between the building and the privilege exercised in it, which was purely personal. The principle of these cases will apply here. The company are the occupiers of a dam which supports the water to the distance of 9823 yards above; they occupy that, by which the profits of the water to that extent arise. Those who use the water use the dam. It makes no difference that the profits arise by means of a river navigation which is in itself not rateable. A man may be rated for the profitable occupation of a house, though it may be, that such profit could not accrue but for some easement, as a right of way, upon which no rate could be laid. It is true that, in the present case, the water of the river is a part of the cause of profit; but so it would have been if the dam had been used for the purpose of turning a mill; yet in that case the proprietors would have been rateable for the whole profits of the mill to the parish in which it was situate. The water, there, would be considered as part of a system of machinery, the profits of which are rated in rating the mill: and it is the same here, only that in the former case a dam and mill are to be rated as performing the operation from which the profit accrues, whereas here it is performed by the dam only. The dam here may be compared to a steam-engine placed upon an eminence on a railroad or similar work, for the purpose of drawing carriages up an inclined plane, and which undoubtedly would be

*144] rated for the tolls earned by means of its power throughout the *line of the ascent. So, in this case, the dam may be considered as an engine calculated to assist vessels in the ascent of an inclined plane, namely, the channel of the river, by holding up the water; and it is rateable like the machine before alluded to, for all the profits earned upon that line of ascent to which the benefit extends. It is clear from *Rex v. The Mersey and Irwell Navigation*, 9 B. & C. 95, that dams, if erected on the company's own land, would be rateable in respect of something; that must be in respect of the advantage and profit derived from the holding back of the water; and no distinction can justly be drawn between the first yard of water so held back, and the rest of the nine thousand eight hundred and twenty-three, but the rate must

be calculated upon the benefit derived from the whole body of water which is supported by the same dam.

Sir James Scarlett, F. Pollock, Milner, and Wightman, *contrâ*. This is an attempt to evade the former decision in *Rex v. The Aire and Calder Navigation Company*, 9 B. & C. 820, by imposing that rate on the dam which could not be laid upon the navigation. According to the argument on the other side, the fields adjoining a canal might be rated, because if it were not for the banks the water would disperse; and it might be said that a reservoir was rateable, for the profits of water distributed from it into different parishes, which is contrary to *Rex v. The Corporation of Bath*, 14 East, 609, and other cases. Admitting even that the navigation could be rated, still a rate cannot be imposed upon any taxable matter not actually in the parish for which the rate is made. This is not the case * of a lockage toll; nothing becomes due at the dam; it is no doubt essential to the beneficial occupation of a property which yields a [*145 profit elsewhere, but it is not the subject-matter which produces that profit. It may be the *sine quâ non*, but it is not the *causa causans*. In *Rex v. Hogg*, 1 T. R. 721, and *Rex v. Bradford*, 4 M. & S. 317, the whole profits arose from the engine and the canteen, which distinguishes those cases from the present. *Dyson v. Collick*, 5 B. & A. 600, does not apply, for the undertakers here hold the dam as proprietors of the mill, not of the navigation; and if they brought trespass for an injury to the dam, it would be in the former capacity. In *Rex v. Thomas*, 9 B. & C. 114, where it was held that the undertakers of a navigation were not rateable for the land covered with water, in which they had merely an easement, it was asked by one of the Judges, "Suppose these proprietors had been owners of the soil, as well as grantees of the tolls, how would the case have been?" and the answer given was, that they would not have been rateable, since the tolls were holden separately from the soil, and by distinct titles. So here, the property which the undertakers have in the soil on the banks of the river makes no difference as to their rateability in respect of the navigation and that which belongs to it. If the dams are a subject of rate at all as part of the company's works, they must be considered as rated by the assessment laid upon the canal, to which they are accessory, and the liability of which is not disputed.

Lord TENTERDEN, C. J. I am of opinion that this rate must be amended [*146] by reducing it to the amount *assessed upon the cut and lock. This is an attempt to evade the decision of the Court in the former case of *Rex v. The Aire and Calder Navigation*, 9 B. & C. 820. We there held that the undertakers were not rateable as occupiers of the bed of the river, having merely an easement in it. No rate, then, could be laid upon them for the water of the river made navigable by them; and if so, none could be imposed in respect of the dam; for to rate the dam because it keeps up the water, would be equivalent to rating the water itself. If the water cannot be rated, neither can the dam which holds it up.

LITTLEDALE, J. It has been held that the company were not rateable for the river, and I therefore think they are not so for the dam.

TAUNTON, J. It has been contended that because the water of this river was holden up and made navigable for 9823 yards by dams, one of which was partly situated in the respondent township, the undertakers might therefore be rated upon this dam for a proportion, at least, of the tolls accruing upon the water so upheld. But I think this is a vicious principle, and at variance with decided cases. It might as well be said that a reservoir which supplies water to a district nine or ten miles in extent, or a lock which acts as a dam, or a steam-engine employed to raise water from a lower to a higher level, is rateable in respect of the whole distance to which water is supplied by any of these contrivances, and the profits accruing from that supply; propositions which cannot now be maintained.

*147] ***PATTESON, J.** It is very clear that such a rate as this, if it may be imposed, is in effect the same as rating the water. Suppose this were a canal, it would then be rateable all along the line of navigation, to the parishes through which it passed, and in that case the rate evidently could not be laid upon the dam. Can it then be imposed upon the dam here, because the line of navigation is not rateable? I agree with my Lord that this is merely an attempt to evade the former decision of the Court.

Rate sent back to be amended, by reducing it from 150*l.* to 15*l.* 16*s.*, the amount chargeable upon the canal and lock.

The KING v. The Inhabitants of the COUNTY of DERBY. Jan. 21.

By the statute 43 G. 3, c. 59, s. 5, no bridge thereafter to be built in any county, by or at the expense of any *individual or private person, body politic or corporate*, shall be deemed a county bridge, unless erected in a substantial and commodious manner, under the direction or to the satisfaction of the county surveyor, &c.

Trustees appointed by a local turnpike act are individuals or private persons within the meaning of this statute; and, therefore, a bridge erected by such trustees after the passing of the statute, but not under the direction or to the satisfaction of the county surveyor, &c., is not a bridge which the inhabitants of the county are liable to repair.

PRESENTMENT by F. H., justice of peace of the county of Derby, that a certain common public bridge upon and over the river Amber, commonly called the Amber Bridge, situated in the parishes of Crick and Duffield, in the county of Derby, in the king's common highway there, leading from the town of Cromford in the county of Derby, towards and unto the town of Belper in the same county, used for all the liege subjects of the king, with their horses, &c., to *148] pass, &c., was out of repair. Plea, that the bridge was erected *after the passing of the statute 43 G. 3, c. 59, by certain persons appointed, by virtue of an act of the 57 G. 3, c. 13, entitled "An act for making and maintaining a turnpike road from the town of Cromford to the town of Belper; and for making a branch of road from and out of the said road near the river Amber, to join the turnpike road at Bull Bridge, all in the county of Derby," trustees for making, maintaining, repairing, and otherwise improving certain roads in the last-mentioned act specified, and for otherwise carrying it and all the matters and things therein contained into full and complete execution and effect; and that the said bridge was so erected by the trustees by virtue of certain powers vested in them by that act; and that the same was not erected in a substantial and commodious manner, under the direction or to the satisfaction of the county surveyor, or of any person appointed by the justices of the peace of the said county, at their general quarter sessions assembled, according to the form of the statute, &c. General demurrer and joinder. The case was now argued by

Fynes Clinton, in support of the demurrer. The inhabitants of the county are bound to repair the bridge in question, unless they be exempted from that burden by statute, because it is established that, even if a private person build a bridge, and it becomes useful to the public, the county is liable to repair it; and it was decided in *Rex v. The West Riding of Yorkshire*, 2 East, 342, that where the trustees of a turnpike road built a bridge which was of general use, *149] and no fund was specially *provided by the legislature for its maintenance, the burden of repairing it necessarily attached on the county; and in *Rex v. Netherthong*, 2 B. & A. 179, that even if a fund had been provided, it would only have been auxiliary, for the original liability would have

remained; which doctrine was recognised in *Rex v. The Inhabitants of Oxfordshire*, 4 B. & C. 194. It will be said, however, that the defendants are exempted from the burden of repairing this bridge by 43 G. 3, c. 59, the fifth section of which enacts, "that no bridge thereafter to be erected or built in any county by or at the expense of any individual or private person or persons, body politic or corporate, shall be deemed and taken to be a county bridge, or a bridge which the inhabitants of any county shall be liable to repair, unless such bridge shall be erected in a substantial and commodious manner, under the direction or to the satisfaction of the county surveyor," &c. The plea states that that provision has not been complied with; but this is not a case within the statute, because the bridge was erected by the trustees of a turnpike road, who are not individuals or private persons within the meaning of the act, or a body corporate (Co. Litt. 250 *a*), for they are not empowered to take in succession. The statute contemplates bridges built by individuals or corporations for their own private benefit, as contradistinguished from the public; as a bridge built by a canal company, or by the corporation of a town for the benefit of its tenants. Here the bridge was built by the trustees for the public benefit. They were directed by the act of parliament to make a road from one point to another; and there being a river in the way, it was necessary for them to *build a bridge. The county surveyor is, by sect. 5, of 43 G. 3, c. 59, [*150 required to inspect and superintend the erection, when requested by the party or parties desirous of erecting the same. [Lord TENTERDEN, C. J. The trustees are such parties. The local act was passed at their desire.] The act, having passed, imposed on them the duty to build the bridge, and for a public purpose. It is not to be presumed that the trustees of a turnpike will build an inefficient bridge.

N. R. Clarke, contra, was stopped by the Court.

Lord TENTERDEN, C. J. I have not the slightest doubt that the words in 43 G. 3, c. 59, s. 5, comprehend every kind of persons by whom, or at whose expense, a bridge shall be built. It is true that the word *private* has crept into the act, but the words *private persons* are used in opposition to the words "*body politic or corporate*." Before that act passed, it was decided in *Rex v. The West Riding of Yorkshire*, 2 East, 342, that the county was liable to repair a bridge built by trustees under a turnpike act, there being no special provision exonerating the county from the common-law liability, or transferring it to others; and that, even though the trustees were enabled to raise tolls for the support of the roads. In that case, which was decided in Hilary term, 1802, Lord Ellenborough observed, "that the effect of the decision might be, that the trustees, under similar acts, would throw this burden generally on the counties, and that it might, therefore, be necessary to make special legislative provision in future;" and in the session of *parliament next ensuing that decision, the statute in question was passed, and was no doubt intended [*151 to remedy the inconvenience so pointed out by Lord Ellenborough. The language used is quite sufficient to embrace the present case.

LITTLEDALE, J. I am of the same opinion. The whole community is composed of private persons, and bodies politic and corporate; and the trustees of a turnpike road are individuals or private persons exercising a public trust.

TAUNTON, J. The words "*private persons*" are used in opposition to the words "*body politic or corporate*." In sect. 7, of the 43 G. 3, c. 59, which provides, "that the act shall not extend to any bridges or roads which any person or persons, bodies politic or corporate, is, are, or shall be liable to repair by reason of tenure or prescription," the word *private* is omitted.

PATTESON, J. It is said that this is not a case within the mischief contemplated by the legislature, because it is not to be presumed that the trustees would build an insufficient bridge. It seems to me they are as likely to do so as any other persons.

Judgment for the defendants.

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*ASKEW, Clerk, v. WILKINSON. Jan. 23.

An inclosure act recited, that the Duke of N. was lord of a barony and of manors in which certain wastes were situate, and, as such lord, was entitled to the soil and royalties belonging to the said manors; and that he and other owners of lands within the barony were also entitled to right of common on the wastes. It then directed the commissioners to set out to the duke an allotment in respect of his *right of soil*, and afterwards to allot the residue of the wastes to him and the said other persons entitled to *common*, in certain proportions, according to a rate already charged upon the lands in respect of which such common was claimed. Allotments were made to the duke accordingly. The *lands* in respect of which in part his allotments were given were exempted from all tithes by a *modus*. In an action brought for tithes of corn grown upon the allotment given in lieu of the duke's right in the waste, it was left to the jury whether the *modus* had extended to that right; and they found that it had. Held, that the question was properly left, for that the duke's right upon the waste, though it could not strictly be a right of common appurtenant or appendant to land which was the duke's own, was yet treated by the act as a quasi right of common annexed to the land, and it might, as such, be legally comprehended within the same *modus* :

Held, also, that the *modus*, as it covered all tithes both on the demesne land and common before the inclosure, covered likewise the tithe of any crop (as grain) raised afterwards upon the allotment given in lieu of common.

DEBT for treble value of tithes, under the statute 2 & 3 Ed. 6, c. 13, s. 1, and at common law for the value of the tithes. Plea, nil debet. At the trial before Parke, J., at the Cumberland Spring assizes, 1831, it appeared that the plaintiff was rector of the parish of Greystoke in Cumberland, and the lands upon which the tithe was claimed were farmed by the defendant under Mr. Howard, who succeeded to them on the death of the late Duke of Norfolk. The duke, in his lifetime, was possessed of the ancient demesnes and park of Greystoke Castle, and of other ancient lands of considerable extent, all in the township, and within the parish, of Greystoke. There were also, in several townships within the same parish, uninclosed wastes upon which the landowners in the townships enjoyed rights of common. The duke exercised rights of this nature on the wastes within the township of Greystoke: and he paid the rector of the parish an ancient yearly *modus* of a buck and a doe in the proper seasons for the tithes of Greystoke Park, and of another ancient park (Gowbarrow) not now in question; and also, as the present defendant alleged, *153] for all tithes great and small yearly arising from *the commons and waste lands appendant or appurtenant to the said parks respectively. The other landowners above mentioned paid the rector tithes of wool, lambs, geese, &c., for the common which they enjoyed on the wastes in Greystoke township.

In 1795, an act was passed (85 G. 3, c. 98, private), "for dividing and inclosing certain commons and waste grounds within the barony of Greystoke, in the county of Cumberland." It recited that there were within or parcel of the barony of Greystoke, certain commons and waste grounds (which it named); and that the Duke of Norfolk was lord of the said barony, and of the manors in which the said commons were situate, and was entitled, as such lord, to the soil and royalties incident and belonging to the said manors: and that the duke and other owners of lands and tenements within or parcel of the said barony were entitled to right of common upon the said commons and waste lands. It then appointed commissioners to carry the act into execution, and, after directing them to set out to the duke an allotment for his right of soil, enacted, that the commissioners should set out and allot the residue of the wastes unto and amongst the said duke and the several other persons entitled to common thereon, according to their respective rights, the same to be settled and ascertained by and according to a certain rule or rate called the *purvey*, charged upon the ancient tenements in respect of which the right of common was

claimed. It further directed that the commissioners, if desired by the duke in writing before their third meeting, should set out one-half part in value of the allotment to be made to him in respect of the purvey rate of 3s. 6d., for his lands lying within the demesne of Greystoke Park, at a place called *Grey-
stoke Townhead, the situation of which was described in the act. [*154]

The commissioners allotted the wastes according to the act, and awarded to the duke (at his request in writing), 380 acres, situated as the act required, and which, in the award, were declared to include one-half part in value of the land allotted to the duke in respect of the purvey rate for his lands lying within the demesne of Greystoke Park. The present action was brought for tithe of oats and barley grown upon a part of these 380 acres after they had been allotted to the duke. Parke, J., left it to the jury upon the facts proved (and which it is unnecessary to detail more fully), whether or not the modus, which was admitted to cover the tithes of the two parks, extended also to the enjoyment which the duke had of the wastes, and in lieu of which the allotment in question was given. The jury were of opinion that it did, and found a verdict for the defendant.

A rule nisi was afterwards obtained for a new trial, on the grounds that the verdict was against evidence, and that the learned Judge was wrong in leaving the question of fact to the jury as above stated; it being contended, first, that the duke's property in the wastes was not appurtenant to his estate in the parks, and could not legally be included in one and the same farm modus with that estate; and, secondly, that, even if it could, the modus did not apply to grain, which could not have been raised upon the wastes before the inclosure.

Sir G. Lewin now showed cause, and contended that the question was purely one of fact, and was conclusively decided by the finding of the jury.

*F. Pollock and Dundas, *contrâ*. First, the modus in respect of the parks could not extend to the waste. This is a farm modus, and must be strictly confined to the particular land to which it is annexed. Such a modus admits of no uncertainty or variation of the quantity of land to which the prescription is applied. *Carlton v. Brightwell*, 2 P. Wms. 462; *Bennett v. Read*, Gwill. 1272. Now, the duke's right in this waste cannot have been an immemorial part of one and the same estate with the parks. It was distinct from them, and could not be appendant or appurtenant to them. It was not a right of common, appurtenant or appendant; for the act states that the duke was lord of the barony and manors to which the waste belonged, and as such entitled to the soil and royalties; and a man cannot have common upon his own land. A park, so far as it is tithable, is not considered as a liberty, or any incorporeal thing, but as so much land, *Cowper v. Andrews*, Hob. 39; *Poole v. Reynolds*, Hutt. 57; and therefore the duke's interest in the waste, if it be considered as a reservation in his hands of the soil, or pasturage, could not be appendant or appurtenant to the parks; for land cannot be appendant or appurtenant to land. Com. Dig. tit. *Appendant and Appurtenant*, (C). Secondly, supposing, however, that the modus did cover both the parks and the duke's property in the waste; still it does not exempt corn and barley now grown upon the allotment given in lieu of that property, no grain having ever been raised upon the waste before the inclosure. *Lambert v. Cumming*, Bunbury, 138, seems an authority to the contrary; but the ground of decision there (as explained by *Lord Mansfield in *Moncaster v. Watson*, 3 Burr. 1375), was, that what had been before exempted by the modus ought to remain exempted, and what was not before exempted should pay tithe; a principle upon which the plaintiff would be satisfied to rest his claim in this case. *Stockwell v. Terry*, 1 Ves. 115, is certainly an authority for the defendant; that is, on the assumption that the modus in the present case clearly extended to the waste. That case is supported by *Lord Gwydir v. Foakes*, 7 T. R. 641; *Steele v. Manns*, 5 B. & A. 22; and *White v. Lisle*, 4 Madd. 214; though in the first

and third of these latter cases the principal point in dispute was not the same as in *Stockwell v. Terry*. But, on the other hand, *Moncaster v. Watson*, 3 Burr. 1375, seems to establish that a modus cannot be considered an equivalent for tithes which could not originally have come within it. And this case is recognised in *Steele v. Manns*, 5 B. & A. 22. The same principle was acted upon in *Scott v. Fenwick*, Gwill. 1250. And in *The Bishop of Carlisle v. Blain*, 1 Y. & J. 123, the plaintiff, as rector of Dalston, demanded tithes of grain on a parcel of land in Dalston, allotted under an inclosure act to the owner of an ancient farm in the neighbouring parish of Castle Sowerby, in lieu of common appurtenant to the farm, but situate in Dalston. The question was, whether a modus which had been immemorially paid to the rector of C. S. for tithes of the farm and common, extended to the tithes of grain produced on the allotted lands in D.: and Lord Chief Baron Alexander held that the receipt of the modus by the rector of C. S., admitting it to be equivalent to the perception of tithes in kind in Dalston parish, could only *be evidence of a title

*157] to the tithes of lamb and wool, which alone had been produced on the common; and that it could not take from the rector of D. his common law right to the tithes of corn and grain, which the modus had never covered. That decision was followed up by the same learned Judge in *Pritchett v. Honeyborne*, 1 Y. & J. 135.

Lord TENTERDEN, C. J. I am of opinion that this rule must be discharged. The first question raised is, whether the duke's right upon the waste, in respect of which his allotment was given, could be considered as a right of common; and it was urged that this could not be, because the duke was lord of the soil, and a man cannot have common on his own land. No doubt this is true as a general proposition, but the legislature has treated the interest in question as a right of common for the purposes of this act, and the Court must consider it in the same manner. The act, in the first instance, orders a certain allotment to be set out to the duke for his right of soil; but it then goes on to direct that the residue of the wastes be set out to and amongst "the said Duke of Norfolk and the several other persons entitled to right of common thereon," according to the purvey rate upon the ancient tenements in respect of which the right of common was claimed; thus showing, by the very terms used, that the duke is intended to receive, together with the other parties mentioned, something in respect of right of common, which in a strict legal view certainly could not be so claimed. The act, though incorrect according to legal language, has

*158] undoubtedly this sense, that the duke shall receive *compensation for his right of soil, and for something further, namely, a right in the nature of common, though not strictly to be called so. Then the question is, whether the modus covers the land so given in compensation, and that in its improved state, producing, as it now does, oats and barley. As to the fact whether or not the modus extended to the right in the nature of common, that has been found in the affirmative by the jury, and I see no reason to disturb their decision. On the question of law, *Stockwell v. Terry*, 1 Ves. 115, is in point, and decides the present case. *Moncaster v. Watson*, 3 Burr. 1375, was a peculiar case; the modus there was originally confined to particular subjects (corn, grain, and hay), and did not extend to such tithes as could arise upon a common. *Steele v. Manns*, 5 B. & A. 22, is not distinguishable from the present case. There an allotment was made under an inclosure act, in lieu of common appurtenant to an estate which was tithe-free, the tithes having been purchased with it: and this Court held that as the owner of the estate was proprietor of all the tithes both of the inclosed and the common land, before the allotment was made, he was likewise proprietor of all tithes of the allotted land afterwards. As to the judgment of the late Lord Chief Baron, for which I entertain sincere respect, it is sufficient to say that it was not quite *ad idem*. The question in *The Bishop of Carlisle v. Blain*, 1 Y. & J. 123, turned upon the right which the incumbent of one parish might claim, as a portionist, to

tithes arising in another, where no tithes of that description had or could have been payable to him before. That case, therefore, and the reference to it in *Pritchett v. *Honeyborne*, 1 Y. & J. 135, are no authority in the case [*159 now before the Court.

LITTLEDALE, J. Upon the whole, I am of the same opinion; though I have entertained some doubt. It is clear that the duke's right of turning cattle on the wastes, for which compensation is given by the inclosure act, though not strictly a right of common, must be considered, with reference to the act, as a right of the same nature. The jury have found that the modus covered not only the parks but the waste; and I do not think there is sufficient reason, upon the evidence, for sending the case to a new trial. Then, as to the point of law. In *Stockwell v. Terry*, 1 Ves. 115, it appeared that the modus covered all the tithes arising on the waste before the waste was converted into tillage; which, upon the finding of the jury, must likewise be assumed as the fact in the present case; and there it was held that the crops raised upon the waste after the inclosure were exempt from tithe; though, it is true, reliance was placed on the particular terms of the inclosure act, and the apparent intention of the several parties interested in agreeing to its provisions. *Steele v. Manns*, 5 B. & A. 22 (though it turned very much on the particular circumstances), goes, I think, to the extent of the present case. And with regard to *The Bishop of Carlisle v. Blain*, 1 Y. & J. 123, though I entertain great respect for the opinion of the late Lord Chief Baron, especially on a question of tithe, I cannot consider his judgment in that case as an authority applicable to the present.

*PARKE, J. I am of the same opinion. The duke was entitled to compensation for rights of two kinds; namely, his right of soil, and [*160 his privilege of taking the herbage on the waste in common with the other landowners, which was a quasi right of common proportioned to the amount of purvey rate assessed upon him. The question then is, how far the land given in recompense for this latter right is subject to tithe. It clearly stands in the same situation in that respect as the duke's interest in the common did before: and that, according to the finding of the jury, was covered by an ancient modus. Then, in point of law, is this allotment exempted by the modus from tithe of produce which was not raised upon it before the inclosure? I think it results from the general course of the cases, that where a modus has covered a farm and common, and all tithes arising from them, before the inclosure of the common, it also covers the new crops raised upon the allotment afterwards. There is a clear distinction to be drawn in a case where, as in *Moncaster v. Watson*, 3 Burr. 1375, the modus did not cover all the tithes of the farm and common before the inclosure, but was confined to certain crops which could not grow on a common: there the crops of that kind grown upon the allotment cannot fall within the modus. The only doubt in the present case arose from the decision in *The Bishop of Carlisle v. Blain*, 1 Y. & J. 123. I feel all possible respect for the opinion of the very learned Judge who pronounced that decision; but the question there turned upon the rights of a portionist, and therefore the case, whether correctly determined or not as to that point, is distinguishable *from the present and from the other cases which have been [*161 cited.

TAUNTON, J. There are three questions in this case. First, in respect of what right the duke received his allotment: whether for a right, or quasi right, of common in the waste, or whether for his mere interest in the soil there? I think it was in respect of the first. The duke was entitled to the soil; he had a right to the minerals, and to the surplus herbage, the commoners having at the same time their respective rights of herbage, each according to his stint. Then, by the express provision of the act, the duke receives an allotment in lieu of his right of soil, and a further allotment, which is that now in question, and which must be in lieu of his right of herbage or quasi common. And this

is not unusual. Such allotments in respect of these different interests were held good in *Arundel v. Lord Falmouth*, 2 M. & S. 440. The second question was upon the weight of evidence; and I think the jury were justified in finding that the modus covered the duke's right, or quasi right, of common. Then, thirdly, does the modus cover the allotment given in lieu of such right, to the extent of exempting these crops from tithe? I think it is clear from the cases, especially *Stockwell v. Terry*, 1 Ves. 115, and *Steele v. Manns*, 5 B. & A. 22, that they are so exempted. In the first case, it is true, the particular provisions of the act of parliament were relied upon, but they only expressed what the law would otherwise have implied, namely, that the new allotment was to be enjoyed in the same manner, with respect to exemption under the modus, as *162] the old common right; if the one was wholly covered from *tithe, the other was to be so too. That principle is clearly adopted by Lord Tenterden, C. J., in *Steele v. Manns*, and he draws a distinction, founded on it, between that case and *Moncaster v. Watson*, 3 Burr. 1875. Here the jury has found that the modus was whole and entire, covering all that was produced upon the wastes. I therefore think that it covers the crops now grown upon the allotment; and, consequently, the rule must be discharged.

Rule discharged.

The Master, Professors, Fellows, and Scholars of DOWNING COLLEGE in the University of Cambridge *v.* PURCHAS and TWEED. Jan. 24.

By statute 28 G. 3, c. 64, for paving the town of Cambridge, it was enacted in s. 23, that commissioners were annually to ascertain the sums to be paid by rate on the inhabitants for the purposes of the act, and levy the same by rate upon the tenants and occupiers of all houses, buildings, gardens, tenements, and hereditaments within the town. By s. 113, the amount so ascertained was to be notified to the vice-chancellor of the university and mayor of the town, and two-fifths were to be paid "by or on account of the said university," 10l. by the corporation, and the residue out of certain tolls granted to the commissioners, and out of the above-mentioned rates. By s. 114, the chancellor or vice-chancellor of the university, and the heads of colleges and halls within the said university, were to meet, upon such notice given, and apportion the respective sums to be paid towards the rate out of the university chest, and by the several colleges and halls. By 34 G. 3, c. 104, s. 17, it was provided, that no person or persons should be rated under that or the former act for any farm, meadow, pasture, or arable land, rented or occupied by any inhabitant of the town, except as to the value of his dwelling-house, yards, gardens, out-houses, and all other buildings rented and occupied by any of the said inhabitants, situated in the said town.

Downing College was founded, and incorporated with the university, after the passing of these acts. It was built on land within the town, but which had not before paid paving-rate:

Held, that the college was liable to be rated as a part of the university for a portion of the two-fifths payable by that body, and was not rateable as a part of the town; for that s. 23 of the paving act was not applicable to colleges, and sects. 113, 114, extended to all colleges forming part of the university, whether erected before or since the act.

TRESPASS for seizing and carrying away a table. Plea, the general issue. At the trial before Alexander, C. B., at the Cambridge Summer assizes, 1828, *163] a verdict was found for the plaintiffs, subject to the opinion of this Court upon the following case:—The table was seized by Tweed under a regular warrant from Purchas, who was a justice of peace, as a distress for a paving-rate assessed by the commissioners under an act, 28 G. 3, c. 64, for paving, cleansing, and lighting the town of Cambridge, amended by 34 G. 3, c. 104. By sect. 23, of the first-mentioned act, the commissioners were required once a year to ascertain the sums to be paid for the purposes of the act, "by rate or assessments on the several inhabitants of the town of Cambridge," and to levy such sums by a rate "upon the several tenants or occupiers of all houses,

buildings, gardens, tenements, and hereditaments within the said town," according to the annual value, which was to be settled according to the rents such houses, &c., were rated at for the relief of the poor. Sects. 111 and 112 provided for the payment of the first expenses under the act; and by sect. 113 it was enacted, that, for defraying the annual charge of repairing, cleansing, and lighting the streets within the town, the commissioners should annually, after having ascertained the sum wanted, give notice thereof to the vice-chancellor of the university and the mayor of the said town; and two-fifths of the said charge should be paid "by or on account of the said university" as after mentioned, 10*l.* by the corporation, and the remaining part out of the money to be raised by tolls granted by the act to the commissioners, and by rates and assessments therein directed to be levied "on the several tenants or occupiers of all houses, &c. (as in sect. 23), within the said town." By sect. 114 it was enacted, that within seven days after notice given as above mentioned, the chancellor or vice-chancellor, and masters or heads of colleges and halls within the said university, *should meet and make an account of such sum or sums as they [164] should deem the quota or proportion of the sum to be paid out of the university chest for the pavement and other works to be done under the act, belonging to the university, and of the quotas or proportions of the different colleges and halls, which respective sums should amount to two-fifths as aforesaid: remedies were provided in case of neglect, and upon non-payment of the rates, the vice-chancellor, or in case of his default, the commissioners, were required to issue a distress warrant, and levy upon the goods of the university, or of the college or hall neglecting to pay. Other clauses were referred to in the case, the substance of which, as far as it is material, will appear from the argument. By 34 G. 3, c. 104, s. 17, it was provided, that nothing in this or the former act should extend to rate or assess any person or persons for any tithes, &c., or modus, or for any farm, meadow, pasture, or arable land rented or occupied by any of the inhabitants of the said town of Cambridge, except only as to the value of his, her, or their *dwelling-house, yards, gardens, barns, outhouses, and all other buildings rented or occupied by any of the said inhabitants*, situate in the said town.

Downing College, in which the seizure now complained of took place, was erected by virtue of letters patent of King George III., bearing date the 22d of September 1800, by which it was declared that the master, professors, fellows, and scholars, and their successors for ever should be a body corporate, and should be deemed and taken to be part and parcel of the University of Cambridge, and should be united and annexed thereto and incorporated therewith. An act of parliament, 41 G. 3, c. 140 (public, local, &c.), was obtained in the following year, to enable the master, professors, &c., *to build the college on a different site from that which had been mentioned in the letters patent; and the college was accordingly erected on certain land in the parish of St. Benedict, in the town of Cambridge, which land, before that time, had been let to different tenants, and assessed to the poor-rate. It had also been rated to the poor in the hands of the present plaintiffs, and was so at the time of the distress; but the case did not state that any paving-rate had been assessed upon it before it was purchased by the plaintiffs; and the contrary was assumed in argument and by the Court in giving judgment. From the opening of the college in 1821, they had been charged with, and paid, their proportion of the two-fifths of paving-rate assessed upon the university under 28 G. 3, c. 64, s. 113. The rate for which the distress issued was assessed under the twenty-third section of the act, upon the college, as part of the town of Cambridge; and the question for the opinion of the Court was, whether the plaintiffs were liable to the rate in respect of the college and the buildings belonging to it. This case was now argued by [165]

Starkie, for the plaintiffs. Downing College is not to be considered a part of the town of Cambridge for the purpose of this rate. When the act 28 G. 3,

c. 64, was framed, the amount of property belonging to the university and the town respectively was taken into consideration, and the proportions of rate fixed by sects. 111 and 113; and the language used in several parts of the act excludes any supposition of an intent that a college afterwards to be erected should be joined, in rating, with the property of the town. It is evident, where "the owners and occupiers of all houses, buildings, gardens, tenements, and hereditaments" are mentioned, *that the "tenements and hereditaments" *166] are meant to be ejusdem generis with those before specified, which are, evidently, houses, &c., owned and occupied by individuals. Sect. 25 provides that a certain portion of the rates shall be borne by the respective *landholders*, and another portion by the respective *tenants or occupiers* of the said messuages, buildings, gardens, tenements, and hereditaments to be rated by virtue of the act; which cannot apply to the colleges: and again, in sect. 28, it is enacted, that if the tenant or occupier of any house, building, garden, tenement or hereditament, assessed under the act, shall not pay his rates in a certain time after notice left at *his dwelling-house or usual place of abode*, the same may be levied by distress. And in the seventeenth section of 34 G. 3, c. 104, the liability of the inhabitants of Cambridge to be rated for their houses, buildings, gardens, tenements, and hereditaments, is explained and limited in a manner which shows that the rating there in question could not apply to colleges either then existing, or to be erected. The town and university must, for the purposes of these acts, be considered as collective names, to be applied according to their general and ordinary signification at any time when a rate should be made. Both bodies were, of course, liable to fluctuate in magnitude and amount of property; but the respective quotas of rate were fixed with a knowledge of that circumstance, and it might rather have been expected that the town would increase beyond the stated proportion than the university: but if a college had become extinct, or a new street had been built, this would be no reason for diminishing the portion of assessment laid on the university, or augmenting *167] that placed upon the town. If a new college is liable to an *additional paving rate under this act, the same might be alleged of a new court added to one of the original colleges.

Gunning, contrd. It would be a great hardship if the university could extend itself so as to swallow up a part of the town, and yet leave the remainder subject to the same proportion of rates. In *Rex v. Gardner*, Cowp. 79, it was held that a college was liable to an additional poor's-rate for ground newly taken into it, and partly built upon, and partly converted into a garden and area; *a fortiori*, a new college added to the university should bear its additional part of a rate like the present. And if this be so, it was no prejudice to the university that such rate should be levied by the town collectors. The plaintiffs come directly within the twenty-third section of 28 G. 3, c. 64, as tenants and occupiers of land, buildings, and gardens, for which they are rated to the poor; and they are clearly not within sects. 113 and 114, which relate merely to the university as then composed, and have no words applicable to after-built colleges. If the establishment of such colleges had been foreseen, there would have been some provision for regulating the proportions of rate accordingly. Sects. 111 and 112 provide for payment of the first expenses under the act, and fix the manner in which *the chancellor, vice-chancellor, and heads of colleges and halls* are to raise their portion of those moneys. This must relate to the masters of colleges, &c., at that time existing. Then sect. 114 requires *the masters and heads of colleges* from time to time to meet the *vice-chancellor*, and *168] fix the quotas of rate to be paid by the university *and colleges respectively. There was not, when the act passed, any master of Downing College, and as nothing appears in any of the clauses to include the master of a future college, there are no means of bringing the plaintiffs within the operation of sect. 114. Downing College is undoubtedly part of the university, but the question is, whether it be so for the present purpose. The

act of 41 G. 3, c. 140, which was merely for changing the site, and for purposes relative to the erection of the college, can have no bearing on this point.

Starkie, in reply. *Rex v. Gardner*, Cowp. 79, only shows that a college is liable to be rated to the poor in proportion to the value of what is occupied there; it proves nothing as to the liability of a newly-erected college under the act in question.

LORD TENTERDEN, C. J. I am of opinion that Downing College is not liable, under the act 28 G. 3, c. 64, to be charged with paving-rate as part of the town of Cambridge. The question depends entirely on the construction of the statute; and the enactment there is, that two-fifths of the annual charges shall be paid by or on account of the university. Then it is urged that Downing College was not in existence when the act passed: and I should have said there was much weight in the argument on this ground, if the college had been built upon the site of property which was before liable to the paving-rate collected from the town; because then, by exempting the college from this, a new burden would have been thrown upon the holders of property in the town. *But that does not appear to have been the fact; on the contrary, it may be [*169 assumed that, before the erection of this college, the ground was not tributary to the paving-rate; and the question is, if it is now to become so by a rate laid upon the college as a portion of the town? The college is, not merely by charter, but by the act of 41 G. 3, a part of the university; and if, as I think, the proper construction of the paving act is, that the university was to pay two-fifths of the annual rate, without reference to what its condition might be at any given time, the plaintiffs are liable to be charged with the rest of the university, but not as a part of the town.

LITTLEDALE, J. I think the "university" in this statute means the fluctuating body, and not the university as it was at any particular time; and this construction is more convenient than if the respective liabilities of the town and university were made to depend on the increase or decrease which may take place in either. And upon a general view of the act, its object seems to be to treat the two bodies as separate and distinct subjects of rate. This appears from the twenty-fifth and other sections, which contain provisions not applicable to the colleges. Upon these grounds, and upon the general construction of the word "university," I think the best interpretation is, that the legislature intended the town to be rateable as the town, whatever might happen, and the university as the university: and this is supported by the explanation of the word tenement in 34 G. 3, c. 104, s. 17. The site of this college does not appear to have been considered rateable as part of the town when the first stone was laid; and I see no reason for saying that the college became so when erected.

*TAUNTON, J. I am of the same opinion. In *Harrison v. Bulcock*, 1 H. Bla. 68, the question arose, whether a clause in the land-tax act then in force, exempting hospitals and "any of the buildings within the walls or limits of such hospitals," extended to buildings newly added to an hospital on land not forming part of its original site, and which had previously paid land-tax: and it was held that such buildings were exempted. I think the terms of the present act, relating to the university, are general enough to comprise a newly erected college.

PATTESON, J. The effect of 34 G. 3, c. 104, s. 17, in restraining the general words of the former act, is very important. It seems clear that the site of Downing College was not treated as rateable. If ever it became so, it must have been on account of the buildings erected on it; but these, as soon as made, were part of the university and rateable as such, according to the distinction plainly drawn by the act between the university and the town.

Judgment for the plaintiffs.

HARRINGTON *v.* PRICE and Another. Jan. 24.

An estate was conveyed in 1803 by J. B. to W. H., who in 1812 conveyed it to A. H., and he sold it in 1826 to the plaintiff. The original vendor did not deliver up the title deeds. In 1824 he was sued by the then owner of the estate for the deeds, and a verdict was recovered against him, but the judgment was not docketed. He absconded, and in 1825 obtained a sum of money, as on a mortgage of the estate, from one of the defendants, with whom he deposited the deeds. On trover brought in 1829 by a party claiming through the conveyance to W. H., it was held, that the legal owner of the estate might recover the deeds from the mortgagee, without tendering the mortgage money.

TROVER for title deeds. Plea, not guilty. At the trial before Lord Tenterden, C. J., at the Middlesex sittings after Trinity term, 1830, a verdict *171] was found for *the plaintiff, subject to the opinion of this Court on the following case:—

In 1803, the estate to which the title deeds related, was duly conveyed by James Brograve to William Harrington and his heirs for a sum of money, which was paid, and the purchaser had possession. He conveyed it in 1812 to his nephew, Andrew Harrington, by whom, in 1826, it was sold for 45*l.*, and duly conveyed to the plaintiff, who was lawfully seized of the estate when this action was brought. At the time of the conveyance in 1803, Brograve refused to deliver up the title deeds, alleging a claim in respect of certain quit rents due upon the estate to the lord of the manor, but this claim was afterwards satisfied (in 1812), and it was admitted in arguing the case, that Brograve had no right to the deeds as against the plaintiff. In 1824, A. H., the then possessor of the estate, sued Brograve in trover for the deeds (which had been before demanded and refused), and obtained a verdict for 100*l.*, to be reduced to 1*s.* on delivery of the deeds. Final judgment was signed and a *fi. fa.* issued, but Brograve absconded, and the writ was not executed nor the deeds delivered; and the judgment was not docketed till 1827. In September, 1825, Brograve mortgaged the estate to the defendant Price for 30*l.*, and deposited the title deeds with him. The plaintiff, having learned in October, 1829, that the deeds were in the hands of Price and the other defendant, applied to have them delivered up, but the defendants refused, Price claiming a right to detain them as a security for the money advanced by him to Brograve.

Kelly, for the plaintiff. The plaintiff is entitled to these deeds, on the principle of law, that the right to the *estate carries with it the right to the *172] title deeds. Nothing has occurred to divest his right, or confer any title upon the defendants. *Hooper v. Ramsbottom*, 6 Taunt. 12, is exactly in point. The judgment against Brograve was not docketed, but that makes no difference, for Brograve would still have had no title if no action had ever been brought. Again, it may be said the plaintiff has been guilty of negligence, but how can that alter the property in these deeds? He might reasonably be unwilling to sue Brograve for the title deeds of a property of such small value. And if the plaintiff was negligent, the defendant Price was equally so.

Campbell, contrd. No doubt, as between the vendor and vendee, the title deeds follow the title to the land; but if the purchaser has allowed the vendor to retain them, and thus to commit a fraud upon an innocent party, he cannot maintain an action for the recovery. It may be said these deeds are of no value to the defendant, since he cannot get the land; but that is not so; if he can discover an outstanding term, he may be able to complete his title. [LITTLEDALE, J. It is found in the case that the plaintiff has the legal estate. There cannot, therefore, be any term outstanding.] There has been great negligence in the Harringtons in not securing the deeds. It was the business of the purchaser to obtain them before he paid the consideration money. If he had done so, and they had afterwards been taken from him, the case would

have been different. Another piece of negligence consisted in not docketing the judgment. If that had been done, the judgment would have *appeared as a lien on the land, and the mortgagee would not have lent his money. In such a case as this, a court of equity would not interfere. Thus, in *Head v. Egerton*, 3 P. Wms. 280, where a second mortgagee, without notice, had possession of the title deeds, the Lord Chancellor would not compel a delivery of them up to the first mortgagee without payment to the second of his mortgage money. In *Hooper v. Ramsbottom*, 6 Taunt. 12, Wells, the purchaser, had not been guilty of any negligence or misconduct. Besides, Wells there had no complete right to the possession of the deeds, whereas *Harrington* had a perfect title. This is more like *Parker v. Patrick*, 5 T. R. 175; or it may be considered as within that class of cases regarding personal property, where a man having allowed another to act and dispose of the property as the real owner, is taken to have authorized such dealing with it, and cannot recover from persons to whom it is conveyed. On the same principle, the plaintiff here cannot recover the deeds from Price till he has been repaid his mortgage money.

LORD TENTERDEN, C. J. To us, sitting in a court of law, this is a very clear case. It is an established principle, that whoever is entitled to the land has also a right to all the title deeds affecting it. But it is contended that the purchasers here were negligent in not securing the title deeds, but leaving them in the hands of the vendor. Fraud is not suggested (which might have made a difference), but only a neglect by which the vendor has been enabled to commit fraud. Is there, however, no negligence on the other side, when a man advances money upon title deeds without inquiring as to the possession of the land? There is equal negligence on both sides. We are pressed with the decision of Lord Talbot in *Head v. Egerton*, 3 P. Wms. 280. But the cases are not alike; for in that the first party was a mortgagee, here he was a purchaser. A mortgagor continues in visible possession of the premises, and therefore his retaining the title deeds is a circumstance more likely to mislead. It is very different with a vendor. I do not presume to say what a court of equity would do in this case: it might say that, when both parties had been equally negligent, it would not interfere. Here the plaintiff brings his action in a court of law, and is entitled to recover on his legal right.

LITTLEDALE, J. The plaintiff has the legal right to these deeds. It is clear there was no fraud on his part; and if he has been guilty of negligence, this Court cannot say that his title is not good. As to *Head v. Egerton*, 3 P. Wms. 280, that was the case of a mortgage, and a mortgagor generally remains in possession of the estate.

TAUNTON, J. concurred.

PATTESON, J. This is put by the defendant on the ground of negligence; but it is clear that, unless there was such negligence as amounted in effect to a fraud, the plaintiff must recover on his strict legal right. I do not think there was: and if there be any negligence, it is quite as much on the part of the defendant as the plaintiff.

Postea to the plaintiff.

*SIMONS, Clerk, v. JOHNSON and MOORE. Jan. 24. [175

To an action of covenant brought by N. S. against J. J. and another, a release was pleaded, which began by reciting, "that various disputes were subsisting between N. S. and J. J., and actions had been brought by them against each other, which were still depending, and that it had been agreed between them that, in order to put an end thereto, J. should pay S. 150*l*. and each of them should execute a release to the other of all actions, causes of action, and claims brought by him, or which he had against the other;" and then proceeded in the usual general words to release *all actions, &c., whatsoever*:

Held, that the effect of the general words was confined by the recital to actions then commenced, and in which S. was the party on one side and J. on the other, and that it could not be pleaded in bar to an action brought by S. against J. and others jointly: and that parol evidence was admissible to show that, at the time of executing the release, there were mutual actions depending between S. and J. for other causes than that of the present suit, and for such causes only.

COVENANT on an indenture executed by the plaintiff of the one part, and the defendant Johnson and one Henry Walker, overseers of the poor of the township of the South end of Thurmaston, in the parish of Belgrave, in the county of Leicester, and the defendant Moore and one Thomas Johnson, overseers of the township of the North end of Thurmaston, of the other part, whereby it was agreed that interest should be paid to the plaintiff by the churchwardens and overseers of the poor of the said township for the time being, on a sum of 400*l.*, and the principal should be repaid by instalments of 35*l.* every year, otherwise a certain term of 2000 years created in certain premises, and a trust to sell the same for repayment of the money, should continue. And there was a covenant by the defendants and the other overseers to pay the interest, and also the principal sum, by such instalments, to the plaintiff. The breaches were non-payment of the money and interest. The defendant Johnson pleaded that, in consideration of 150*l.* and a general release granted by him to the plaintiff, the latter had released him from *the causes of action mentioned in the declaration*. The defendant Moore pleaded, among other pleas, that the plaintiff had released Johnson, the other defendant. The *176] plaintiff, in *his* replication, denied that he had released Johnson from the causes of action mentioned in the declaration. At the trial at the Summer assizes for the county of Leicester, 1830, a verdict was found for the plaintiff, subject to the opinion of this Court on the following case:—

The sum of 400*l.* was lent by the plaintiff and another person who died in August, 1826, in moieties, at the time when the deed stated in the declaration was executed, and for the purposes therein mentioned. The parish of Thurmaston is divided into two parts, the North end and the South end, and the usual poor's-rates and assessments for each end were regularly made and levied, and would have been sufficient to pay their respective shares of the interest accruing from time to time upon the said sum of 400*l.*, if they had been, or legally could be, so applied. Interest on the plaintiff's portion of the 400*l.* had been paid by each township to December, 1825.

The release pleaded bore date the 11th of November, 1818, and was in the following terms:—"Whereas various disputes and differences have arisen and are subsisting between Nicholas Simons and John Johnson of Humberstone, in the county of Leicester, and actions at law have been brought by *them* against *each other* which are still depending: and it has been agreed between them, that in order to put an end thereto, J. Johnson shall pay to N. Simons 150*l.*, and that each of them shall execute to the other a good and valid release of all actions, causes of action, claims, and demands brought by him, or which he has against the other of them: Now these presents witness, that in pursuance and performance of the said agreement on the part of N. Simons, and in con- *177] sideration of the *said sum of 150*l.* to N. Simons in hand well and truly paid by J. Johnson at or before the execution hereof, and of J. Johnson having executed to N. Simons such release as aforesaid, he, N. Simons, hath remised, released, and for ever quitted claim, and by these presents doth remise, &c., unto the said J. Johnson, his heirs, executors, and administrators, and every of them, all and all manner of actions and causes of action, suits, controversies, sums of money, bills, bonds, writings obligatory, accounts, reckonings, damages, judgments, executions, claims and demands whatsoever, both at law and in equity, which, against him, J. Johnson, his heirs, executors, and administrators, or any of them, or against his, their, or any of their lands, tenements, goods, chattels, or real or personal estate, he N. Simons now hath,

or he, his heirs, executors, or administrators may hereafter claim, for, upon, or by reason of any matter, cause, or thing whatsoever from the beginning of the world to the day of the date of these presents."

The following admissions were made. None of the actions at law referred to by the deed or release mentioned in the pleadings had any reference to the deed on which the action was founded, or the money sought to be recovered on the same; but such admission was not to preclude the defendants respectively from insisting on giving evidence at the trial that the debt sought to be recovered was intended to be released thereby, or that disputes and differences existed between the plaintiff and defendant at the time of the execution of such release, touching the deed upon which the action was brought. The due execution of that deed, and of the deed of release mentioned in the pleadings, and the receipt of 150*l.* by the plaintiff from the defendant *mentioned in the memorandum subscribed to such deed, were also admitted. No [*178 evidence was offered by the defendants upon the subject of the release. On the part of the plaintiff evidence was given that previous to the execution of the release the defendant Johnson had occupied a farm as tenant to the plaintiff; that upon Johnson quitting it, certain disputes had arisen between the parties, the plaintiff claiming arrears of rent, and compensation for breaches of covenant; and, on the other hand, that Johnson had brought one or more actions against the plaintiff for an illegal arrest. These disputes had been the subject of arbitration; and the evidence was offered with a view to prove that it was with reference to these disputes only that the release was given. The defendants objected to this evidence as inadmissible; and it was only received subject to their right of insisting upon such objection in the Court above.

Follett, for the plaintiff. The question is, Whether, although the money was advanced for parochial purposes, for which the two defendants rendered themselves personally liable, the release in the present case will operate to bar the plaintiff? Now it is a well-established rule of construction, that where there is a particular recital in a deed, and general words of release are afterwards inserted, the generality of the words shall be qualified by the recital, *Knight v. Cole*, 3 Lev. 273; *Thorpe v. Thorpe*, 1 Ld. Raym. 285; *Payler v. Homersham*, 4 M. & S. 423. *Milbourn v. Ewart*, 5 T. R. 381, went on the same principle. Applying that rule to the present case, it appears clearly *that the release cannot apply to this action; for the recital is, that disputes [*179 had arisen between N. Simons and J. Johnson, and actions at law have been brought by them against each other, which were still depending, and that it had been agreed to put an end thereto, that is, to the actions and disputes between Simons on the one side, and Johnson on the other. The present action is one between Simons on the one side, and Johnson and Moore on the other. It is clearly, therefore, one not contemplated in the recital. Besides, the sum paid by Johnson was 150*l.*, and the plaintiff here claims 400*l.* and interest. The Court here called upon

Fynes Clinton, for the defendant, Johnson. No doubt the general words of a release may be qualified by the recital. But the intention to restrain it must appear from the instrument itself; no parol evidence is admissible. Where, indeed, the instrument itself shows that it applies to some particular object, parol evidence may be received to show that that object was distinct from the subject-matter of the action. In *Payler v. Homersham*, 4 M. & S. 423, the release was confined by the recital to a particular class of debts, namely, those due from the party in his sole right, it was, therefore, competent to the plaintiff to show that the debt he was suing for was not one of that nature; and parol evidence might have been given in support of the replication, not to explain the release, but to apply it. But in the present case the recital is, that it had been agreed that each should release to the other *all* actions brought by him, or which he had against the other: it is not confined to all *such* actions, which

*[180] might *have raised this question. Then the consideration is not merely the sum of 150*l.*, but also a general release by Johnson of all actions against Simons, which must have been a material part of the consideration. *Knight v. Cole*, 3 Lev. 273, is in favour of the defendant: there the instrument itself was looked to; and by reference to that it appeared clearly to have been the intention of the parties to confine it to the legacy.

Coleridge, for the defendant, Moore. If this release be available for Johnson, it is so for Moore. [Lord TENTERDEN, C. J. That is a good reason why it is not available.] One of two co-covenantors will be discharged by a release to the other, whether the parties intended a general release or not. In *Rotherham v. Crawley*, Cro. El. 370, the court expressly held, that though the intent was not to extinguish the debt, yet it was so extinguished by the general words of release. That, if good law, is stronger than the present case.

Lord TENTERDEN, C. J. It appears to me that *Payler v. Homersham*, 4 M. & S. 423, is well founded in law and common sense, and is not distinguishable from the present case. It is said we must look to the recital of the release, and find something there sufficient to confine the effect of the general words. If I do so here, I find this was intended to operate as a qualified release. It states that disputes are subsisting between Simons and Johnson, about which actions at law have been brought, and that it has been agreed, in order to put an end thereto, that *each* of them shall execute a release of all actions and *causes of action, claims and demands, brought by him against the

*[181] other. I cannot read this without seeing that the release which follows was intended to apply to the matter recited, namely, the actions then depending, and that the object was to put an end to them. The generality of the language was, then, confined by the recital, so as to render it competent to the plaintiff to give parol evidence of the nature of those actions, and thereby show that the subject of the present action was not part of the matter intended to be released.

LITTLEDALE, J. *Payler v. Homersham*, 4 M. & S. 423, and *Solly v. Forbes*, 2 B. & B. 38, show that the general words of a release may be qualified by the recital. There can be no doubt that the matter contemplated in this release was the actions there referred to, and parol evidence was admissible to show that the subject-matter of the present action was not involved in them; as where, in a will, the testator has used words which, by reason of some extrinsic circumstance, require explanation by evidence respecting the situation of property or other facts.

TAUNTON, J. Nothing can more clearly show that the release was intended to be qualified, and apply to the disputes between Simons and Johnson only, than the fact of Moore, whose name does not once appear in the instrument, now claiming a benefit under it.

PATTESON, J., concurred.

Judgment for the plaintiff.

*[182] *DOE dem. CURTIS *v.* SPITTY. Jan. 25.

A notice to produce deeds was served on defendant's attorney in Essex on Saturday, the commission day of the assizes being Monday; the attorney went to London and fetched them. A notice was served on the Monday evening to produce another deed. The attorney stated he had been to town to fetch the deeds; and if the plaintiff would pay the expense of sending for this from town, where it was, it should be had. No offer to pay was made, and the trial was on Thursday:

Held, that, under these circumstances, the plaintiff was not entitled to give secondary evidence of the last-mentioned deed.

THIS was an ejectment tried at Chelmsford at the last Spring assizes for the

county of Essex, before Garrow, B., when a verdict was obtained for the plaintiff. The lessor of the plaintiff gave secondary evidence of a deed in the defendant's possession. This was objected to, and the question turned upon the sufficiency of the notice to produce the original. A notice had been given before the previous Summer assizes to produce a number of deeds, but this particular one was not included. On the Saturday before the last Spring assizes, which commenced on Monday, notice was served upon the defendant's attorney, at Billericay, in Essex, to produce the deeds mentioned in the former notice. On Monday evening, about seven o'clock, fresh notice was given to the defendant's attorney at Billericay, to produce this particular deed. He stated to the person who served the notice (and the statement was not disputed) that the deed was in London; that he had already been to town to fetch the other deeds, and if the lessor of the plaintiff would pay the expense of the journey, this also should be had. There was no offer to pay such expenses, and the deed was not produced at the trial. The cause was tried by a special jury, and was appointed for Wednesday, but was not tried till Thursday. The learned Judge thought the notice sufficient, and received the secondary evidence. Thesiger in the following term obtained a rule nisi for a new trial, on the ground that this notice was not sufficient.

*Gurney now showed cause. There was ample time to send to London. If a letter had been written to the office where the deed was said to be, it might have been down by Wednesday. It is not pretended that the parol evidence offered was inaccurate. [*183

Thesiger and Steer in support of the rule. The notice given had required the production of thirty different deeds, omitting that in question, and had been complied with. Then the party who served the second notice, which was on the commission day of the assizes, was told how the deed in question might be procured, and that ought to have been done at the expense of the lessor of the plaintiff.

Lord TENTERDEN, C. J. Under the special circumstances of this case the notice was insufficient. A notice to produce deeds is served, the attorney goes to town and fetches them. Then, at the time which has been stated, he is served with another notice; whereupon he says, I have been to town already, if you desire to have this deed, pay the expense of sending for it, and you shall have it. That is not done; and I think the defendant was justified in not complying with the notice, and was not bound to have his title-deeds sent by a coach, if the other party refused to be at the expense of a special messenger.

LITTEDALE, TAUNTON, and PATTESON, Js., concurred. Rule absolute.

*The KING v. CHARLES MOORE. Jan. 25.

[*184

Indictment charged the defendant with keeping certain inclosed lands near the king's highway, for the purpose of persons frequenting the same to practise rifle shooting, and to shoot at pigeons with fire-arms; and that he unlawfully and injuriously caused divers persons to meet there for that purpose, and suffered and caused a great number of idle and disorderly persons armed with fire-arms to meet in the highways, &c., near the said inclosed grounds discharging fire-arms, making a great noise, &c., by which the king's subjects were disturbed and put in peril.

At the trial it was proved, that the defendant had converted his premises, which were situate at Bayswater, in the county of Middlesex, near a public highway there, into a shooting ground, where persons came to shoot with rifles at a target, and also at pigeons; and that as the pigeons which were fired at frequently escaped, persons collected outside of the ground and in the neighbouring fields to shoot at them as they strayed, causing a great noise and disturbance, and doing mischief by the shot: Held, that the evidence supported the allegation, that the defendant caused such persons to assemble, discharging fire-arms, &c., inasmuch as their so doing was a probable consequence of his keeping ground for shooting pigeons in such a place.

INDICTMENT charged the defendant in the first two counts with keeping certain inclosed lands, grounds, and premises near to the king's highway, and to private dwelling-houses, for the purpose of persons frequenting such grounds and meeting therein to practise rifle-shooting, and to shoot at pigeons with guns, and that he did unlawfully and injuriously cause divers persons to meet and frequent there for that purpose; and did unlawfully and injuriously permit and suffer and cause and occasion a great number of idle and disorderly persons, armed with guns and fire-arms, to meet and assemble in the streets, highways, and other places near and about the said inclosed premises of him (defendant), discharging fire-arms and making a great noise, disturbance, and riot, by means whereof the king's subjects were disturbed, and put in peril. The third and fourth counts were for keeping a ground for rifle-shooting at a target, and causing persons to assemble and shoot there, by means whereof, &c., (as before). Plea, not guilty. At the trial before Lord Tenterden, C. J., at the Middlesex sittings after last Trinity term, it was proved that the defendant, a gun-maker, had taken some land at Bayswater, in the county of Middlesex, distant about 100 feet *from the north side of the main

*185] London and Uxbridge road, and had inclosed part of it, and converted it into a shooting-ground, where persons came to practise with rifles at a target on a mound, and to shoot at pigeons. It was also proved that, as the pigeons which were fired at often escaped, it was the custom for idle persons to collect outside the grounds and in the neighbouring fields to shoot at the birds as they strayed; these persons were called scouts; and there was some evidence to show that the defendant employed people to keep them off his own grounds. Some injuries were said to have been received from the bullets and shot used in these grounds; but, as the defendant contended, they arose entirely from the scouts, for whose acts, he urged, he could not be responsible. Lord Tenterden, however, thought otherwise, and directed the jury to find him guilty on the first four counts, but reserved leave for him to move to enter a verdict of not guilty on the first two.

The defendant this day being brought up for judgment,

Joy now moved accordingly. The illegal acts of the scouts who shoot these pigeons cannot be charged upon the defendant, for that would be to impute guilt where there is no criminal act or purpose traced to the party, and to make him answerable for the acts of others, over whom he has no control. Nor can such purpose be looked upon as a legal inference from the result, because that result is not a necessary consequence of the acts of the defendant, inasmuch as it never would follow from them, were it not for the unauthorized and

*186] improper intervention of other persons. The acts of such persons cannot be accounted his acts. So far from being his agents or servants, or in any way subject to his authority, they even refuse to depart at his request. The indictment asserts "that he did cause and occasion," &c.; but according to the facts proved, the misconduct of these strangers, and that alone, is the direct and proximate and criminal cause. He only furnishes the indirect and innocent occasion. The real wrongdoers in this case are amenable to justice, and would have been the proper objects of this prosecution. It may be said that there is a difficulty in proceeding against so many; but if this be so, still it does not follow that when a collection of idle people commit a nuisance, the attraction which drew them together may not be perfectly innocent: otherwise, the exhibition of prints in a window would render a print-seller liable to an indictment wherever the footpath was obstructed by the number of gazers. And yet even this would not be so hard as the present prosecution, because it is the print-seller's object, by exposure of the prints, to arrest the progress of passers, and thereby induce them to purchase; whereas the defendant could have no desire to attract the idlers who created the nuisance here charged. In *Rex v. Cross*, 3 Campb. 226, Lord Ellenborough, in allusion to the mention by counsel of the possibility of a hundred indictments every time a rout was

given by a lady at the west end of the town, puts this question, "Is there any doubt that, if coaches, on the occasion of a rout, wait an unreasonable length of time in a public street, and obstruct the transit of his majesty's subjects, *the persons who cause and permit such coaches so to wait are guilty of a nuisance?" By which he appears to have meant, not that the lady herself ought to be indicted, but only such of her guests as blocked up the way by ordering their carriages to wait, instead of drawing off, and returning when wanted. They, of course, as obstructing the way by their equipages and servants, would be responsible, and not the person who invited them. And the present case is more favourable to the defendant, for he did not even invite the persons who committed the nuisance. Suppose a piece of ground were dedicated to archery or cricket in a situation where a crowd of spectators were frequently collected, so as to obstruct an adjoining path, or trespass on adjoining fields, could the owner of such a piece of ground be thereupon convicted of a nuisance? Or, if the woods of an estate abounding with game are intersected by a high road, upon or near which idle persons congregate from a neighbouring town for the purpose of shooting such pheasants as cross it when the covers are beaten, a not uncommon case, could the proprietor of such estate (who preserves the game) be indicted for the nuisances these people would probably commit, provided nothing were done by himself, or his friends or servants, to alarm or injure the public travelling on the highway? If not, how can the defendant be held responsible under the present circumstances? He neither committed the nuisance in his own person, nor was it his object to induce others to commit it; nor was it a necessary and inevitable consequence of any act of his, being done by persons beyond his control: and those persons are themselves amenable to punishment for it.

*Sir James Scarlett, *contra*, was stopped by the Court.

Lord TENTERDEN, C. J. The defendant asks us to allow him to make a profit to the annoyance of all his neighbours; if not, it is said we shall strain the law against him. If a person collects together a crowd of people to the annoyance of his neighbours, that is a nuisance for which he is answerable. And this is an old principle. Here the defendant invites persons on his own ground to shoot pigeons. The effect of that is, that idle people collect near the spot: they tread down the grass of the neighbouring fields, destroy the fences, and create alarm and disturbance. It is not found that the defendant has attempted to prevent their so collecting. He has indeed had them driven off his own ground, but that is all. I cannot say that the verdict is wrong.

LITTLEDALE, J. It has been contended that to render the defendant liable, it must be his object to create a nuisance, or else that that must be the necessary and inevitable result of his act. No doubt it was not his object, but I do not agree with the other position; because, if it be the *probable* consequence of his act, he is answerable as if it were his actual object. If the experience of mankind must lead any one to expect the result, he will be answerable for it.

TAUNTON, J. In Hawkins P. C. b. i. c. 75, s. 6, 7, it is laid down that all common stages for rope-dancers, and all common gaming-houses, are nuisances in the eye of the law, "not only because they are great temptations to *idleness, but because they are apt to draw together great numbers of disorderly persons, which cannot but be very inconvenient to the neighbourhood. Also, it hath been holden that a common playhouse may be a nuisance if it draw together such numbers of coaches, or people, &c., as prove generally inconvenient to the places adjacent." The present is a very similar case.

PATTESON, J., concurred.

Rule refused (a).

Judgment was not pressed by the prosecutors, the defendant entering into recognisances to discontinue the shooting.

(a) See *Betterton's case*, 5 Mod. 142; *Skinn.* 625.

JOHN SMITH *v.* COMPTON and Others, Executors of SOUTHWELL.^(a)

By indenture, reciting a power vested in A. B. to dispose of certain premises, and that C. D. had contracted to purchase them, A. B. appointed and conveyed them to the use of C. D., his heirs, &c., and covenanted that the power in A. B. was then in force and not executed; and also that he, A. B., then had in himself good right, title, power, and authority to limit and appoint, and to grant, bargain, sell, &c., the premises to the said uses; and further, that the premises should be held and enjoyed to the said uses, without the let or interruption of A. B. or any claiming under or in trust for him; and also for further assurance by A. B. and all so claiming:

Held, that the second covenant was absolute, for good title against all persons, and not to be qualified by reference to the other covenants, inasmuch as there were no words, either in the second covenant itself, or in preceding or subsequent ones, to connect it with them.

COVENANT.—By indenture made between the testator, John Southwell, of the first part, the plaintiff of the second, and T. S. of the third, after reciting *190] certain former indentures of lease and release, by which *the premises after mentioned were conveyed to such uses and for such estates as Southwell should by deed appoint, and reciting also that the plaintiff had contracted with Southwell for the absolute purchase of the said premises in fee simple, and had desired that they might be limited and appointed to T. S. and his heirs to certain uses; it was witnessed, that Southwell, in pursuance of the agreement, and of the said power, and of every other power vested in him, did limit, declare, direct, and appoint that the said premises should remain and continue, and that all other conveyances thereof should enure, to the uses after mentioned; and it was further witnessed, that Southwell, in pursuance of such power and powers did grant, bargain, sell, dispose of, alien, release, and confirm to T. S. and his heirs (in his possession then being by a previous bargain and sale) all that messuage, tenement, &c. (described in the deed) habendum to T. S., his heirs and assigns, to such uses as the plaintiff should appoint; and in default of such appointment, to the use of the plaintiff and his assigns for his life, &c., and ultimately to the use of the plaintiff's heirs and assigns for ever. The declaration, after stating the indenture thus far, set forth a covenant by Southwell, that he, Southwell, then had in himself good right, &c., to appoint, and to grant, bargain, and sell, &c., the premises to T. S. and his heirs, to the uses before mentioned; and the breach complained of was, that Southwell, at the time of executing the indenture, had not such right, but had only an estate for certain lives; that the lives afterwards expired; and that one E. D., thereupon claiming to be entitled, and being lawfully entitled, to the premises, brought a plea of formedon in remainder against the plaintiff for *191] recovery of the same, and he, to prevent *being dispossessed, and to perfect his title, was obliged to pay the said E. D. £550, and incur other expenses.

The deed declared upon was set out on oyer. The covenants were as follows: "And the said John Southwell, for himself, his heirs, executors, and administrators, doth covenant, promise, grant, and agree, to and with the said J. S., his heirs and assigns, by these presents, in manner and form following; that is to say:—" The first covenant was, that the power enabling Southwell to appoint was then in full force and unexecuted, and not suspended or extinguished. The deed then proceeded as follows: "And also that the said John Southwell now hath in himself good right, true title, full power, and lawful and absolute authority, to limit and appoint, and to grant, bargain, sell, dispose of, release, and convey all the said hereditaments and premises hereby limited and appointed, granted and released, or intended so to be, with their appurtenances,

(a) This case was argued and determined in Michaelmas term, but was unavoidably omitted in its proper place.

unto the said Thomas Smith and his heirs, to the uses, upon the trusts, and for the several ends, intents, and purposes hereinbefore mentioned, expressed, and declared of and concerning the same, and according to the true intent and meaning of these presents. And further," that the premises should be held and enjoyed to the said uses, &c., "without the let, suit, hinderance, &c., claim or demand whatsoever, *of or by the said John Southwell, or of any person or persons claiming or to claim by, from, under, or in trust for him;*" and that free from all gifts, grants, &c., and other incumbrances made, done, &c., or knowingly permitted or suffered, "*by the said John Southwell, or any other person or persons claiming, or to claim by, from, through, under, or in trust for him.*" And also" that further assurances, &c., should be made on request by [*192 *Southwell, and all persons having or lawfully or equitably claiming, or who should have, claim, &c., title to or interest in the premises, *by, from, under, or in trust for him,* or by means of any use, trust, estate, power, &c., in the indenture enabling Southwell to appoint; so that such assurances should not contain any warranty further than against the persons making them. And, lastly, it was declared and agreed between the parties and by Southwell, that all persons in whom any terms of years in the premises were then vested should assign or transfer the residue thereof, in trust to attend the inheritance, &c., at the plaintiff's request, and as he should direct; and in the meantime stand possessed in trust for him and his heirs, &c., for the purposes of the deed of appointment. The defendant demurred generally to the declaration, and the plaintiff joined in demurrer. The case was argued in last Michaelmas term.(a)

Follett, in support of the demurrer. The breach stated does not apply to the covenant in question; for, although the words there used are general, and amount to a guarantee of title as against all persons, they are qualified when read in connexion with the preceding covenant, which is personal to Southwell, and the two following ones, which are only for quiet enjoyment, without the let, suit, &c., of *Southwell and those claiming under him*, and for further assurance by *Southwell and all persons so claiming*; and if the covenant declared upon be understood, as it must be, with the like restriction, it was not broken by an eviction under title independent of and paramount to Southwell's. It is not usual, in a conveyance like this, for the *vendor to covenant against the acts of strangers, nor can it have been the intention here. There [*193 is no covenant in the deed which is not confined to the acts of Southwell himself and those claiming under him, except the covenant declared upon, and the last, which is in its nature limited. The second covenant, if distinct from the first (which is questionable), must be taken as a sequel to it, according to the mode of construction adopted in *Browning v. Wright*, 2 B. & P. 13, where, in a similar deed, it was said that the whole context must be looked to. The fair meaning of these two clauses of the indenture, taken together, is, that Southwell had not executed the power, and that, not having done so, he had full right to convey the premises, as far as depended on him or any claiming under him. In *Browning v. Wright*, J. W. granted premises in fee, and warranted against himself and his heirs, and covenanted that he was, notwithstanding any act by him done to the contrary, lawfully seised in fee; and that he had good right, &c., to convey in manner aforesaid (which was the covenant declared upon); and that the covenantee should quietly enjoy, without the interruption of J. W. or any claiming under him; and that J. W. and all claiming under him should make further assurance. Lord Eldon there asked, What would be the use of any of the other covenants, if the covenant declared upon were general? The same question might be asked here: to what purpose is the limitation in the covenants for quiet enjoyment and for further assurance, if the general words in this covenant are to stand unqualified? *Howell v. Richards*, 11 East, 633, may be cited on the other side, but is distinguishable. There the *covenant [*194 which was held to be general and not confined by the preceding quali-

fied ones, contained an express provision against the let, suit, disturbance, &c., of any person or persons whatsoever; and there was an exception as to chief rent payable to the lord of the fee, which clearly showed that the parties did not mean to confine the covenant for quiet enjoyment to the acts of the covenantors themselves. [PATTERSON, J., referred to *Hesse v. Stevenson*, 3 B. & P. 565.] Lord Alvanley said there, "If it is plainly and irresistibly to be inferred that the party could not have intended to use the words in the general sense which they import, the Court will limit the operation of the general words:" and he added, that he had looked through the concomitant covenants to see if they afforded any inference of an intent to restrain that in question, but could find none. That is not so here. In *Forod v. Wilson*, 8 Taunt. 543, the assignor of a term covenanted that he had not done any act to incumber the premises, and that notwithstanding any such act the lease was a good lease, and that the defendant had a right to assign the premises in manner aforesaid; and it was held that the last clause was qualified by those preceding. In *Nind v. Marshall*, 1 B. & B. 319, the assignor of a lease covenanted that for and notwithstanding any act done by him, the lease was valid, &c.; and further, that the assignee should quietly enjoy, &c., without the interruption of the assignor, his executors, &c., or any other person whomsoever, and that discharged by the defendant, his heirs, executors, &c., from all incumbrances made, done, or suffered by them or either of them; and moreover, that the assignor, his executors, &c., and all persons claiming *under him, should execute further assurances if required: and there it was held that the general words in the covenant for quiet enjoyment were restrained by those of the other covenants. In *Milner v. Horton*, M'Clel. 647, it was covenanted, by an indenture of sale, that the parties therein named had a good estate in fee simple in the premises; and had full and absolute title to enfeoff and convey the same; and also that the feoffee should quietly enjoy without let, &c., of the said parties, their heirs, or any other persons claiming under them; and that the said premises were and should be clear of all incumbrances done, &c., by the said parties or one Sir W. H., or any of his ancestors: and it was there held that the qualified covenant for quiet enjoyment restrained the general ones. *Barton v. Fitzgerald*, 15 East, 530, is no authority for the plaintiff. There the assignor of a lease covenanted generally that it was a good and subsisting lease of the premises assigned, and afterwards covenanted for quiet enjoyment as against himself and all claiming under him, and the former covenant was held not to be restrained: but the deed began with a recital, which was held to bear upon all the covenants, that the remainder of a term of ten years granted by the said lease was vested in the assignor; which residue of the term he professed to make over by the assignment. And it is observed in *Sugden on Vendors and Purchasers*, p. 588 (8th ed.), that this case turned on very particular circumstances, but for which, it should seem, the special covenant would have restrained the general one. In *Gainsford v. Griffith*, 1 Saund. 51, 58 g, where a general covenant was held not to be qualified by a subsequent special one, the first was for an **indefeasible* title, and was a separate and distinct covenant; the second was for quiet enjoyment notwithstanding the assignor's own acts. "The nature of the assurance," as Lord Eldon says in *Browning v. Wright*, 2 B. & P. 13, "shows it to have been the intent of the parties that the words of the last covenant should not attach upon the first." And the rule, that a covenant must be explained according to the intention of the parties, as collected from the whole deed, is consistent with the old decisions, most of which are touched upon, with reference to that point, in the case last cited.

Platt, contra. The covenant declared upon is general and not to be controlled by the others. From the nature of the conveyance, it is evident that the parties meant this covenant to have an unlimited effect; for the recital states that Smith has agreed with Southwell for the absolute purchase of the premises, and of the freehold and inheritance thereof in fee simple; that is what South-

well professes to convey, and the covenant, interpreted generally, is consistent with such intention. The next, which is said to control it, is completely disjoined from it by the words "and further." In *Browning v. Wright*, 2 B. & P. 13, the words "for and notwithstanding anything by him done to the contrary," at the beginning of the first covenant, were considered as carried on to the subsequent one, and they evidently controlled the whole subject-matter of the assumed obligation in both. So in *Foord v. Wilson*, 8 Taunt. 543, the qualifying terms in the first covenant clearly overran the whole contract: the words "in manner aforesaid" in the last clause, gave the *whole the effect of one covenant. But in *Howell v. Richards*, 11 East, 638, the words "for and notwithstanding any act," &c., done by the releasors, were held not to control a subsequent general covenant, such construction appearing, upon a view of the whole context, not to be applicable. *Barton v. Fitzgerald*, 15 East, 530, where a general covenant preceded and followed by special ones, but distinct from them, was held not to be restrained, is a case almost in point for the plaintiff. In *Nind v. Marshall*, 1 B. & B. 319, the very covenant declared upon as a general one, contained words of a qualifying effect. *Gainsford v. Griffith*, 1 Saund. 51, 58 *g*, is in the plaintiff's favour; and yet much of the argument for the defendants in the present case, if well founded, would have been applicable there. *Hease v. Stevenson*, 3 B. & P. 565, is also an authority on the same side; and yet there the general covenant formed almost one context with the restricted one. *Milner v. Horton*, M'Clel. 647, is a case by itself, and was decided evidently against the intention of the parties to the conveyance. At all events it is not conclusive. Each case must be decided by its own circumstances, the words of the particular deed, and the intention of the parties as evinced by the whole of it. Here, if the covenant for title and power to convey is to be limited in construction, nothing is gained by it to the covenantee; the others are sufficient without it. The proper rule is that, in the first instance, each covenant should be taken by itself, looking indeed to the whole context of the deed for explanation, where there are covenants which, if unqualified, cannot coexist, but not resorting to a restrictive clause to limit the effect *of a general one, where each may have a separate operation. In *Belcher v. Sikes*, 8 B. & C. 185, there was a covenant that for and notwithstanding anything done by J. B., the plaintiff might and should receive certain moneys without let, &c. of J. B. or his executors; the breach assigned was, that the executor of J. B. prevented the plaintiff from receiving, and it was held, with reference to the apparent sense and general intention of the covenant, that the more restrictive words "notwithstanding anything done by J. B." must be rejected as insensible, and the larger clause "without let of J. B. or his executors" must prevail; and that though both were in the same covenant. [Lord TENTERDEN, C. J. Except *Milner v. Horton*, M'Clel. 647, there is no case in which a qualified covenant has been held to restrain a general one, where the covenants have not been connected with each other, either by preceding words, as in *Browning v. Wright*, 2 B. & P. 13, or by intervening or subsequent ones. PARKE, J. The whole context of a deed may be looked to, to reconcile any inconsistency between one covenant and another; but an absolute covenant for title is not inconsistent with a limited one for quiet enjoyment. TAUNTON, J. The covenant that Southwell had not executed the power must, from its nature, have been personal to him, whatever had been intended by the rest.]

Follett, in reply. The covenant in question is undoubtedly absolute in itself, if it is to be taken separately; but it is analogous to that in *Browning v. Wright*, which was held to be qualified by the rest of the deed; and in *Milner v. Horton*, M'Clel. 647, the covenant for seisin *was no less absolute. That case must be overruled in order to decide this for the plaintiff. [Lord TENTERDEN, C. J. I think you are right.] The order in which the covenants may have followed each other in any of these cases is, of itself, unim-

portant, 1 Wms. Saund. 60 *a*, n. (1), to *Gainsford v. Griffith*; and in note (i) to the same case, in the last edition (p. 60), it is said, that covenants are to be construed as independent or restrictive of each other, according to the apparent intention of the parties, upon an attentive consideration of the whole deed: "every case, therefore, must depend upon the particular words used in the instrument before the Court; and the distinctions will be found to be very nice and difficult."

Cur. adv. vult.

In the same term the judgment of the Court was delivered by Lord Tenterden, C. J., who, after stating the covenant declared upon, and the breach, proceeded as follows:—

The question raised on the demurrer was, whether this covenant was absolute, or limited to the acts of persons claiming under John Southwell. All the leading authorities upon the point were cited in argument, and it is unnecessary now to comment on them at length. *Browning v. Wright*, 2 B. & P. 18, was much relied upon on behalf of the defendants. The covenant there, if taken by itself, was general, and it was held to be qualified by the preceding and subsequent ones; but there the first and second covenants were connected together by the words "for and notwithstanding anything by him done to the *200] *contrary," which extended to both. And, looking at all the cases which were cited for the defendants, there is only one, *Milner v. Horton*, M'Clel. 647, where a general covenant has been held to be qualified in the manner here contended for, unless there appeared something to connect it with a restrictive covenant, or unless there were words in the covenant itself amounting to a qualification. It is said, that an absolute covenant for title is inconsistent with a qualified one for quiet enjoyment. I am not sure that that is so generally; but this, at any rate, is an instrument of a particular nature. It begins by a statement of the specific power vested in Southwell for the disposal of the premises, which is followed by a covenant that the power has not been executed, and by other special covenants, which, in a deed so stating the vendor's title, may, not inconsistently, be introduced at the same time that the vendor covenants generally for right and power to convey. As I have said, there is, with one exception, no case mentioned where a general covenant has been held to be qualified by others, unless in some way connected with them. We have considered *Milner v. Horton*, M'Clel. 647, again since the argument, and we cannot feel ourselves bound by its authority: we are, therefore, under the necessity of coming to this conclusion, that the covenant declared upon, being unqualified in itself, and unconnected with any words in the qualified covenants, must, in a court of law, be regarded as an absolute covenant for title.

Judgment for the plaintiff.

*201] *The *KING v. The Inhabitants of MIDDLESEX*. Jan. 25.

To an indictment against the inhabitants of a county, for the non-repair of a foot-bridge, they pleaded that it was parcel of a carriage bridge, which A. B. was bound to repair *ratione tenuræ*. Replication admitted the liability of A. B. to repair the carriage bridge, but denied that the foot bridge was parcel of the same; whereupon issue was joined. The evidence was, that the carriage bridge mentioned in the pleadings had been built before 1119, and that certain abbey lands had been ordained for the repairs of the same, and the proprietors of those lands (of which those mentioned to be held by A. B. were part) had always repaired the bridge so built.

In 1786 the trustees of a turnpike road, with the consent of a certain number of the proprietors of the abbey lands, constructed a wooden foot bridge along the outside of the parapet of the carriage bridge, partly connected with it by brickwork and iron pins, and partly resting on the stonework of the bridge:

Held, that this (being the foot bridge mentioned in the indictment) was not parcel of the carriage bridge which A. B. was bound by tenure to repair; and, consequently, that the county was liable to repair the foot bridge.

INDICTMENT charging the defendants with the non-repair of a common and public foot bridge commonly called Bow-Foot Bridge. Plea, that the bridge was parcel of a certain common and public carriage bridge which one George Purkis, by reason of his tenure of certain lands in West Ham in Essex, was bound to repair. Replication, admitting the liability of Purkis to repair the carriage bridge, but denying that the foot bridge was parcel of the said common and public bridge which said G. P. ought to repair in manner and form as in the plea alleged; whereupon issue was joined. At the trial before Lord Tenterden, C. J., at the Middlesex sittings after Hilary term 1831, a verdict was taken for the crown, subject to the opinion of this Court on the following case:—

Between the years 1100 and 1119, Matilda, Queen of Henry the First, caused to be built across the river Lea two carriage bridges, one at Stratford Bow, called Bow Bridge, being the carriage bridge mentioned in the pleadings, and the other towards Essex, called Channel or Channelsea Bridge, and a causeway between the two bridges, and ordained for the maintenance and repairs of the said bridge and causeway, certain lands in West Ham, which were afterwards held by the abbot of Stratford *Langthorn Abbey, and are now called the Stratford Langthorn Abbey Lands.^(a) [*202 The proprietors of these lands are still liable to repair the two carriage bridges and the causeway, and the lands mentioned in the pleadings to be held by the said G. Purkis are part of the said abbey lands. There has immemorially been on the north side of the public carriage way, between the two bridges, a public footpath, which runs to the extent of 100 yards beyond each of the bridges. It is raised above the level of the carriage way, and is kept up in certain parts by a wharfing at the side; and it is repairable, as well as the carriage way, by the owners of the abbey lands. In the 8 G. 1., an act was passed for repairing the highways from Whitechapel to Bow Bridge and Stratford, &c., and the trustees under that act were empowered to make causeways, drains, &c., and to widen the said highways by taking in adjacent grounds; to make *arches of brick, timber, and stone* upon such grounds, &c., and to maintain by the tolls any *new bridges, drains, or sewers* to be erected by them in pursuance of the act. By a clause of the same act, reciting that all the road and causeway lying between the said two bridges ought to be repaired by the proprietors of the abbey lands, and that the said proprietors were desirous of coming to a yearly contribution for such repairs, the proprietors were charged with the yearly payment of 150*l.* for such repairs during the continuance of the act. The powers of that act were continued by four subsequent acts until 1823, and then ceased upon the passing of the 4 G. 4, c. 106, by which the above-mentioned highways have ever since been regulated.

*On the 25th of March 1736, the carriage bridge at Bow, repairable by the owners of the abbey lands, consisted of three stone arches thrown [*203 over the Lea, having the western abutment on the Middlesex and the eastern abutment on the Essex side of the river, and protected by a stone wall or parapet raised on the north and south sides respectively of the carriage way over it. At a general meeting of the trustees held on the last-mentioned day, it was resolved that a foot bridge should be made on the north side of Bow Bridge at the charge of the trust, and in pursuance of that resolution, and with leave in writing first obtained from a certain number of the proprietors of the abbey lands (who were deemed by the trustees for the time being to be a sufficient number for that purpose), in the same year, 1736, a wooden foot bridge or pathway (the subject of the present indictment) was constructed, and foot passengers were thereby enabled to pass with more safety and conve-

(a) See the history of these bridges, and of the obligation to repair them, in *Rex v. The Inhabitants of Kent*, 2 M. & S. 520, note (a).

nience from the footpath at one end of the old carriage bridge to the footpath at the other, the wooden structure being placed on the north side of the northern wall or parapet of the bridge in continuation of the line of the old causeway or footpath on the east side. It is of the same length as the parapet wall, and is supported by brick work at the Middlesex end up to the first pier of the carriage bridge, which brick work is built into the abutment of the old bridge. The remaining portion of the wooden structure rests on a ledge or projecting part of the stone work of the old carriage bridge, and is further supported by struts or beams resting upon the cutwaters or angular projections of the old bridge, and by fir bearers let into the facing of the same, the whole frame of the wooden structure being braced to the carriage bridge by iron pins passing *204] through the stone *work and rivetted on the southern side of the old bridge. No part of the wooden structure has ever been repaired by the inhabitants of Middlesex, but until 1823 it was maintained and repaired out of the tolls collected by the trustees of the highway, who, in 1800, rebuilt it; and until January 1824, when it fell into decay, as averred in the indictment, it was constantly used by, and afforded great accommodation to, the public. The fir bearers were first let into the facing of the carriage bridge in 1800, and the iron pins were first used for the purpose above mentioned in the year 1818. The stone carriage bridge from the time of its erection has been repaired by the owners for the time being of the abbey lands. The question for the opinion of this Court was, Whether the county of Middlesex is liable to repair so much of the said wooden structure as lies in that county? If the Court were of that opinion the verdict was to stand, otherwise a verdict to be entered for the defendants.

Platt, for the prosecution. The county at large is *prima facie* liable to the repair of all public bridges within its limits; even newly-erected ones, if they be of public utility; and, therefore, if a private person, or the trustees of a turnpike road build a bridge which is useful to the public, the county becomes bound to maintain it. *The King v. The Inhabitants of the West Riding of Yorkshire*, 2 Sir W. Blackst. 685, and *Same v. Same*, 2 East, 342. The foot bridge here is of public utility. It lies, therefore, upon the inhabitants of the county in this case to show that some other persons are bound to the repair. They have only shown that the owners of the abbey lands are bound *ratione* *205] *tenuræ* to repair the carriage bridge. The fact *of their having repaired the causeway between the two bridges does not prove any obligation on their part as to the foot-bridge, that being no part of the carriage bridge which the owners of the abbey lands have been used to repair, though supported by it. It did not exist till 1736, when it was built by the trustees under a turnpike act. In *The King v. The West Riding of Yorkshire*, 2 East, 353, note, to an indictment for not repairing a public carriage bridge, the plea alleged, that certain townships had immemorially used to repair the said bridge. The evidence was, that the townships had enlarged the bridge to a carriage bridge, which they had before been bound to repair as a foot bridge; and this was held not to support the plea, because it showed that the townships could not have been immemorially bound to repair the said bridge, that is, the carriage bridge. So, here, the evidence shows that the foot bridge is not parcel of that bridge which Purkis, and those whose estate he had, were immemorially bound to repair by reason of the tenure of their lands; for it was built in 1736. The dictum of Lord Kenyon in *The King v. The Inhabitants of Cumberland*, 6 T. R. 194, implying that those who are bound to repair, are also bound to widen a bridge if the public convenience require it, was expressly overruled by this Court in *The King v. The Inhabitants of Devon*, 4 B. & C. 670. The alleged fact of the owners of the abbey lands having permitted the erection of the foot bridge on the arches or abutments of the carriage bridge, does not show that they thereby became liable to maintain the foot bridge. On the contrary, by the common law, if a private person, without any obligation to do

so, builds a new bridge, and the public afterwards use it, the county must *continue to repair it; and that being so, as in this case there was no obligation on the owners of the abbey lands to build the foot bridge, [*206 and as they only gave their consent, and did not enter into any binding obligation to repair in future, it follows that the public, and not the private individuals, are bound to repair.

Addison, contra. The defendants in this case have shown that the owners of the abbey lands were bound to repair the ancient carriage bridge. The fallacy in the argument on their side consists in treating the foot bridge, which is a mere appendage to the old bridge, as a bridge of itself. It is not a distinct bridge, but a mere addition to or excrescence from the old bridge, and forms part of it. The evidence shows that it is connected with and entirely dependent upon the old bridge, and would be undistinguishable from it if the parapet were taken away. The public derive no other benefit from the foot bridge than they would have done from the widening of the old carriage bridge. There is no authority to show that the mere widening of a carriage bridge, which individuals are liable *ratione tenuræ* to repair, will throw that burden on the county. The county is liable either when an entire new bridge has been built where none existed before, or, where a new carriage bridge has been built on the site of a foot bridge which has been entirely destroyed. Thus in *Rex v. The Inhabitants of Surrey*, 2 Campb. 455, an old wooden foot bridge, repairable by a parish, had been destroyed, and a new carriage bridge, different in materials and structure, built on its site; and the county was held liable to repair this. In *Rex v. The Inhabitants of Devon*, 14 East, 477, an entirely *new [*207 bridge was built where none existed before, and it was contended that this merely constituted an appendage to another bridge within the distance of 800 feet, in the county of Dorset, and which the latter had always repaired; but it was held to be a substantive bridge in Devon, and to be repairable by that county. Here, too, the foot bridge was built with the consent of the owners of the abbey lands, and they enjoy an estate for the purpose of repairing the bridge, and it is found that the value of that estate is insufficient for the repair of the whole. Now if, instead of an estate, they had had granted to them a right to take toll from all persons passing over the bridge, they would clearly have been liable to repair this foot bridge. In the Case of the Repair of Bridges, 13 Rep. 33, Lord Coke, after stating that of common right the country shall be charged to the reparation of a bridge, adds, "This is true when no other is bound by law to repair it; but he who hath the toll of the men or cattle which pass over a bridge or causeway, he ought to repair the same, for he hath the toll to that purpose, et qui sentit commodum sentire debet et onus." And the principle thus applied to tolls has also been extended to other cases, where the erection or continuance of a bridge, or some proceeding which rendered a bridge necessary, has been a matter of private benefit to individuals, and they have exercised an authority on the subject, and have proper funds applicable to the repair. *Rex v. The Inhabitants of Lindsey*, 14 East, 317; *Rex v. Kerrison*, 3 M. & S. 526.

Lord TENTERDEN, C. J. This is an indictment against the inhabitants of the county of Middlesex, for not repairing a foot bridge, called The Bow Foot Bridge, and *the plea is, that the bridge mentioned in the indictment [*208 was parcel of a carriage bridge, which one Purkis by reason of his tenure of certain lands was bound to repair. The issue is, whether the foot bridge indicted be parcel of that carriage bridge which Purkis was bound to repair. The question substantially is, whether Purkis be bound to repair the foot bridge. Now, it is well established, that the inhabitants of a county, though bound to repair a bridge, are not bound to widen it. Assuming that to be the law, and the old bridge in this case to have been widened, would the owners of these abbey lands be bound to repair the whole bridge so widened? The King v. The Inhabitants of the West Riding of Yorkshire, 2 East, 353, note, is an

express authority to show they would not. There, the inhabitants of the Riding were indicted for not repairing a public *carriage* bridge which they were bound to repair. The plea was, that certain townships had immemorially repaired, and had been accustomed and of right ought to repair the *said* bridge. It appeared at the trial, that there had been a *foot* bridge till the year 1745, when it was enlarged to a *horse* bridge, by the townships, and in 1755 to a *carriage* bridge, at their expense, and it was held that the evidence did not support the allegation in the plea that the townships had been immemorially bound to repair the *said* bridge, but merely proved that they had been immemorially bound to repair the foot bridge. Buller, J., there said, "The indictment states it to be a carriage bridge, and the defendants in their plea admit it to be a carriage bridge, but they allege that other persons are bound by prescription to repair it. Now there is no evidence *whatever which tends
*209] to support that: on the contrary, it is shown that this never was a carriage bridge till within these few years, but was a foot bridge, which was kept in repair by the townships. Where a party is bound to repair a foot bridge, he shall not discharge himself by turning it into a horse or carriage bridge; but still he shall only be bound to repair it as a foot bridge; that is *pro rata*." Now apply that doctrine to the present case. Here the owners of the abbey lands being immemorially bound to repair the ancient carriage bridge, cannot release themselves from that obligation by reason of the foot bridge having been added; they remain liable to the burden of repairing the carriage bridge; but the county is liable at common law to repair the foot bridge, which is useful to the public. That case is quite decisive of the present. The issue must be considered as having been found against the defendants: and, consequently, they are liable to repair this foot bridge, and the owner of the abbey lands the ancient carriage bridge.

LITLEDAL, J. I am of the same opinion. The question is, Whether that part of the bridge which was made in 1736, is part and parcel of the public carriage bridge which Purkis was bound to repair by reason of tenure? I think the foot bridge, which was erected in comparatively modern times, cannot be considered as having become parcel of the old carriage bridge, repairable by the owners of the abbey lands, but was a distinct structure; and therefore that the verdict must stand for the crown.

TAUNTON, J. This case is abundantly clear on principle and authority.
*210] The issue is, whether Purkis be *bound to repair the bridge described in the indictment. The allegation in the plea, that he is bound to repair *ratione tenuræ*, implies an obligation from time immemorial, and the defendants, therefore, were bound to prove such obligation by evidence of repairs done immemorially by the owners of the abbey lands. Now the foot bridge indicted was built in 1736; there could not, therefore, be an immemorial obligation to repair it. In *Rex v. The West Riding of Yorkshire*, 2 East, 358, note, certain townships had immemorially used to repair a public foot bridge; and it was there held, that the townships, having enlarged that which had been a foot bridge to a carriage bridge, were liable to repair it to the extent, not of the carriage way but of the foot way only. That case is the converse of this. It is clearly established that the county is not bound to widen a bridge; a fortiori a party bound to repair by prescription is not obliged to repair a foot bridge annexed to a carriage bridge, as this was, within legal memory. I am therefore of opinion that upon the issue here raised, the verdict must be for the crown.

PATTESON, J. The question is, whether the foot bridge be part of the carriage bridge which Purkis, by reason of the tenure of his lands, was immemorially bound to repair? Now if this adding of the foot bridge be considered a widening of the old bridge, which is putting the case in the most favourable manner for the defendants, still, according to *Rex v. Devon*, Purkis was not bound to make such widening, or to repair the new part when it was made.

Judgment for the crown.

*CATHERINE MANNING and Others v. FLIGHT and Another. [*211]

Covenant for rent. Plea, that before the rent became due, the defendants, by deed, assigned all their interest in the demised premises to A. B., subject to the payment of the rent, and performance of the covenants contained in the lease; and that he, by the assignment, covenanted to pay the rent and perform the covenants contained in the lease, that the defendants delivered the lease to him, and he accepted the same, and entered on the premises by virtue of the assignment: the plea then stated, that A. B. became bankrupt, and that the arrears of rent accrued after the date of the commission: that the assignee of his estate declined the lease, and that the bankrupt within fourteen days after notice of that fact, delivered up such lease to the plaintiffs, devisees of the reversions:

Held, upon demurrer, that the plea was bad, inasmuch as the statute 6 G. 4, c. 16, s. 75, did not put an end to the lease, but merely discharged the bankrupt from any subsequent payment of the rent or observance of the covenants.

COVENANT by the plaintiffs as devisees of John Manning, against the defendants as lessees, for one year's rent reserved by a lease dated 1st of September, 1814, which became due on the 29th of September, 1830. Plea, that before the arrears of rent became due, the defendants, by indenture dated the 30th of September, 1829, assigned all their interest in the demised premises to one W. P. Barnard, subject to the payment of rent and performance of the covenants contained in the above lease; and the said W. P. B. did, by the assignment, covenant with the defendants to pay the rent during the term, and perform the covenants contained in the lease. Averment, that the defendants delivered the lease to him, and that he accepted the same, and entered on the premises by virtue of the assignment. The plea then stated, that W. P. B. being a trader, and indebted to one Lees, on the 16th of October, 1829, became bankrupt, and on the 10th of December, 1829, a commission issued against him, under which he was duly adjudged a bankrupt: that the arrears of rent became due after the date of the commission, and that after W. P. B. became bankrupt, to wit, on the 31st of January, 1830, Lees, the assignee of his estate and effects, declined the lease, of which W. P. B. had notice, and thereupon, within fourteen *days after such notice, he, W. P. B., delivered up such lease [*212 to the plaintiffs. Replication, that the plaintiffs did not accept the lease, or in any wise agree to or accept a surrender of the same, nor had they at any time discharged the defendants from the covenants therein contained, &c. Demurrer and joinder.

Hoggins, in support of the demurrer. If the plea can be sustained, the replication is bad, and the question is, whether there has been a surrender of the term by operation of law; for if that sufficiently appears on the plea, the acceptance of the surrender by the lessor is wholly immaterial. The 6 G. 4, c. 16, s. 75, enacts, "that any bankrupt entitled to any lease, if the assignees accept the same, shall not be liable to any rent accruing after the date of the commission, or to be sued in respect of any subsequent non-performance of the covenants therein contained; and if the assignees decline the same, shall not be liable as aforesaid, in case he deliver up such lease to the lessor within fourteen days after he shall have had notice that the assignees shall have declined as aforesaid." The object of the legislature undoubtedly was to discharge the bankrupt at all events. Therefore, in *Doe d. Cheere v. Smith*, 5 Taunt. 800, where a lessee covenanted not to assign, and became bankrupt, and his assignees took to the lease, it was held that his covenant was absolutely discharged by the 49 G. 3, c. 121, s. 19, and, consequently, that if he came in again as assignee of his assignees, he should not be charged with that covenant. Now here, if the delivering up of the lease does not amount to a destruction of the term, although *the bankrupt may be discharged from any claim by [*213 the lessors, he will be liable over on his covenant with the lessees, to hold them harmless from the payment of rent or observance of the covenants in the

lease, and if so, he will not be absolutely discharged. Supposing the bankrupt discharged, the question arises, what has become of the term? It is divested from the bankrupt, and has it become re-invested in the lessees by operation of the statute, or is it destroyed? The statute does not declare the assignment of the term void by the bankruptcy, nor does it empower the lessee, as it does the lessor, to compel the assignees to elect; and supposing that the assignees should refuse to elect, the lessees, if the term be not destroyed, might be liable on their covenant with the lessors, though until the assignees elected, they would be unable to take possession of the premises. The statute empowers the lessor to compel the assignees to elect, and having this advantage, he must also take the burthen. The legislature, therefore, intended, not to draw any line of distinction between the case of a bankrupt lessee and assignee, but that the delivering up of the lease to the lessor by the bankrupt, being the owner of the lease at the time, whether assignee of the lease or lessee, should amount to an actual surrender of it by operation of law. *Copeland v. Stevens*, 1 B. & A. 593, is an authority to show that the term remains in the bankrupt till the assignees do some act to manifest their intention to accept the lease; and the statute giving to them an option of refusing the term, and to the lessor the power of forcing them to elect, and the bankrupt being discharged at all events *214] from all liability in case he deliver up the lease to the lessors within fourteen days after notice that the assignees have refused to accept the same, it must have been intended that the very delivery of the lease to the lessor should take effect as a surrender of it by operation of law. In *Taylor v. Young*, 3 B. & A. 521, it was decided that the nineteenth section of the 49 G. 3, c. 121, which contains a provision similar to that in the 6 G. 4, c. 16, s. 75, did not apply to cases between the lessee and assignee of the lease, but, there, *Holroyd, J.*, considering to what cases the statute did not apply, points out the cases which it includes, and says, "The clause in question applies to cases between the lessor and lessee, or between the lessor and assignee of the lease." In *Tuck v. Pyson*, 6 Bingh. 321, *Tindal, C. J.*, seemed to consider that the term continued in the bankrupt only until he himself delivered up the lease under the provisions of the statute, and that the lease became surrendered when he delivered it up to the lessors. The surety was discharged in that case from liability on his covenant with the lessors, and the only question raised was, at what time the surrender took effect.

Thesiger, contrâ, was stopped by the Court.

LORD TENTERDEN, C. J. I am clearly of opinion that the plea is bad. The stat. 6 G. 4, c. 16, s. 75, does not apply to this case. It would be strange if the assignee of the lease could, because the statute has omitted to provide for the rights of a lessee, compel the lessors to discharge the lessees from their personal *215] covenant. *In *Taylor v. Young*, 3 B. & A. 521, it was held that a similar clause in the 49 G. 3, c. 121, was confined to cases between the lessor and lessee, and did not comprise cases between the lessee and assignee of the lease. The dictum attributed to *Holroyd, J.*, in that case was wholly unnecessary with respect to the point decided, and was probably a mistake of the reporters. All the other Judges speak of the statute as confined to cases between the lessor and lessees. The judgment of the Court must be for the plaintiffs.

LITTLEDALE, J. I am of the same opinion. If, before the statute, there had been an assignment of the lease, and the lessors had accepted rent from the assignee, they might notwithstanding have proceeded by covenant against the lessees; the privity of contract not being destroyed. The 6 G. 4, c. 16, s. 75, makes no difference in this respect; it contemplates the case of a bankrupt lessee only, not of an assignee of the term. The statute operates only as a personal discharge of the bankrupt, for it does not say that the lease and the covenants shall be at an end, but merely that the bankrupt lessee shall not be liable to be sued in respect of any subsequent non-observance of the covenants.

contended, that these words had been introduced merely *ex majori cautela*. Upon the best consideration we have been able to give this case, we are of opinion, that we ought not to consider the exception of meadow and pasture ground as made only for greater caution, but are bound to look upon it as introduced by way of special exception, and so to construe the clause: and, consequently, everything not so specifically excepted must be understood to fall within the general liability. We therefore think that the court of quarter sessions were wrong in striking out the company's name from the rate, and that the rate on them ought to have been allowed. Order of sessions quashed.

*WETHERELL v. JONES and Another. Jan. 26. [*221]

The statute 6 G. 4, c. 80, s. 124, enacts, that no dealer in British spirits shall sell, send out, &c., any plain British spirits exceeding the strength of twenty-five above proof, or any compounded spirits (except shrub) exceeding that of seventeen under proof, on pain of forfeiting such spirits.

Held, that this section does not apply to a distiller or rectifier, and, therefore, that where a rectifier had sold and sent out plain British spirits of the strength of twenty-seven and a half, such contract of sale was not illegal, nor were the spirits prohibited goods, and the seller might recover the price.

By s. 115 and 117 it is enacted, that no spirits shall be sent out of the stock of any distiller, rectifier, &c., without a permit first granted and signed by the proper officer of excise truly specifying the strength of such spirits, and by

Sect. 119. If any permit granted for spirits shall not be sent and delivered with such spirits to the buyer, such spirits shall, if not seized in the transit for want of a lawful permit, be forfeited to the buyer, and the seller shall be rendered incapable of recovering the same or the price thereof, and shall incur other penalties:

Held, that this latter section applied to cases only where the permit granted by the officers of excise has not been delivered with the goods to the buyer, and not to a case where the permit, though irregular, was delivered to him; and therefore where a rectifier of spirits had sent to the buyer spirits of the strength of twenty-seven and a half above proof, with a permit in which they were described as of seventeen below proof, it was held, that although the irregularity was the seller's own fault, and was a violation of the law by him, it still did not preclude him from suing for the price, the contract of sale being legal.

ASSUMPSIT for goods sold and delivered. The plaintiff was a rectifier of spirits, the defendant a confectioner. The defendant paid into Court a sum of money sufficient to cover the whole of the plaintiff's demand, with the exception of the price of twenty gallons of plain British spirits. At the trial before Patteson, J., at the sittings after Hilary term 1831, it appeared that these spirits were of the strength of twenty-seven and a half above proof, at the defendant's desire, and that they were delivered with a permit, in which they were described as being of the strength of seventeen under proof. It was objected, on the part of the defendant, that this transaction was illegal under the provisions of the 6 G. 4, c. 80. By that act British spirits are classed under three heads: first, spirits of wine; second, British plain spirits; third, British compound spirits. Spirits of wine, by sect. 114, must be of the strength of forty-three per cent. above proof; and by section 124, dealers in British spirits are prohibited from sending out any *British plain spirits exceeding the strength of twenty-five above proof, or any British com- [*222 pound spirits, except shrub, exceeding the strength of seventeen under proof, on pain of forfeiture. It was therefore contended that the spirits in question being twenty-seven and a half above proof, were prohibited goods; that they were too weak if considered as spirits of wine, and too strong if considered as British plain spirits or British compound spirits. It was also contended that sections 115 and 117 prohibited the sending out spirits without a permit expressing the true strength, and that by the 119th section, if no legal permit be delivered with the spirits, they are forfeited to the buyer. On these two points

the learned Judge nonsuited the plaintiff. A rule nisi was obtained for a new trial upon the ground that the 6 G. 4, c. 80, s. 124, did not apply to rectifiers, but to dealers in spirits only, who by the act of parliament were treated as a class distinct from rectifiers, and therefore that the spirits delivered were not prohibited goods; and, secondly, that although the plaintiff had been guilty of a violation of the law by sending out an irregular permit, yet that was a mere breach of a revenue regulation, and did not deprive him of the right to recover in this action; and *Brown v. Duncan*, 10 B. & C. 98, was cited.

Campbell and *Channell*, in Michaelmas term showed cause. Section 124 enacts, that no dealer in British spirits shall send out spirits but of a given strength therein required, on pain of forfeiture. The words "*dealer in spirits*" are sufficiently large to include rectifiers; and if that be so, these spirits were prohibited goods, and the plaintiff cannot recover; and the case is *distinguishable from *Johnson v. Hudson*, 11 East, 180, and *Brown v. Duncan*, 10 B. & C. 98. But, assuming that that clause does not apply to the case of a rectifier, section 115 enacts, that no spirits shall be sent out of the stock of any distiller, rectifier, &c., without a permit specifying among other things, the strength of such spirits; and it subjects all spirits sent out without such permit to seizure, and the rectifier, &c., so sending them to a penalty of 20s. per gallon; and section 117 enacts, "that no rectifier shall receive into his stock any spirits unless the permit shall, among other things, truly express the strength thereof;" and it subjects the spirits to seizure and the party receiving such spirits to a penalty of 100l. for every offence. Section 119 enacts, "that if any permit" (which must mean *lawful* permit) "granted for spirits shall not be sent and delivered with such spirits unto the buyer thereof, such spirits shall, if not seized in the transit for want of a lawful permit accompanying the same, be forfeited to the buyer, and the seller shall be rendered incapable of recovering the same, or the price thereof," and shall be liable to other penalties. Here there has been a violation of the statute, which prohibited the thing done under a penalty; and what is done against an express statutory provision, made for the benefit of the public, cannot be the subject-matter of an action. They cited *Bensley v. Bignold*, 5 B. & A. 335; *Langton v. Hughes*, 1 M. & S. 593; and *Law v. Hodgson*, 11 East, 300.

F. Pollock and *F. Kelly*, *contrâ*. Assuming that the plaintiff has violated the law by delivering spirits with *an irregular permit, that will not prevent his recovering the price from the defendant. *Johnson v. Hudson*, 11 East, 180; *Brown v. Duncan*, 10 B. & C. 98. The breach of the statute was in a matter of mere excise regulation. The contract itself was perfectly legal. The act does not expressly prevent a distiller or rectifier from recovering the price of the spirits sold, in any case but one, viz., where the permit granted by the excise has not been delivered to the buyer. Here the permit so granted, though irregular, has been delivered to the buyer. Then, as to these being prohibited goods, the 124th section applies only to dealers in British spirits, and not to distillers or rectifiers. The act of parliament, sect. 3, divides traders in spirits into four distinct classes: distillers, rectifiers, dealers in spirits, and retailers of spirits, and subjects them to different duties upon their respective licenses. The persons who are to be deemed distillers, are described in s. 11 as persons making or keeping any wash prepared or fit for distilling, or making low wines or spirits, &c., and having in their custody any still, &c. A rectifier is described in s. 103 as a person having at least one entered still of a particular description, and really and bonâ fide used for the rectifying or making of British compounds for sale. A dealer, in s. 122, is described as a person having in his custody any spirits exceeding the quantity of eighty gallons, not being an entered and licensed distiller, rectifier or compounder, or retailer of spirits. Then, if the 124th section applies only to dealers in spirits and not to distillers or rectifiers, it was not illegal in the

plaintiff, a rectifier, to send out spirits of the strength of twenty-seven *and a half above proof. The contract, therefore, in this case was not [225 illegal, and the goods were not prohibited. *Cur. adv. vult.*

Lord TENTERDEN, C. J., now delivered the judgment of the Court. After stating the facts of the case, and the objections arising out of the 6 G. 4, c. 80, ss. 115, 117, 119, and 124, his Lordship proceeded as follows:—Upon these grounds the plaintiff was nonsuited. But, upon a more careful examination of the act of parliament, we find that the 124th section relates only to dealers in spirits,—a class of persons particularly pointed out in the act, and distinguished from rectifiers; and that there is no provision in the act regulating the strength at which rectifiers may make or sell British spirits. The contract, therefore, in this case was not illegal, nor were the spirits delivered prohibited goods; and the first objection taken at the trial fails.

We find, also, that the 119th section, whereby spirits are forfeited to the buyer, is confined to cases where no permit whatever is delivered.

The question, therefore, is reduced to the effect of the 115th and 117th sections, regarding the delivery of a permit containing the true strength.

We are of opinion that the irregularity of the permit, though it arises from the plaintiff's own fault, and is a violation of the law by him, does not deprive him of the right of suing upon a contract which is in itself perfectly legal; there having been no agreement, express or implied, in that contract, that the law should be violated by such improper delivery. Where a contract which a plaintiff seeks to enforce is expressly, or by implication, *forbidden by [226 the statute or common law, no court will lend its assistance to give it effect: and there are numerous cases in the books where an action on the contract has failed, because either the consideration for the promise or the act to be done was illegal, as being against the express provisions of the law, or contrary to justice, morality, and sound policy.

But where the consideration and the matter to be performed are both legal, we are not aware that a plaintiff has ever been precluded from recovering by an infringement of the law, not contemplated by the contract, in the performance of something to be done on his part.

Consequently, the rule for a new trial must be made absolute.

Rule absolute for a new trial.

SIMPSON v. LEWTHWAITE. Jan. 26.

In pleading a prescriptive, private way, it is not necessary to describe all the closes intervening between the two termini: And therefore, where, to trespass for breaking and entering the plaintiff's closes, the defendant pleaded "that he was seised in fee of land next adjoining to one of the said closes in which," &c., and then claimed, in respect of the said land, a way from the said land unto and into, through, over, and along the said closes in which, &c., and unto and into certain common king's highway; and at the trial the defendant proved a prescriptive right of way from his land into and over the land of third persons, and thence into and over the plaintiff's closes, and thence into a common highway: Held, that the plea was sufficiently proved; and this, though it appeared that part of the defendant's land did adjoin to one of the plaintiff's closes, and that, by permission of the latter, the defendant had sometimes used a way from that part of his land over the plaintiff's adjoining close, as well as the way to which the plea was meant to refer.

TRESPASS, for breaking and entering the plaintiff's closes. The defendant pleaded, that he was seised in fee of 100 acres of land with the appurtenances, situate, &c., contiguous and next adjoining to one of the said closes in which, &c., and prescribed for a foot, horse, and carriage way for himself and his tenants, *occupiers of the said land, to go, &c., from the said land [227 of the defendant unto, into, through, over, and along the said closes

in which, &c., and unto and into a certain common king's highway; and from the said common king's highway unto, into, through, over, and along the said closes in which, &c., unto and into the *said* land of the defendant."

At the trial before Parke, J., at the Cumberland Spring assizes, 1880, it was proved that the way claimed by the defendant ran from his own land *over certain other land*, and then over the plaintiff's closes into the highway; but that one of the plaintiff's closes was contiguous to the defendant's land above mentioned, and that the latter had sometimes, by permission of the plaintiff, gone across that close, but he did not claim any right of way there. The plaintiff's counsel contended, that the defendant had not proved the way set out in his plea; because that must be taken to be a way leading from the land of the defendant immediately into the plaintiff's close. The learned judge directed a verdict to be entered for the defendant; but gave the plaintiff leave to move to enter a verdict for him. A rule nisi to that effect was obtained in Easter term last.

F. Pollock now showed cause. The question is, whether there is a misdescription of the way in this plea, because the intermediate closes have not been set out? That was not necessary, and the plea is sufficient in this case. With regard to the statement in the plea that the defendant's land adjoined the plaintiff's, that is only a description of the land in respect of which the right *228] of way is claimed, and is not used in that part of the plea *which sets out the way. In *Rouse v. Bardin*, 1 H. Bl., 351, it was held, by Gould and Wilson, Js., to be unnecessary to set out the intermediate closes between the termini of a public highway. It would be attended with great inconvenience to require a party to set out all the intervening closes. *Wright v. Rattray*, 1 East, 377, may be cited on the other side; but there the prescription stopped short of the village of Allesley, unto which it was claimed by the declaration. *Jackson v. Shillito*, 1 East, 381, 382, is more like the present case. There the defendant prescribed for an occupation way from his own close unto, through, and over the said several closes in which, &c., to and into a certain highway, and from thence back again; and it appeared that one of the intervening closes was in the possession of the defendant himself: it was held that the prescription had been fully proved; for the defendant had, in fact, a right to go the whole line of way from one terminus to another. (He was then stopped by the Court.)

Courtenay and Blackburne, contrd. There was a material variance between the line of way pleaded and that which was proved. The plea claims a prescriptive right of way from the defendant's said land (which, by reference to the early part of the plea, must be taken to be land contiguous to one of the plaintiff's closes) into the plaintiff's closes, and thence into the highway. The prescriptive way proved was from the defendant's land, first into the land belonging to other persons, thence into the plaintiff's closes, and thence to the high- *229] way. The defendant was bound, in support of the plea, to prove a *right of way by prescription, leading from his own land immediately into the plaintiff's; and he did prove that he had used a way from that part of his own land which was contiguous to one of the plaintiff's closes, over the closes in which, &c. The plea applies rather to that way than to the one proved at the trial. If this verdict stand, the record will be evidence of a prescriptive right of way from that part of the defendant's land; whereas, the proof was, that the defendant used that way only by permission of the plaintiff. In *Rouse v. Bardin*, 1 H. Bl. 351, the principal point decided was, that, in pleading a public highway, it is not necessary to set out the termini; and there Lord Loughborough differed from the rest of the Court. But a prescriptive right of way must be strictly proved. In *Sloman v. West, Palmer*, 387, Dodridge, J., states, "If a man have a right of way from his house to the church, and the close next to his house over which the way leads is his own, he cannot

prescribe that he has a right of way from his house to the church, because he cannot prescribe for a right of way over his own land."

LORD TENTERDEN, C. J. The termini in this case are correctly described; and I am of opinion that, as a general proposition, where a private way is claimed by prescription, if both the termini be correctly stated, it is not necessary to take notice of all the intervening land. That is conformable to the opinions delivered by Gould and Wilson, Js., in *Rouse v. Bardin*, 1 H. Bl. 351, and to the decision in *Jackson v. Shillito*, 1 East, 381. The question here is, whether the facts of the case are sufficient to take it out of what I conceive to be the general rule? The evidence *shows that the defendant's land does in one part adjoin the plaintiff's; and the former has [*230 claimed a way from his *said* land into, through, and over the plaintiff's land. But he does not claim that way as leading from *that part* of his land which adjoins to one of the plaintiff's closes: if he had so done, he would have failed in proof. Another fact is, that the defendant had used, by the plaintiff's permission, a way from that part of his land which is contiguous to the plaintiff's, over the land of the latter, into the highway. The defendant, however, cannot be supposed by his plea to have alluded to that way on which he had no right, and which he had only used by permission; but must be taken to speak of that way to which he established his right. There is nothing, therefore, to take this case out of the general rule; and the verdict was right.

LITLEDAL, J. The defendant alleges that he is seised in fee of land contiguous to the plaintiff's. Now it was not necessary to prove, in support of that allegation, that the whole of that land adjoined the plaintiff's; it was sufficient to show that any part of it was contiguous. Then the defendant claims a certain way from his *said* land unto, over, and through the plaintiff's close. The word "*from*" does not necessarily import "*next immediately*." That word may be satisfied though there be several closes intervening between the defendant's land and the plaintiff's closes. Thus a highway may be said to lead from one town unto another, although there may be between the two many intervening places. *Unto* was the word anciently used in pleading, (a) though *"*towards*" has been introduced in modern times. *Rouse v. Bardin*, 1 H. Bl. 351, supports the pleading in this case; *Wright v. Rattray*, 1 East, 77, was decided on the ground that the right of way had been destroyed in part by unity of possession and a subsequent conveyance. It would be very inconvenient to require a party to set out all the intermediate closes; for their identification would be very difficult after a great lapse of time.

PARKE, J. The question is, whether the allegation in the plea is supported by the evidence? The plea claims an immemorial right of way from the *said* land of the defendant, unto, into, through, over, and along the said closes in which, &c., and into a certain highway. Now, assuming that the word "*said*" incorporates by reference the description given to the defendant's land in the early part of the plea, so as to confine the way in proof to one commencing in land of the defendant adjoining to one of the plaintiff's closes; it was proved, in fact, that part of the defendant's land, in respect of which the way was claimed, did adjoin one of the plaintiff's closes. It was therefore proved, that the defendant had a right to go from *his said land* into and unto the plaintiff's close. All the facts alleged in the plea, then, were established by the evidence. But it appeared, also, that the way claimed from the defendant's land went over certain other land before it reached the plaintiff's close; and it was contended that there was a misdescription, because the averment of a right of way from the defendant's land unto and into, over and along, the plaintiff's closes, unto and into a common highway, necessarily imported that the way claimed

(a) See Lord Kenyon's judgment in *Wright v. Rattray*, 1 East, 381.

*232] went from *the defendant's land immediately* into the plaintiff's closes, or that the plea must be construed as if it claimed the way from that part of the defendant's land which was contiguous to one of the plaintiff's closes: and, undoubtedly, to authorize such a construction, these latter words must be considered as embodied in the description of the way in the plea; for there is no authority to show that where a way is claimed in a plea from the defendant's land into the plaintiff's closes, that necessarily imports that it leads from the defendant's land *immediately* into those closes. On the contrary, the opinions of Gould and Wilson, Js., in *Rouse v. Bardin*, 1 H. Bl. 351, show, that such an allegation means only that the way leads from the defendant's lands over the plaintiff's closes to the highway; and that it was satisfied by proof of such a way as given in this case, although it also appeared that land of third persons intervened between the defendant's and the plaintiff's. Wilson, J., says there, "The objection in this case is, that the way is stated to lead to the Fulham road; but that, before it reaches the Fulham road, it goes for a little space on another highway. But I do not conceive that to be a material variance. I understand the allegation to import no more than this, namely, that there is a highway over the close, on which you may go from the Fulham road to the Kensington road; but not that the Fulham road joins to the close over which the highway leads. But, even if that were the import of the allegation, I should have considerable doubts whether this were a variance. But, clearly, the allegation means no more than this; there is a highway over the close leading *233] *from the Fulham road to the Kensington road, which I think was sufficiently proved by the evidence." According to the doctrine laid down in that case, the plea claiming a way from the defendant's land into and over the plaintiff's close is well supported by proof that it goes from the defendant's land into and over the land of other persons, and thence into and over the plaintiff's. That being so, the verdict was right.

TAUNTON, J. There is one difference between pleading a public and a private way: in the former case, it is not necessary to set out the termini, in the latter both must be set out with certainty. It is not necessary, however, to set forth with precision all the closes over which the private way extends. There may be a convenience in requiring all the intervening closes to be set out; because the plaintiff thus knows the right claimed, and the record may be more certain evidence of the right established; but on the other hand, there may be great practical inconvenience; for, at the trial, the defendant will be encumbered with the difficulty of proving a way over all those closes. There is no case, however, which decides that the intervening closes need be set forth. Then, was the way here proved as claimed? It is claimed from the defendant's land, over the place trespassed upon, unto and into the king's highway. It was proved to be from the defendant's land over the plaintiff's close, and into the highway. The circumstance of there being some land intervening between the defendant's and the plaintiff's close does not disprove the allegation in the plea. And I think the mere accidental fact of the plaintiff possessing land adjoining to part of the defendant's, from which part the defendant sometimes *234] passed across the *plaintiff's close, cannot make any difference: for if the rule of pleading be satisfied as to the right of way relied upon, it cannot signify that there may be another road which would better satisfy the description. This view of the case is supported by *Jackson v. Shillito*, 1 East, 381, and the opinions of two of the Judges in *Rouse v. Bardin*, 1 H. Bl. 351. *Wright v. Rattray*, 1 East, 877, is distinguishable from the present case, because there the party had not a right of way "unto" the place named; he had lost a part of the way by unity of possession and a subsequent conveyance without reserving the right. Here the evidence satisfies the description of the way in the plea.

Rule discharged.

WARD v. DEAN. Jan. 27.

An arbitrator awarded that the plaintiff had no cause of action, and that a verdict should be entered for the defendant; and then, by mistake, directed that the costs of the reference and award should be paid by *the defendant*, meaning the plaintiff: Held, that the arbitrator, having executed his award in this form, could not rectify it. The plaintiff moved the Court for a taxation of his costs as adjudged; or that the award, which had been executed in duplicate, and one copy afterwards corrected by the arbitrator, might be set aside. The defendant not agreeing to this latter proposal, the Court ordered a taxation.

THIS cause was referred at Nisi Prius to a barrister, who, by his award, executed in duplicate, adjudged "that W. H. Ward had no cause of action against J. Dean; that a verdict should be entered for J. Dean instead of the verdict and damages which had been found for the plaintiff; and further, *that J. Dean should pay the costs of the reference and award.*" The arbitrator intended that the plaintiff should pay the costs, but, by mistake, charged them upon the defendant. Having discovered his error, he communicated it, the next day but one after making his award, to the parties, each of whom *had received a stamped copy. The plaintiff refused his consent to any alteration, in- [*235 sisting that the arbitrator could not make it after having executed his award. The defendant's copy was corrected, with his consent, by the arbitrator, according to his original intention, and before the expiration of the time allowed for making his award. Notice was given to tax the plaintiff's costs of the reference and award; but on hearing the facts the Master declined proceeding. Platt afterwards obtained a rule calling on the defendant to show cause why it should not be referred to the Master to tax the plaintiff's costs as awarded; or why the award should not be set aside, on the ground of the arbitrator having omitted to decide part of the matters in difference, or having decided that the costs of the reference and award should be paid by the plaintiff and also by the defendant.

Hutchinson and *Arnold* now showed cause; and, in addition to affidavits of the above facts, put in a certificate by the arbitrator, stating that he had used the defendant's name by mistake for the plaintiff's, and that he was ready, if required, to make affidavit to that effect. (As to this, *Platt, contra*, cited *Gordon v. Mitchell*, 3 B. Moore, 241, where, an award being clear on the face of it, the Court of Common Pleas refused to admit an affidavit by the arbitrator to explain his intentions.) The arbitrator's meaning being ascertained, and the mistake evident, the award ought not to be enforced, except as rectified in the defendant's copy. It is true, the Court held in *Henfree v. Bromley*, 6 East, 309, that an umpire having executed his award, could not, even before delivery, make an alteration in *the sum awarded; but there the proposed alteration might have implied a new exercise of judgment, here [*236 it is only the correction of an obvious mistake. [PATTESON, J. It has been held, that a miscalculation in figures could not be corrected by the arbitrator after executing his award, *Irvine v. Elton*, 8 East, 54.] There it was said that such a mistake might include the essential merits. It was not a case like the present, where the arbitrator's meaning is clear on the award itself, and nothing is asked but to have the expression of his will made to correspond with his intention. At all events, the Court may withhold the assistance now demanded for enforcing this award. [Lord TENTERDEN, C. J. Then the plaintiff may bring an action upon it.]

Platt, contra. The award is either good or bad altogether, and must so be dealt with. The arbitrator could not exercise a new act of judgment after having once made his award.

Lord TENTERDEN, C. J. He had exercised his judgment, but the award does not correspond with it. However, if it is insisted that the award shall

not stand as altered, I am afraid all we can do is to set it aside, if that is the defendant's wish.

LITTTLEDALE, TAUNTON, and PATTESON, Js., concurred.

The defendant, however, preferred paying the costs under the present award, and the rule for taxation was made. Absolute.

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*The KING v. MOATE. Jan. 27.

An indictment removed into K. B. by the defendant, and made a special jury cause by the prosecutor, came on to be tried, and was immediately referred. The order of reference stated, that if the arbitrator should be of opinion that the defendant was guilty and the prosecutor entitled to costs, the defendant agreed to pay the costs. The arbitrator did so find:

Held, that the prosecutor could not recover the costs of the special jury, since the Judge had not certified for those costs (pursuant to 6 G. 4, c. 50, s. 84), and the order of reference did not expressly give a power of doing so to the arbitrator. Also that the general term "costs" in this order did not include those of the reference and award.

THIS was an indictment for a nuisance, removed into the King's Bench at the defendant's instance. The prosecutors obtained a special jury. On the cause being called on for trial at the Middlesex sittings, June 1831, before Lord Tenterden, C. J., the defendant's counsel proposed a reference, and an order of Court was made, by consent of the parties, that it should be referred to a gentleman of the bar to determine whether any nuisance had been committed, and if so, what should be done by the defendant. The order then continued: "And if he shall determine that there has been a nuisance, and shall be of opinion that in point of law the prosecutors are entitled to costs, the defendant agrees to consent to a verdict of guilty, and to pay the costs." The arbitrator made his award, finding, in a special manner, that the defendant had been guilty of a nuisance, and also adjudging that the prosecutors were by law entitled to costs. A verdict of guilty on such of the counts as had proved applicable, was endorsed on the record, and the prosecutors proceeded to tax the costs; but the Master refused to allow the costs of the special jury, because the Lord Chief Justice had not certified, pursuant to the statute 6 G. 4, c. 50, s. 34; the same in substance as 24 G. 2, c. 18, s. 1; nor would he allow the costs of the reference and award, being of opinion that such allowance was not authorized by the order of reference. A rule nisi was afterwards obtained

*238] *for reviewing this taxation, on the ground that the costs of the special jury were "reasonable costs" within the meaning of 5 & 6 W. & M., c. 11, s. 3, and ought in justice to be allowed, inasmuch as the Judge had been prevented from certifying according to the statute, "immediately after the verdict," by the proposal to refer, which originated with the defendant himself: and, as to the costs of the reference and award, that they were included in the undertaking to pay costs which was embodied in the order of reference.

Sir James Scarlett and Gurney now showed cause. No part of the costs sought by this motion is provided for by the order of reference. The costs of the cause must, therefore, be taxed as they would have been in the ordinary course on a trial and verdict of guilty. As to the costs of the reference and award, Firth v. Robinson, 1 B. & C. 277, is conclusive.

The Attorney-General, *contrd.* The statute 5 W. & M., c. 11, s. 3, allows the prosecutor (if he be the party grieved) reasonable costs on conviction of the defendant, and the costs of the special jury are reasonable under the circumstances. The costs of the reference and award must evidently have been contemplated by the parties in the submission upon which the order of reference was framed, and, in such a case, the general word costs may be taken to include these. Wood v. O'Kelly, 9 East, 436, is an authority to this effect,

which does not appear to have been noticed in *Firth v. Robinson*. (He also referred to *Hullock on Costs*, p. 422, 2d edit., where several of the cases on this subject are reviewed.)

*Lord TENTERDEN, C. J. The act 6 G. 4, c. 50, s. 34, expressly provides that the costs of a special jury shall not be allowed to the party applying for [*239 it, unless the Judge who tries the cause shall, immediately after the verdict, certify under his hand that it was a cause proper to be tried by a special jury. It has always been the practice, in my recollection, when the cause went to a reference under circumstances which did not admit of a certificate by the Judge, to provide, by a special consent of the parties, that the arbitrator should have the power of awarding those costs. Without such power in the arbitrator, and such award made, they cannot be had. As to the costs of the reference and award, *Wood v. O'Kelly*, 9 East, 436, was cited to show that they may be taxed under this order; but the more modern case referred to on the other side is an authority to the contrary: and it has been the practice, as far back as I can remember, to give the arbitrator an express authority over these costs in the order of reference. It seems to me that the costs mentioned in the present order can only be construed to mean such as the party would be entitled to under the general rules of law, and do not include those contended for.

LITLEDAL, TAUNTON, and PATTESON, Js., concurred.

Rule discharged.

*The KING v. The Inhabitants of GRAVESEND. Jan. 28. [*240

The statute 10 G. 2, c. 31, s. 5, after reciting the inconvenience which happens by watermen, &c., taking apprentices before they are housekeepers or have any settled habitation for themselves or their apprentices, enacts, that it shall not be lawful for any waterman, though a freeman of the (waterman's) company, or his widow, to take to keep any person as his or her apprentice, unless he or she shall be the occupier of some house or tenement wherein to lodge him or herself and such apprentice; and that he or she shall keep such apprentice in the same house or tenement wherein he or she shall lodge or lie, on pain of forfeiting 10*l*. for every offence.

By section 4, it is provided, that no such freeman or freeman's widow shall take or retain more than two apprentices at the same time, under a penalty:

Held, that by section 5, any contract to take an apprentice, entered into by such freeman or widow, not being an occupier of some house, &c., or having already two apprentices, was prohibited; and, therefore, that where a pauper bound himself by indenture of apprenticeship to serve the widow of a waterman, she not having such house, &c., but it being understood that he was to live at the house of a freeman of the company (which he did), and to serve him conformably to the indenture, he having two other apprentices at the time, such indenture was absolutely void, and no settlement was gained by serving under it.

UPON an appeal against an order of two justices, whereby Joseph Needham, waterman, and Sarah his wife, and their children, were removed from the parish of West Thuncock in Essex, to the parish of Gravesend in Kent, the sessions confirmed the order, subject to the opinion of this Court on the following case:—

Needham, the pauper, before and when he was bound apprentice as after-mentioned, was living in the parish of Gravesend with Mr. Twiss, lighterman and freeman of the waterman's company, as his servant. Twiss had at that time two apprentices regularly bound to and serving him. It was agreed between Twiss and Needham that the latter should be his apprentice, and with this view he was sent up by Twiss to Waterman's Hall to be bound to Mrs. Elizabeth Pearce, who was entitled, as the widow of a freeman of the waterman's company, to take apprentices. She was living at Gravesend, at the house of her daughter; and she had no business or residence of her own. At Waterman's Hall Needham was regularly bound to Mrs. Pearce for seven years

from the 11th of October, 1804, but upon an understanding that he was
 *241] to serve Twiss. He never went to or served Mrs. Pearce. She retained one part of his indentures, but Twiss bore the expenses of the binding, and paid her a sum of money every quarter in consideration of Needham's services as long as Needham stayed with him. The latter resided with him in the parish of Gravesend, and served him, conformably to the indentures, for about two years; he then ran away, and never returned to the service. On the 19th of January, 1815, he was made a freeman of the waterman's company, as having served Elizabeth Pearce. It is the practice of the waterman's company to confer the freedom of that company upon apprentices who may not have served their masters regularly during all the time for which they were bound, if the masters are satisfied, or are remunerated for lost time. The court of quarter sessions held that the indentures were not rendered void by the stat. 10 G. 2, c. 31, s. 3 and 5, and that service under them conferred a settlement; and they confirmed the order of removal, subject to the opinion of this Court as to the validity of the indentures. The case was argued in Michaelmas term by

Knox and *Bullock*, in support of the order of sessions. No question arises in this case on the fact of the apprentice having been bound to one person for the purpose of serving another, it having been decided that such a binding is valid; *Holy Trinity v. Shoreditch*, 1 Str. 10. The true question is, then, whether, under the 10 G. 2, c. 31, s. 4 and 5, (a) this indenture be void, or only
 *242] voidable? There are no words declaring indentures made contrary to the act void or unavailable. There is much difficulty in defining the principle of the cases where indentures have been considered void, or only voidable. The last case, *Rex v. Hipswell*, 8 B. & C. 466, arose on the 28 G. 3, c. 48, s. 4 (to prevent the binding of children under eight years of age as chimney-sweepers); an indenture was there decided to be void, and not merely voidable, on the ground that it would be contrary to the spirit of the act to consider it only voidable where the provision was introduced for a public purpose, and to protect those who were incapable of protecting themselves, as in the case of infants of such tender years. It was, indeed, considered that void may be construed voidable; and if this had not been intimated, it must have been inferred from the Court giving such a reason for its decision, as that act declares indentures contrary to its provisions absolutely void in law to all intents and purposes. In *Rex v. St. Nicholas, Ipswich*, Burr. S. C. 91, 2 Str. 1066, and *Rex v. Gainsborough*, Burr. S. C. 586, which have frequently been recognised (the former particularly in *Gray v. Cookson*, 16 East, 13, the ques-
 *243] tion arose under the 5 Eliz. c. 4, s. 26 and 41, the last of which declares that all indentures not conformable to its provisions shall be "void to all intents and purposes;" and in those cases it was holden, after great consideration, that indentures not in conformity with the act were voidable only, and settlements might be acquired under them. In *Gye v. Felton*, 4 Taunt. 876, an action was brought for harbouring an apprentice; and it appeared that the indenture was

(c) To avoid the great inconvenience which happens by wherryman and such other watermen and lightermen as aforesaid daily taking apprentices, before such wherryman, watermen, or lightermen are housekeepers, or have any settled habitation for themselves and their apprentices to lodge in, whereby pilfering and disorderly actions are committed, it is enacted, "that it shall not be lawful for any wherryman, waterman, or lighterman, though a freeman of the company, or his widow, to take, retain, or keep any person as his or her apprentice, unless such waterman, wherryman, or lighterman, or the widow of such waterman, wherryman, or lighterman, shall be the occupier of some house or tenement wherein to lodge him or herself, and his or her apprentice; and such waterman, wherryman, or lighterman, or his widow, shall keep such apprentice to lodge and lie in the same house or tenement wherein he or she doth lodge or lie, upon pain that every master or mistress acting otherwise, and offending against this act, being thereof convicted, shall for every such offence forfeit and pay the sum of 10*l*." Sect. 4. prohibits, under a penalty, the taking more than two apprentices at a time by any freeman or his widow.

not conformable to this statute, and that the master was liable to a penalty: the Court there held the nonsuit to be proper, simply on the ground that the plaintiff could not avail himself of a right originating in his own violation of the law; for they did not hold that the indenture itself was void, being precluded from so doing by the above cases. The statute here in question supposes that an indenture, though not conformable to its provisions, may be valid for some purposes, since it specifies in sect. 3, certain disabilities that attach to the apprentice bound contrary to the act (the master only being subject to the penalty imposed by sect. 5), which would have been unnecessary, if the legislature had intended the apprenticeship to be absolutely void. Again, the mischief contemplated, of apprentices serving masters with whom they do not reside, was not occasioned here, for the apprentice resided with his actual master. The regulation as to the number of apprentices is for the advantage of the waterman's company, and not for the public benefit; the number being thus restricted, in order that all the members or their widows may have an equal chance of obtaining premiums for binding, and becoming entitled to the earnings of *apprentices. It would be too much to hold this indenture [*244] void for a non-compliance only with the letter of the statute; and there is no case where a settlement by apprenticeship has been defeated, unless a statute has expressly declared that no settlement shall be acquired, as the 56 G. 3, c. 139, "for regulating parish apprentices;" or, unless in terms the indenture is declared void, and not available for any purpose.

Ryland and Round, contra. The taking or keeping of an apprentice by the widow of a waterman, who has not a house or tenement wherein to lodge the apprentice, being prohibited by the statute, the contract to take and keep the apprentice must also be prohibited. It is laid down by Holt, C. J., in *Bartlett v. Vinor*, Carth. 252, "that every contract made for or about any matter or thing which is prohibited and made unlawful by any statute is a void contract, though the statute itself doth not mention that it shall be so, but only inflicts a penalty on the offender, because a penalty implies a prohibition, though there are no prohibitory words in the statute; as, for instance, in the case of simony, the statute only inflicts a penalty by way of forfeiture, but doth not mention any avoiding of the simoniacal contract; yet it hath always been held that such contracts being against law, are void." And this position as to simony is confirmed by Gibbs, C. J., in *Greenwood v. The Bishop of London*, 5 Taunt. 727. In *Rex v. Hipswell*, 8 B. & C. 466, it was held, that no settlement was gained by serving under an indenture whereby a child under eight years of age was bound apprentice to a chimney-sweeper. There, indeed, the statute *28 G. 3, c. 48, s. 4, expressly made void all such indentures. The [*245] statute 10 G. 2, c. 31, contains no such provision; but the third section enacts, that every apprentice bound contrary to the true intent of the act shall not obtain any freedom by such apprenticeship, or be entitled to any the privileges and advantages by such apprenticeship, which watermen free of the company are entitled to, but shall be subject to pay for every time he shall work any boat, &c., 10*l.*; and section 5 prohibits any waterman or his widow (and that under a penalty) from taking an apprentice, unless such waterman or widow shall be the occupier of some house or tenement wherein to lodge him or herself and such apprentice. Coupling these two sections together, and construing them with reference to the object which the legislature had in view, the statute does not amount to a legislative declaration that an indenture of apprenticeship made with a waterman or his widow not having a place of residence wherein to lodge the apprentice, shall be absolutely void. And this is an answer to any argument founded on *Holy Trinity v. Shoreditch*, 1 Stra. 10.

Our. adv. vult.

Lord TENTERDEN, C. J., now delivered the judgment of the Court.

This case was argued in last Michaelmas term. In support of the settlement of the pauper in Gravesend, and of the order of sessions, it was contended that

the indenture of apprenticeship was not void, but only voidable at the election of the parties to it, and *The King v. St. Nicholas, Ipswich* (or *St. Nicholas and St. Peter's*), *Burr. S. C. 91*, *and some other cases which uphold *246] the authority of that case, were cited in support of the argument.

On the other side it was contended that the binding in this case, being in direct violation of the provisions of the statute 10 G. 2, c. 31, was absolutely void; and the case of *The King v. The Inhabitants of Hipswell*, 8 B. & C. 466, was relied upon as an authority in point.

Upon reference to the statute 5 Eliz. c. 4, and the 10 G. 2, c. 31, a manifest distinction will be found. The clause of the statute of Elizabeth declaring that indentures and bindings otherwise than by the statute is limited and provided, shall be clearly void, is the forty-first section. The clause which was relied upon in *The King v. St. Nicholas*, 6 *Burr. S. C. 91*, for the purpose of showing the indenture to be void, is the twenty-sixth section. But this twenty-sixth section is not negative or prohibitory; it is permissive only. It allows a householder in a town corporate to take an apprentice of the description therein mentioned for seven years. The apprentice thus allowed to be taken is the son of a freeman, not occupying husbandry, nor being a labourer, and inhabiting in the same or some other city or town corporate. But this section does not enact that no apprentice shall be taken, who is not the son of such a freeman as therein mentioned, or that an apprentice shall not be taken for less than seven years. And if a binding for less than seven years had been held void, it would have been difficult to say that the binding in a town corporate, of the son of a person not falling within the description in the statute, must not be void also; and this appears to have been the opinion of Lord Hardwicke. It is well known that the policy or *expediency of this and some other of *247] the provisions of this statute of Elizabeth had ceased to be acknowledged before the decision in the case I have mentioned. And the other Judges of the Court, according to the report by Burrow, observed that the act seemed more beneficial to corporations than to the public in general. Indeed, it bears a strong resemblance to the system of keeping persons in the caste in which they were born, that prevails in some parts of the East. But the fifth section of the statute 10 G. 2, c. 31, is negative and prohibitory. It recites a mischief, and for remedy thereof enacts that it shall not be lawful for a waterman or his widow to take, retain, or keep an apprentice, unless he or she be the occupier of a house or tenement to lodge him or herself and the apprentice. Sect. 4 prohibits a waterman from taking more than two apprentices. It is clear, upon the facts found, that the binding of this pauper was an evasion of these sections.

The contract, then, was a prohibited contract, and this case falls within the principle of the decision of this Court in *The King v. The Inhabitants of Hipswell*, 8 B. & C. 466. Upon the authority of that case, and upon the distinction between a prohibited contract and a provision like that of the twenty-sixth section of the statute of Elizabeth, we are of opinion that this indenture of apprenticeship was absolutely void, and that no settlement could be gained under it; and consequently the rule for quashing the orders must be made absolute.

Orders of sessions quashed.

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*FORD v. JONES. Jan. 28.

Where a cause is referred to two arbitrators, and their umpire, in case of dispute, and it is afterwards agreed to appoint an umpire, such appointment must in no case be decided by chance. And, therefore, where each of two arbitrators had named a person to be umpire, and neither was disapproved of, and it was thereupon proposed that the final choice should be determined by lot, which was accordingly done in the presence and with the concurrence of the arbitrators and parties, an award made by the umpire so chosen was set aside. *

THIS cause was referred by agreement to two arbitrators, and their umpire in case of dispute. The two, after hearing the case, differed as to the decision; and at a meeting, which they and both the parties attended, it was determined that an umpire should be chosen, and each arbitrator named one. Neither was objected to. Some one then proposed that the two names should be written on papers, put into a hat, and one drawn out, and the party drawn should be the umpire. A name was accordingly drawn in this manner, with the consent of all present; and the umpire so chosen afterwards made his award in the plaintiff's favour. The defendant being dissatisfied with this decision, and having discovered, as it was now alleged, that the umpire was an objectionable person, obtained a rule to show cause why the award should not be set aside, on the ground that the choice of an umpire by lot was irregular.

Campbell, now showed cause. The facts here are distinguishable from those of the case, *In the Matter of Cassell*, 9 B. & C. 624, where the Court overruled *Neale v. Ledger*, 16 East, 51, and held an appointment by lot to be irregular. In both of those cases each arbitrator preferred the umpire named by himself; here the umpires named were equally approved of by each, and, therefore, the choice of one by lot was only like the daily practice of taking twelve names from the jury pannel by ballot to try causes. [Lord TENTERDEN, C. J. That is by statute.] In **Cassell's* case the arbitrators had agreed to decide by lot, before any one had been nominated by either, which is also a ground of distinction. [*249] See *Young v. Miller*, 3 B. & C. 407. *Harris v. Mitchell*, 2 Vern. 485, and *Wells v. Cooke*, 2 B. & A. 218, which may be mentioned on the other side, both differ in circumstances from the present case. If, indeed, *Neale v. Ledger* is overruled to the extent of establishing that the nomination of an umpire by lot can, under no circumstances, be valid, this motion cannot be resisted. But the Court has not yet gone that length.

Cockburn, *contra*. The evident object of the Court in the case *In the Matter of Cassell*, 9 B. & C. 624, was to set aside nice distinctions, and exclude chance altogether in the appointment of umpires. Lord Tenterden, C. J., says there, "The parties to the reference expect the concurring judgment of the two in the appointment of a third; and we think it better not to decide the present case upon any nice ground of resemblance to, or difference from, the others, which might lead to discussion and litigation in other cases, but to lay it down as a general rule, that the appointment of the third person must be the act of the will and judgment of the two, must be matter of choice and not of chance, unless the parties consent to or acquiesce in some other mode." Here the parties had not the concurring judgment of the arbitrators in the ultimate appointment, admitting that they had it in the nomination of the two out of whom the appointment was made. In *Neale v. Ledger*, 16 East, 51, which is overruled by *Cassell's* case, neither of the parties named for umpire was disapproved of; there was only a preference by each arbitrator of the person named by himself.

*Lord TENTERDEN, C. J. I am of opinion that this rule ought to be made absolute. The principle laid down in the case *In the Matter of Cassell*, 9 B. & C., 624, appears to me very sound, that the appointment of an umpire must be matter of choice and not of chance. I thought the rule had been so clearly stated in that case as to exclude all subtle distinctions for the future. [*250]

LITLEDAL, J. I am of the same opinion. It is alleged here that the parties themselves, at a meeting with the arbitrators, assented to the proceeding by lot, but such assent must always be a matter of doubt.

TAUNTON and PATTESON, Js., concurred.

Rule absolute.

The KING v. The Justices of KENT. Jan. 28.

The statute 13 G. 2, c. 18, s. 5, requires that the party suing forth any certiorari shall have given notice thereof to the justices whose order is in question. A certiorari cannot be issued at the instance of any but the party who gave such notice, although he avowedly drops the proceeding, and although it is too late to give a fresh notice.

In Easter term, 1831, a rule was made absolute for a certiorari to remove into this Court an order of justices for diverting a highway and turning the new line of road through the lands of Sir Thomas Maryon Wilson, Bart., with his consent; and also to remove an order of sessions for confirming and enrolling the former. See *Rex v. Horner and Roupell*, 2 B. & Ad. 150. No further step having been taken, Sir T. M. W. in the last vacation obtained a summons to show cause before a Judge at chambers why the certiorari should not
*251] *forthwith be lodged by the parties to whom the rule had been granted, and why they should not get the case set down in the crown paper: but on the attendance before the Judge, it was stated on their behalf that they abandoned their rule. In the present term D. Pollock obtained a rule, calling upon the justices to show cause why Sir T. M. W. should not be at liberty at his own instance to issue the writ, and to take such further proceedings thereon as should be necessary for quashing the orders.

Erle now showed cause. The act 13 G. 2, c. 18, s. 5, requires it to be proved on oath that the party suing out any certiorari has given notice thereof to the justices whose proceedings are to be removed. The name of the party is an essential ingredient in the notice, *Rex v. The Justices of Lancashire*, 4 B. & A. 289. It is impossible, therefore, that the notice should be given by one person, and the writ taken out by another.

D. Pollock, contrd. The notice here was given, at the time, consistently with the act, but is abandoned with the manifest purpose of preventing the orders from being brought up to be quashed. There are no means of compelling these parties to proceed, and it is now too late for a new application to the Court, as that, by sect. 5 of the act, must be made within six months next after the order. The object of this motion is only to follow up what the opposite parties have regularly commenced. Any terms the Court think reasonable will be acceded to.

*252] *The Court, however, thought the words of the act "unless it be duly proved upon oath that *the said party or parties suing forth the same*, hath or have given six days' notice," conclusive against the motion; and the rule was
Discharged.

Ex parte GARRETT and CLARK v. The Mayor of NEWCASTLE. Jan. 30.

In the absence of any precedent, the Court refused a rule nisi for a mandamus calling on the mayor of a town to propose a resolution to the burgesses in guild assembled, for repealing certain by-laws; though it was alleged that by-laws and ordinances might, by charter, be made, and had formerly been made, at such guilds.

On a former day of this term, Merewether, Serjt., moved for a rule to show cause why a mandamus should not issue, calling upon the mayor of Newcastle-upon-Tyne to propose a certain resolution to the burgesses of that town in guild assembled, upon the following circumstances, alleged in the affidavits upon which the application was founded. The mayor and burgess of Newcastle are a corporation, of which the parties applying to the Court are members. Three assemblies of the corporation, called guilds, are held in the year, by custom, on stated days. By charters of Queen Elizabeth and James the First, the common council or major part thereof being assembled, of which the mayor and

six aldermen were to be seven, or the mayor and burgesses or the major part, whereof the mayor was to be one, being gathered together, were empowered to make by-laws for the government of the mayor, burgesses, and inhabitants, and of all merchants and others resident in the town, and for other particular purposes, which it is not material to enumerate. The mayor always presides at the guilds. As soon as he takes his place, *proclamation is made for [*253 all persons having anything to do at the court to come forth and be heard: after which the stewards and wardens of the several incorporated companies of the town frequently put questions, and make observations or complaints, to which the mayor gives such answers and explanations as are necessary, and he announces such matters as require to be communicated to the guild: the town clerk then calls over the names of persons claiming their freedom, and these being disposed of, the assembly is dismissed. The affidavits stated, that the right of making laws and orders at these guilds, though an ancient privilege, had of late been disused, and the only formal business transacted had been the hearing of claims to freedom; but that orders appeared to have been made in open guild in 1641, 1650, and 1662, and were believed to have been made at other times: and that in 1820, at a guild of burgesses, a resolution was passed, and signed by the then mayor, that that court considered itself a court of record: That, nevertheless, the mayors had of late years, when presiding at guilds, except on the last-mentioned occasion, refused to put any resolution or motion to the burgesses there, or to sanction the making of any laws or ordinances: and in particular it was stated, that at a guild on the 16th of last January, the parties now applying, with the concurrence of a majority of the burgesses assembled, moved and seconded a resolution, "that all by-laws annulling or lessening the power or authority of the mayor and burgesses in guild assembled, should be repealed:" and that the mayor, being asked to put this motion, refused to do so either then or at the next guild. The object of the present application was to compel the putting of this motion.

*The Court expressed a doubt whether such a mandamus could be granted, as the matter appeared to be one in which the mayor was to use [*254 his discretion, and they inquired whether there were any authority for such an application. The case was adjourned, in order that this might be ascertained. On a subsequent day in the term, (a)

Merewether, Serjt., said he had found no direct authority, but relied on the general power of the Court to interfere by mandamus where there was a public official duty to be exercised, and the non-performance of it occasioned an inconvenience for which there was no other remedy. It was said in *Machell v. Nevins*, 11 East, 84, n. (a), where the question related to the election of common councilmen, that the proposing of business to the corporation belongs to the mayor; but it was added, that if the mayor refuse to make elections (the business in question there), he may be compelled by this Court. It cannot be the right of a mayor to put an absolute veto upon the proceedings of the corporation, which he might do if the power here assumed were lawful. The argument of Sir Robert Atkins in *Rex v. Atkins*, 3 Mod. 3, is strong upon this point; and in *Rex v. Gaborian*, 11 East, 77, the Court refrained from giving any opinion in favour of such a power. *Cur. adv. vult.*

Lord TENTERDEN, C. J., now delivered the judgment of the Court. We have considered of this case, and can find no instance of a mandamus granted upon a similar application. We think that by granting such a *mandamus we should be taking upon us a power which does not belong to us, [*255 and which our predecessors have never exercised. There will, therefore, be no rule. *Rule refused.*

(a) Before Lord Tenterden, C. J., Littledale, Taunton, and Patteson, Js.

The KING on the Prosecution of M. SCALES, Esq. v. The MAYOR and ALDERMEN of LONDON. *Jan. 30.*

To a mandamus to the lord mayor and aldermen of London, to admit and swear in A. B. to the office of alderman, they returned that the court of mayor and aldermen had, from time immemorial, the authority of examining and determining whether or not any person returned to them by the court of wardmote as an alderman, was, according to the discretion and sound consciences of the mayor and aldermen, a fit and proper person and duly qualified in that behalf, whensoever the fitness and qualification of the person so returned had been brought into question by the petition of any person interested therein; and that it was a necessary qualification of the person to be admitted to the office of alderman, that he should be a fit and proper person to support the dignity and discharge the duties of the office; that A. B. having been returned to them by the court of wardmote as duly elected, a petition by persons interested in the election was presented to them, charging circumstances which rendered A. B. an unfit person to be admitted to the office of alderman; and that they took the petition into consideration, and having heard witnesses, did adjudge according to their discretion and sound consciences, that A. B. was not a person fit and proper to support the dignity and discharge the duties of the office:

Held, that the custom set out in the return was good and valid in law:

Held, secondly, that as the fitness of the person to be admitted was to be determined according to the discretion of the mayor and aldermen, it was sufficient for them to state in the return that they had exercised their discretion, and adjudged that A. B. was unfit, without giving particular reasons.

The prosecutor of a mandamus, to which a return has been made, having moved for a concilium, and the Court having, upon argument, adjudged that the return is sufficient in point of law, cannot afterwards traverse the facts contained in the return.

Quære, Whether after an issue in fact found in favour of the party making the return, the prosecutor can question the legality of the return.

MANDAMUS reciting that Michael Scales had been duly elected into the place and office of alderman of the ward of Portsoken, in the city of London, and ought to be admitted and sworn into the said office, and commanding the mayor and aldermen of the city of London to admit him thereto. The return began by stating (as in the case of *The King v. The Mayor and Aldermen of London*, 9 B. & C. 1), that the city of London was an ancient city, and that the citizens were a body corporate, &c., and that there were divers wards within *256] the city, and among others, that of Portsoken, and divers citizens and freemen who have been and are called aldermen, and that the office of alderman was one of public trust; that there was a court of record called the court of mayor and aldermen of the city of London; and that there were assemblies or courts called wardmote courts holden by virtue of precepts for, amongst other things, the election of aldermen, to which precepts returns were made into the court of mayor and aldermen:

It then stated, that the court of mayor and aldermen, according to the custom of the city from time whereof, &c., have had, &c., the cognizance, jurisdiction, and authority of examining, hearing, determining, and adjudging of and concerning the election and return of every person elected into any place or office within the said city at any such wardmote court, whensoever the merits of such election or return have been brought into question by the petition of any person interested therein to the said court of mayor and aldermen holden as aforesaid, and also of examining and determining whether or not any person so returned to the said court of mayor and aldermen as an alderman of any ward of the said city is, according to the discretion and sound consciences of the mayor and aldermen of the said city for the time being, a fit and proper person, and duly qualified in that behalf, whensoever the fitness and qualification of the person so returned have been brought into question by the petition of any person interested therein to the said court of mayor and aldermen holden as aforesaid; and that according to the custom of the said city from time whereof,

&c., it hath been and still is a necessary qualification of the person to be elected, admitted, and sworn into the place and office of an alderman of any *ward of the said city that such person should be a fit, able, and sufficient citizen [*257 and freeman of the said city; and also that a person to be admitted and sworn into such place and office as aforesaid, should be a fit and proper person to support the dignity and discharge the duties of the said office of an alderman of the said city, and the honour and charge of the said city, according to the discretion and sound consciences of the mayor and aldermen of the said city for the time being.

The return then stated (as in *Rex v. Mayor of London*), that a court called the court of common council had power to make by-laws for the better government, &c., of the said city, and it set out the by-laws made in the reign of Richard the Second and Queen Anne, touching the election of aldermen, and stated that before the former, and ever since the latter by-law, the aldermen of the divers wards had been elected at such wardmote courts, one alderman for each ward. It then further certified that a vacancy having occurred in the office of alderman of the ward of Portsoken, a wardmote court was holden at which divers persons present voted for the prosecutor, and he claimed to be duly elected alderman, and was returned duly elected to the court of mayor and aldermen; that Robert Carter and others, being citizens and freemen, and being persons interested in the said election, presented a petition to the said court of mayor and aldermen on the 8th of March, 1831, touching the merits of the said election, and against the admission and swearing in of the said M. Scales to the place and office of alderman of the ward of Portsoken, the effect of which petition was, that the said M. Scales was not a freeman of the city, having been admitted to his *freedom as having served an apprenticeship, whereas he had bound himself to such apprenticeship before [*258 he had attained the full age of fourteen years, and not afterwards, contrary to the laws and customs of the city: and that Edward Colebatch and others, being citizens and freemen, and being persons interested, &c., also petitioned the court on the same day and year, touching the fitness of M. Scales to be admitted and sworn into the said office, charging circumstances which in the judgment of the last-mentioned petitioners rendered the said M. Scales an unfit and improper person to be so admitted and sworn, and praying that the mayor and aldermen would direct proper inquiries to be made into the character, the conduct, and the integrity of M. Scales; and that they would not permit him to be sworn a member of the said court until the said mayor and aldermen were satisfied of his fitness to perform the duties which would be cast upon him, and to support the high honour and respectability of the said ancient corporation; and that evidence might, if it should so seem fit, be adduced and heard in support of the said petition. Whereupon the court of mayor and aldermen (after adjournment, and on divers days which were mentioned), took the petitions into consideration; and having heard the petitioners and M. Scales by their respective counsel and witnesses touching the merits of the election, and the qualification and fitness of M. Scales to be such alderman as aforesaid, did, according to the said ancient custom, examine, determine, and adjudge of and concerning the merits of the said petitions, and the qualification and fitness of M. Scales to be admitted, &c.; and adjudged that the said M. Scales was not, and they did then certify that in truth and in fact M. Scales then and there was not a *sufficient freeman of the said city to hold the said place and office, for the reason stated in the said first petition in that behalf; [*259 and they did also adjudge and determine, according to the discretion and sound consciences of the said mayor and aldermen, that the said M. Scales was not a person fit and proper to support the dignity and discharge the duties of the said place and office of an alderman of the said city; and they certified that for the causes aforesaid, and each of them respectively, M. Scales was not a sufficient citizen and freeman, nor a fit and proper person to entitle him to be

admitted and sworn into the place and office of alderman of the said ward of Portsoken, according to the custom of the said city; and they returned that the said M. Scales, for the reason in that behalf before alleged, was not duly elected into the place and office of alderman of the said ward of Portsoken, as by the said writ was supposed and suggested; and for these reasons and causes they, the said mayor and aldermen, could not admit and swear, nor ought they to admit and swear the said M. Scales into the said place and office, &c., as by the said writ they were commanded. The prosecutor having moved for a *concilium*, the case was set down in the crown paper, and in last Michaelmas term was argued by

Platt, for the crown. The return must be quashed, because the custom therein alleged is bad in point of law. By that custom, the defendants claim, first, a right of examining into the validity of every election by the court of wardmote; and, secondly, they claim a right, even though the party returned *260] in their judgment, he be a person not qualified to fill it. First, such a power is wholly inconsistent with the statute 11 G. 1, c. 18, s. 7, which enacts, that the right of election of aldermen for the several wards of the city of London, shall belong and appertain to freemen of the said city being householders, paying scot as thereafter mentioned, and bearing lot when required in their several and respective wards, and to none other whatsoever. Now, if the power assumed by the court of mayor and aldermen, under the alleged custom, be established, the act of parliament will be abrogated, for the election must be virtually vested in them, because, on a mere surmise that a petition has been presented to them, which they decide upon without assigning any cause upon which issue can be taken, they can reject every person proposed. Here, a petition surmises that a long time ago the prosecutor had commenced an apprenticeship, a few days, perhaps, before he was fourteen, and, therefore, he was not a good freeman. But he has been admitted to the right of freedom according to the custom of the city. By the refusal to admit him into the office of alderman, this corporate body, in effect, deprives him of his freedom, in which he has a vested interest. He was, at all events, a freeman *de facto*, and that is a sufficient qualification if he was chosen by the majority of the electors. Suppose, before this election, the corporate body had proceeded to oust him of his freedom, and a *mandamus* had issued to restore him, they could not have returned that certain persons had petitioned them, and had surmised matters which they had determined to be true. They must have expressly averred that they were true, and must have assigned the causes, so that this Court could decide upon their sufficiency.

*261] *Then the right claimed is inconsistent with the by-law of the reign of Anne, whereby it was enacted, that there should be returned only one sufficient citizen and freeman to the court of aldermen, instead of two as prescribed by the ordinance made under Ric. II. That, coupled with the act of 11 G. 1, c. 18, shows that the court of aldermen can have no power of selection. Besides, the custom must be bad, inasmuch as the power of selection thereby claimed is so liable to abuse, that its existence is inconsistent with public policy. The court of aldermen might, on account of political opinions, or from any other improper motive, exclude any person returned to them by the wardmote. The grounds of amotion must always be precisely and distinctly stated in the return. *Rex v. The Mayor of Abingdon*, 2 Salk. 432; *Rex v. The Mayor of Liverpool*, 2 Burr. 723; *Rex v. The Mayor of Lyme Regis*, Doug. 149. Here, the custom relative to the apprenticeship is not stated precisely, it is only to be collected by inference from the petition, so that the prosecutor could not traverse it, and though it may be, that he is not a freeman by apprenticeship, yet he may have acquired the freedom by other means, which is not negated. The return is altogether bad, as not stating the precise grounds of objection. In *Bagg's case*, 11 Co. 98, it was resolved, "that

the cause of disfranchisement ought to be grounded upon an act which is against the duty of a citizen or burgess, and to the prejudice of the public good of the city or borough whereof he is a citizen or burgess, and against his oath which he took when he was sworn a freeman of the city or borough." Here, however, nothing of that kind is alleged to deprive *him of his right as freeman. [*262 With respect to the latter petition, the return is only, that the petition charged circumstances, which, in the judgment of the petitioners, rendered the said M. Scales an unfit and improper person to be admitted and sworn. It is impossible to collect what were the complaints there charged against him, upon which the court of aldermen have decided; and this Court, who have the power of reviewing their judgment, are not informed of the grounds on which it went. The power of amotion may be incident to every corporation, but on return to a mandamus the defect of title in the party amoved, ought to be shown.

Follett, contrd. The authorities cited apply to cases where a mandamus has been granted to restore a person removed from a corporate office. Here, the mandamus is to admit the prosecutor to the office of alderman, not to restore him after amotion. It states two grounds, first, that he was duly elected; and, secondly, that the court of mayor and aldermen ought to admit him to the office. Now, the return applies separately to each of those grounds, and several distinct matters may be returned to different parts of the writ. It is stated that the defendants have jurisdiction, first, of examining concerning the election and return of every person elected into the place of alderman, as in Alderman Winchester's case, in *Rex v. The Mayor and Aldermen of London*, 9 B. & C. 1; and, secondly, of examining and determining whether or not the person returned by the wardmote as an alderman, is, according to the discretion and sound consciences of the mayor and aldermen, *a fit and proper person, and duly qualified in that behalf. It then sets out a custom, "that [*263 the person to be *elected*, admitted and sworn in, should be a freeman;" and, secondly, "that a person to be *admitted* into such office, should be a fit and proper person to support the dignity and discharge the duties of the office," according to the discretion and sound consciences of the mayor and aldermen for the time being. The return then states two petitions, one relating to Mr. Scales's sufficiency as a freeman; the other, to his fitness to hold the office; and that the court of mayor and aldermen, after hearing the evidence, decided, first, that he was not a sufficient freeman (upon which the prosecutor might have taken an issue); and, secondly, that they, in their sound consciences adjudge him to be unfit to be admitted and sworn into the office. In *Rex v. The Mayor and Aldermen of London*, 9 B. & C. 1, the point turned upon the validity of the election, and it was contended that the court of aldermen had an exclusive jurisdiction; but it was determined that this Court had still a power of review. Here, however, the question is not whether the prosecutor was duly elected, but whether, having the majority of votes, and having been properly elected by that part of the corporate body in whom the right of election was vested, he has a right to be admitted and sworn in, the right of election being in one part of the corporate body, and the right of examining the merits of such election, and the right of approval, being either by charter or usage, in another. Such rights may, by the charter, have been vested in a stranger, or in a part of the corporation itself. The custom is not inconsistent with the 11 G. 1, c. 18, s. 7. The object of that *statute was to regulate the mode of election, and the [*264 section referred to is confined to the election of aldermen and common councilmen, and it enacts that the right to elect shall be in certain persons. It does not affect the right of examination and approval here claimed. In the case of the lord mayor, where two persons are to be elected by the livery, it does not take away from the court of aldermen the power of selecting one out of two returned.

Then, as to the supposed want of allegation that the prosecutor was not a sufficient freeman, assuming that the ground of removal must be clearly set

forth in a return to a mandamus to restore, yet, where it is a necessary qualification that the party should be a freeman, and there is an ascertained defect in his title as such, the Court will not order him to be admitted when he can be ousted immediately. But there is no want of precision here. The return states that a petition was presented, which alleged, in effect, that the party was not a freeman, because he had been admitted to his freedom as having served an apprenticeship, whereas he had bound himself before he had attained the age of fourteen years. It is not necessary to set out the custom in that respect; it can be certified by the recorder at any time; and, indeed, it was so certified in the reign of James I. But the return expressly alleges that the prosecutor was not a sufficient freeman, and that he might have traversed. His having exercised the office of freeman for more than six years, will not aid him, because this is not a derivative title, but is itself the necessary qualification for a fresh office. *Rex v. Stokes*, 2 M. & S. 71.

*265] Then, with reference to the second point, the custom *for the court of mayor and aldermen to approve the election is a good and valid custom. There would be no illegality in such a power, if created expressly by the charter. The office of alderman of London is one of great trust. They are justices of the peace of the capital of the kingdom. Their names are in the commission of oyer and terminer, and the lord mayor must be taken from their body. County magistrates are appointed by the crown, and a discretion is always exercised in their selection; and it is important in the city of London, where the aldermen hold the office for their lives, that there should be some power of control over the election, to prevent an improper person from filling the office. Here that discretion is lodged in the court of mayor and aldermen. In the case of the lord mayor, the right of approval is in the king. Here, the custom being immemorial, it must be presumed that the king, by his charter, instead of reserving this right to himself, vested it in the court of mayor and aldermen. It is said that the power is liable to abuse; but if it be abused, there is a remedy. If the court of mayor and aldermen had decided from improper motives, and not according to their discretion and sound consciences, that part of the return might have been traversed, and the fact of their having been influenced by any improper motive would be evidence upon the issue. They would also be liable to a criminal information. A right of approval like this exists in many cases. In *Wright v. Fawcett*, 4 Burr. 2041, the custom was that every person admitted and sworn into the office of free burgess, or freeman of the borough of Morpeth, was to be approved by the lord of the manor and borough; *266] and the return was objected to, but held good; and it was never suggested that such a right of approval might not exist. In *The Queen v. The Mayor of Norwich*, 2 Ld. Raym. 1244, where a return to a mandamus alleged that the custom of electing aldermen of Norwich was the same as in London, and that in London, if a person be elected alderman by the ward, the court of aldermen may reject him, though the return there was held bad, the power of approval, as exercised in London, was recognised by Mr. Justice Powell. And so it was in *The Queen v. Sir Gilbert Heathcote, Fortescue*, 283. In *Rex v. Dr. Askew*, 4 Burr. 2186, a power of disapproval by the comitia majora of the college of physicians, after the party had been ballotted for and approved by the comitia minora, was held valid by this Court. These authorities show that such a general discretionary power of approval is not illegal in itself. The next objection is, that the causes of the rejection have not been set forth; but if the court of mayor and aldermen have the power of exercising a discretion, they ought not to state the reasons which guided them in coming to a conclusion. In *Rex v. The Mayor of London*, 9 B. & C. 1, the point arose upon the election, and this court had a right to see the grounds of decision on the return, in order to determine the validity of the election. It has been said, that in cases of amotion, the causes of amoval must be set forth. In *Rex v. The Mayor of London*, 9 B. & C. 21, Parke, J.,

(then at the bar), says, "If the corporation have the power to elect persons, or not, at their discretion, this Court cannot interfere. *Rex v. The Corporation of Eye*, 4 B. & A., 271; 1 B. & C., 85. The same principle governs the *cases of amotion. At common law, corporate bodies have no power to
 amove a party from his franchise until he has been convicted of an offence. [*267
Bagg's case, 11 Co., 94. All power beyond that must be derived from the charter. If that gives power to amove for reasonable cause, this Court will inquire into the cause, *but if there is power given to amove for such cause as the corporation think reasonable, this Court cannot interfere.*" So that, even as to amoval, which is not the case now before the Court, the same rule applies. In *Rex v. The Mayor of Stratford-upon-Avon*, 1 Lev. 291, a town-clerk chosen durante bene placito was held to be removable, though no cause or summons to answer was returned. It was there said by the Court, it was to no purpose to summon him to answer whom they remove without a crime. So in *Rex v. The Burgesses of Andover*, 1 Ld. Raym. 710, where there was a power to remove common-councilmen at discretion, it was held not to be necessary to set forth any reason; and the same principle is recognised in *Rex v. The Bishop of London*, 13 East, 419. *The Queen v. The Burgesses of Ipswich*, 2 Ld. Raym. 1240, shows that the reasons ought not to be stated where there is power to amove at discretion; for if they be set forth, and appear insufficient on the return, the Court will quash it. In *Rex v. The Guardians of the Church of Thame, Oxford*, 1 Str. 115, it was held, that on a mandamus to restore an officer who is in at pleasure only, it is a good return to say it was their pleasure to remove him; and in such a case a summons is not necessary. Besides, where a party is to act upon his discretion, it is obvious that many matters will and may, properly, operate upon his mind, which cannot be the subject of proof, and *ought not to be subjected to inquiry. [PARKE, J. *Rex v. The Bishop of Gloucester*, 2 B. & Ad. 158, is an authority on this point.] [*268

Platt, in reply. *Rex v. Stokes*, 2 M. & S. 71, does not decide the point there raised; the rule for the information was made absolute, that it might be solemnly determined. In *Wright v. Fawcett*, 4 Burr. 2041, the right of election was in certain persons, the power of approval in the lord of the manor, and that of admission in the steward, which clearly showed that the power of approval was not incident to the right of admission. Here, the right claimed is qualified; the mayor and aldermen cannot act upon their own knowledge, but have only authority to examine and approve when complaint is made to them on petition; the power does not arise unless there is such an application. Such a right is not answerable to the object for which it is alleged to be given. The cases of removal without cause assigned, where the appointment has been during pleasure, are not analogous to the present.

LORD TENTERDEN, C. J. I am of opinion that the return to the mandamus is sufficient. The writ supposes two points. First, that Mr. Scales was duly elected to the office of alderman. Secondly, that he ought to be admitted. And the return in answer thereto is founded on a custom consisting of two parts. By the first, the court of lord mayor and aldermen claim the power of examining into the election and the return of any person elected by the ward-mote, whensoever the merits thereof have been questioned on petition; by the second, they claim the power of examining and determining *whether
 or not any person so returned to the mayor and aldermen, as an alder- [*269
 man, is according to their discretion and sound consciences, a fit and proper person and duly qualified in that behalf, whensoever the fitness and qualification of the person so returned has been brought into question on petition presented to them. My judgment is entirely founded on this latter part of the custom, and I therefore give no opinion upon the first part, not thinking it necessary to do so in order to decide this case. The return having set forth this custom, for the court of mayor and aldermen to examine into the fitness of the party elected, further states that a petition was presented by certain persons

interested in the election, complaining that Mr. Scales was not a person fit and proper to hold the office of alderman; that they took that petition into their consideration, and that, having heard the petitioners and Mr. Scales by their counsel and witnesses, touching the qualification and fitness of Mr. Scales to be such alderman, they did, according to the said ancient custom, determine and adjudge, according to their discretion and sound consciences, that Mr. Scales was not a person fit and proper to support the dignity and discharge the duties of the said office. This, therefore, brings the case to the single question, whether or not this custom, as alleged, be good and valid in law. Now it has been argued in support of the writ, and against the validity of the return, that such a power of determining whether a person elected by the wardmote is duly qualified to hold the office, is inconsistent with the act of parliament, which has prescribed the mode of election; but it appears to me that the right of election, and the right of approval (as it has been properly expressed), are *270] in themselves matters perfectly distinct. Although, therefore, the right of election has been settled by the legislature (and it is impossible to say that any mode of election, otherwise than according to the right so settled and ordained can be a good election), yet it by no means follows that the election having been according to the terms prescribed by the statute, a power that cannot arise till after the election, viz., that of determining upon the fitness of the person, and approving or disapproving of him, may not be exercised. The two rights, election and approbation, in my judgment are perfectly distinct, and were so spoken of by Mr. J. Powell, one of the most learned judges of his day, in the case of *The Queen v. The Mayor of Norwich*, 2 *Ld. Raym.* 1244.

Then what is the objection to the validity of this custom? It is said that it is liable to abuse. The answer to that is, that there can be no custom, no ordinance by charter, no ordinance by statute, no ordinance by any human tribunal or human authority, which may not, peradventure, be abused and applied occasionally to the furtherance of improper objects; but if it were held that, because a power might be abused, it therefore could not legally exist, such a judgment would go to destroy almost every power which exists in this or any other country. It is said that great temptation may arise upon political grounds to pervert this power to improper purposes, but the right claimed is to be exercised according to discretion and conscience; a perverse and unconscientious exercise of it would expose the members of the Court to serious consequences. One motive must always be expected to act upon the minds of the lord mayor *271] and aldermen, and that is, a desire to maintain the honour and dignity of a society in whose honour and dignity those of the city itself, as well as the administration of justice within it, and the maintenance of all its liberties and franchises, are materially concerned. Then it is said, that, allowing the custom to be good, the defendants ought to show the grounds of their disapproval; but the cases which have been cited are decisive against this objection, and so is all reason; for if a matter is left to the discretion of any individual or body of men, who are to decide according to their own conscience and judgment, it would be absurd to say that any other tribunal is to inquire into the grounds and reasons on which they have decided, and whether they have exercised their discretion properly or not. If such a power is given to any one, it is sufficient in common sense for him to say that he has exercised that power according to the best of his judgment. For these reasons, and upon the authority of the cases cited for the defendants, I am of opinion that this part of the return is good; and that, without deciding anything on the first question raised upon the record, is a sufficient reason why the court of mayor and aldermen should not be compelled to admit Mr. Scales to the office of alderman.

PARKE, J. I am also of opinion that the return to this mandamus is good, and when the return and mandamus are attentively considered, I own it appears to me an extremely clear case. The rule of law is, that wherever there is a

mandamus directed to a party to do some act, or to return some cause to the contrary, it is competent to that person to return as many causes as ^{he} [*272] pleases, provided they are not inconsistent; and if any one of them is sufficient, no peremptory mandamus will be awarded. Now in the present case we must assume that the return is true in fact. The question is whether it is sufficient in law. The writ states that the prosecutor had been duly elected alderman and ought to be admitted. The answers are, first, that he was not duly elected, because he was not a sufficient freeman, for the reason stated in the first petition referred to: upon that I give no opinion, for the case does not require it. The second answer is, that by ancient custom the court of mayor and aldermen have the power of examining and determining, according to their discretion and sound consciences, upon the fitness of any person returned to fill the office; and further, that it is a necessary qualification that the party to be admitted should be a fit and proper person to support the dignity and discharge the duties of that office; so that the question is reduced to this, whether that custom be or be not a valid custom in point of law. Two objections are raised to it; first, that it is inconsistent with the statute of 11 G. 1, c. 18, s. 7. The answer given to that by my Lord is quite satisfactory; that the clause has nothing to do with the discretionary power of admission; it is confined to the election only. Then, as to the custom itself, I take it to be valid in law. If such a power of approval had been inserted in the original charter, there could have been no question that it would have been perfectly good. One instance has been produced, that in *Rex v. The Burgesses of Andover*, 1 *Ld. Raym.* 710, where there is by charter a discretionary power of amotion. ^{If} [*273] there is no objection in point of law to such a clause being introduced into an original charter, I can see none to this power of approval existing in the city by immemorial custom.

TAUNTON, J. I am of the same opinion. Where the return to a mandamus consists of distinct and independent matters, it is sufficient if any of them be good. I therefore omit saying anything as to that part of the return which applies to the supposed insufficiency of the prosecutor, in consequence of his not being properly bound apprentice, because I am very clearly of opinion that the other part of the return which refers to his general unfitness, is sufficient to warrant the Court in saying that a peremptory mandamus should not go. Taking the custom simply by itself, it is a good custom in law. I see nothing unreasonable in it; on the contrary, I think it may be justified, and probably was warranted in the first instance by every consideration of expediency. Here, the court of mayor and aldermen have not determined without evidence, for they have heard the parties and their witnesses, and have adjudicated that, in their discretion and sound consciences, Mr. Scales is not a fit and proper person to be alderman. They have acted, therefore, upon a reasonable and legal custom, and having so acted, it appears to me that this Court has not jurisdiction to disturb that conclusion to which they have come according to their discretion and sound consciences. But then it is said that they ought to have set forth the grounds upon which they arrived at that conclusion. I think that this is one of those cases in which it is probably much better that the grounds should not be disclosed, because the ^{*circum-} [*274] stances which regulated the exercise of a discretion like this may be such that it would be extremely inconvenient for a traverse to be taken. It is unnecessary, however, to proceed upon that reasoning, because this return is sufficiently justified by the cases cited (and more might have been adduced), which show that where a corporate office is held durante bene placito, it is a sufficient return to a mandamus that the corporation have determined their pleasure; but if the corporation are so candid as to state their reasons, and allege bad ones, this Court will in such cases interfere. The statute of 11 G. 1, has nothing to do with this case. It applies only to the mode of election, and declares who shall be the electors, but leaves all the other matters, as to

the admitting and swearing in the parties, just as they were before. When the officer is elected, the court of aldermen have an independent right to examine into his general fitness. In this case they have so examined according to their discretion and sound conscience, and that being so, I am of opinion that this Court has no power to say that they have done wrong.

PATTERSON, J. I beg to be understood as expressing no opinion upon the first point, either as to the form of the return or the cause assigned: my judgment proceeds entirely upon the latter cause stated, which is not inconsistent with the first. The only question raised as to that part of the return is, whether the custom there stated be valid in law. Two objections are taken to it; first, that it is inconsistent with the act of the 11 G. 1; and, secondly, that it is unreasonable, because liable to be abused. I cannot see that the custom is inconsistent with the statute, because that relates only to the parties *275] *who are to elect, whereas the custom is not in operation till after the election; it expressly relates to the person *returned*. It appears to me a very reasonable custom, and a very proper thing, that such a power as this should be reposed somewhere. With respect to its liability to be abused, a satisfactory answer, and one to which I can add nothing, was given by my Lord. Then, as to returning the reasons which guided the discretion of the lord mayor and aldermen, it appears to me that to require this would be wholly inconsistent with the custom itself; because then the fitness and qualification of the person would be determined, not by the discretion and sound consciences of the mayor and aldermen, but by the discretion and sound consciences of this Court. It therefore appears to me that this is a good return.

Judgment for the defendants.

The Judges having delivered their opinion as above on the 19th of November, 1831, the judgment was entered up of record as of Michaelmas term, as follows:—

“Whereupon all and singular the premises being seen and fully understood by the Court of our said lord the king now here, it is considered and adjudged by the said Court here, that the said return is good and sufficient in law to preclude him the said Michael Scales from being admitted into the said place and office of alderman of the ward of Portsoken, in the said city of London, and that the said mayor and aldermen of the city of London do go without day in this behalf.”

After the judgment had been so entered of record, the prosecutor filed several pleas traversing many of the material facts contained in the return. A rule nisi was obtained on a former day in this term for taking *276] *the traverse to the return off the files of the Court, on the ground that the prosecutor had no right after moving for a concilium and obtaining the judgment of the Court upon the validity of the return in point of law, to take issue on any of the facts contained in it.

Sir James Scarlett now showed cause. By the statute 9 Ann. c. 20, s. 2, the prosecutor of a mandamus is allowed to plead to or traverse all or any of the material facts contained in the return. He may do so after judgment given as to the sufficiency of the return as well as before. Before the act, the party prosecuting a mandamus could not bring an action for a false return until after the return had been adjudged to be good in point of law. In *Enfield v. Hills*, 2 Lev. 236, in an action for a false return, where a verdict had been given for 300*l.* damages, an objection was taken to the declaration, in arrest of judgment, because it did not show what was done on the return; and it was urged that the return might still be adjudged ill, and then the plaintiff would be restored to his office, and yet would have damages for the loss of his place; and it was contended, he ought to have waited till judgment had been entered on the return, and thereupon have declared. And the Court said, “that although the clerks *ex officio* do not enter up judgment on the return but where they make farther benefit by issuing out writs of restitution; yet, if judgment was given

upon the sufficiency, the plaintiff should have procured it to be entered up, to enable him to bring his action : and they strongly inclined that the declaration was nought, though they gave no judgment. This case is cited in Comyn's *Digest, *Mandamus* (D. 6), where it is said, "An action does not lie for a false return till judgment be given on the return, *semble*." The [*277 reason of the law, that the party should first take the opinion of the Court on the sufficiency of the return, was, that, if it were insufficient in law, he could not have been prejudiced by it. To alter this, and to render the proceedings on mandamus more speedy and effectual, the statute 9 Ann. c. 20, was passed. After providing, by sect. 1, that the party to whom the mandamus is directed shall make a return to the first writ, by sect. 2, it enacts, that the prosecutor may plead to or traverse all or any of the material facts contained in the return, to which the person making such return shall reply, take issue, or demur ; and such further proceedings shall be had therein, for the determination thereof, as might have been had if the person suing out such writ had brought his action on the case for a false return. There is nothing to show that the legislature intended to deprive the prosecutor of the right of contesting the validity of the return in point of law, before he denied any facts contained in it. Besides, the statute says further, that "if the verdict shall be found for the person suing such writ, or judgment given for him upon demurrer, he shall recover his damages and costs in such manner as he might have done in such action on the case, and a peremptory writ of mandamus shall be granted without delay for him for whom judgment shall be given, as might have been if such return had been adjudged insufficient ; and in case judgment shall be given for the person making such return, he shall recover his costs of suit." There can be a peremptory mandamus only in case the verdict or judgment be in favour of the prosecutor. Now, if he be bound to *traverse the return before he takes the judgment of the Court upon its validity, and it be insufficient in [*278 point of law, but the facts stated in it be true, the issue will be found in favour of the party making the return. Then what is the prosecutor to do ? It is very doubtful whether he could apply to the Court to quash the return, because, where an issue is joined, the statute authorizes the Court to order a peremptory mandamus, in cases only where the verdict is found for the party who sues out the writ.

The *Attorney-General*, *Law*, *Stephen*, Serjt., and *Follett*, *contra*. The prosecutor had no right to traverse the facts contained in the return, after he had moved for a concilium and set down the case for argument, with a view of obtaining the opinion of the Court upon the validity of the return in point of law. The judgment entered of record is in its form final. The mayor and aldermen are dismissed without day. The defendants then not being in Court, it was not competent to the prosecutor to come into Court and plead when they were not there. The defendants being told by the Court they should go without day, cannot be obliged to take a day which the prosecutor gives them. But independently of the form of the entry, upon general principles, and according to the ordinary rules of pleading, the judgment is final. It is in the nature of a judgment on demurrer to a declaration, for the return to a mandamus is in the nature of a declaration. The prosecutor by applying to this Court for a concilium, does that which is equivalent to alleging (as he would on a demurrer) that the matters stated in the return are insufficient in point of law to preclude him from *being admitted into the office. Now, it is quite clear [*279 that a party who has demurred to a declaration, and had judgment against him, cannot afterwards take an issue in fact. The statute 9 Ann. c. 20, does not give the prosecutor this right. The object of the act was to place him in the same situation when the facts are found to be falsely alleged, as if the return were adjudged to be insufficient, and an action on the case brought for a false return. He may have damages for the false return, and a peremptory mandamus. But he cannot first contest the validity of the return in law, and then try the facts.

Lord TENTERDEN, C. J. On the true construction of this statute, the party, if he intends to traverse any fact, must do so before he sets the return down for argument, and takes the opinion of the Court as to its sufficiency. The object of that statute was to expedite the proceedings on this writ. It seems to have been the practice before it was passed, that when a return was made, it must have been first argued and adjudged sufficient before an action for a false return could be maintained. That caused some delay. To relieve the party suing out the writ from this, the act allows him to plead to, or traverse the facts in the return; and if the issue on the traverse be found for him, it becomes immaterial whether the return be sufficient or not, and he is to have a peremptory mandamus, in the same manner as he might have had if the return were adjudged insufficient. All this is very plain. If it turn out that the facts are untrue, the result will be the same as though they were true, and the return *280] were held insufficient. But then it is said *that if the issue be found in favour of the party making the return, there could be no mandamus, because, in case of an issue in fact joined, the statute only authorizes a peremptory mandamus where such issue is found in favour of the prosecutor. It is by no means clear, however, that the party might not by application to the Court be permitted to question the sufficiency of the return in law. This would be analogous to the case where after verdict there is a motion in arrest of judgment, or to enter a judgment for the defendant non obstante veredicto. It is not necessary to decide how that would be, as it is not now before us. But a traverse, if taken at all must be taken in the first instance.

LITTLEDALE, J. As the law stands, there are two modes of proceeding on a return to a mandamus. Before the statute of Anne the party suing out the mandamus might object to the return that it was insufficient, and by moving for a concilium have the question argued and determined. That was a proceeding in the nature of a demurrer. And then after judgment was entered up on the record, if the facts stated were not true, he might have had an action for a false return. But the rule was, that he could not bring such action until the return was adjudged sufficient in point of law. Then to remedy the inconvenience which was supposed to exist at common law, the statute of Anne passed, which alters the course of proceeding, and enables the party suing out the writ to traverse the facts in the return without previously taking any other proceeding. The true construction of the act is, that after the return is *281] made the prosecutor may, if he choose, *plead to or traverse any of the facts contained in it; but he may also adopt the common law course, and if he does so, he must follow it up. If he had traversed the facts and they had been found to be true, so that there had been a verdict for the persons making the return, I think the prosecutor might have applied to the Court to enter up judgment in his favour, on the ground of the insufficiency of the return in point of law, or he might have brought a writ of error on the judgment. In *Kynaston v. The Mayor and Aldermen of Shrewsbury*, Str. 1051, after a special verdict on a traverse of the return, and a rule obtained for a peremptory mandamus, judgment was entered up that the return was not sufficient in law, and that it be disallowed and quashed.

TAUNTON, J. I am of the same opinion. The statute 9 Ann. c. 20, was intended to supply a defect in the law, namely, that where a return was made, the prosecutor, in order to have a peremptory mandamus, was obliged to insist upon the insufficiency of the return in point of law. He could not traverse the facts contained in the return, although it were notorious to all the world that they were false. The course was, as it is now, where the sufficiency of the return is disputed, to move for a concilium, and argue the validity of the return in point of law; if it appeared to the Court insufficient, a peremptory mandamus was awarded. But the prosecutor could not traverse any of the matters contained in the return till judgment was given that it was sufficient in point of law. The statute now enables him to take an issue of fact upon the return,

*as he before might have taken an issue in law, and it puts a judgment on such issue on the same footing precisely, and causes it to be followed [*282 up with the same consequences as, before that time, a judgment upon an issue of law was. The prosecutor of a mandamus may now, like any other party who is to answer a pleading on any record, either traverse the material facts, or question the sufficiency of the matter pleaded in point of law: but he cannot argue the sufficiency of the return, and then, when that has been adjudged against him, traverse the facts. I give no opinion whether, supposing the prosecutor of a mandamus choose, in the first instance, to go to trial on the traverse, and the issue be found against him by a jury, it be competent to him to question the return in point of law. That is the converse of this case, and is not now before the Court.

PATTESON, J. I entirely am of the same opinion. Before the act of parliament, if the facts returned to a mandamus amounted to a sufficient answer in point of law, there was an end to the proceeding by mandamus. The only course for the prosecutor was, to apply to the Court to quash the return for insufficiency. If the Court held it to be sufficient, the party suing out the writ could only bring an action on the case for a false return. The statute now gives him a further benefit; it first allows him to traverse the facts contained in the return, and if they be found to be false, it gives him a peremptory mandamus, which he could not have had at common law without an action. It seems to me that, since the statute, the motion for a *concilium on a [*283 return to a mandamus is in the nature of a demurrer, and the party making such motion stands in the same situation as a defendant who has demurred to a declaration; who, if that be determined against him, cannot afterwards take issue on the facts. The rule for taking the traverses off the files of the Court must therefore be made absolute. Rule absolute.(a)

(a) See *Rex v. The Dean and Chapter of Dublin*, 8 Mod. 27, and *The Dean and Chapter of Dublin v. Dowgate*, 1 P. Wms. 348.

*BEILBY qui tam, &c. v. RAPER. Jan. 30.

[*284

By a charter of Queen Elizabeth the corporation of the Trinity House of Hull are authorised to take certain duties "in the port of the town of Kingston-upon-Hull, and in all places within the limits and liberties thereof; that is to say, in all havens, creeks, and other places where our customer of Hull by virtue of his office hath any authority to take any custom," &c.; and they are also empowered to exercise jurisdiction over certain disputes arising within the same limits and liberties; and moreover, to forbid any mariner of the port of Hull or the said limits to take charge as pilot of any ship to cross the seas, except such as shall be first examined by them, whom, if they find sufficient, they shall receive into their guild, and give him a writing, signifying the countries, coasts, and places for which he shall be so found sufficient; and they are authorized to punish any person who shall take charge upon him as a pilot to cross the seas without their allowance.

The limits in question extended many miles up the Humber and river Ouse. Goole, a place within those limits, situate on the Ouse, and where the customer of Hull had formerly exercised jurisdiction, was constituted a port in 1828. Till after that time the Trinity House had never licensed pilots to take charge of vessels upon the Ouse, or the Humber above Hull Roads, and the members of the corporation had on one or two occasions refused to interfere with the pilotage of those parts: but they had exercised the other powers given by the charter both on the Humber and on the Ouse beyond Goole. Before the erection of that port scarcely any foreign trade was carried on with places above Hull Roads:

Held, that the power given by the charter to license, &c., in all places where the customer of Hull had authority to take custom, extended over all the limits within which the customer might so act at the time when the charter was granted, and was not confined to the jurisdiction of the customer for the time being; consequently that Goole, though now an independent port as to customs, was still subject to the charter in respect of the licensing of pilots:

Held also that, under the above circumstances, the forbearance of the corporation in former times to license pilots above Hull Roads could not affect their right to enforce the charter on this head when it became necessary.

Held further, that it was not requisite, by the terms of the charter, that every license should be for crossing the seas; but that the corporation might grant a more limited license; as from Goole to Hull Roads.

Sect. 6 of the general pilot act, 6 G. 4, c. 125, which enacts, that it shall be lawful for the Trinity Houses of Hull and Newcastle to appoint sub-commissioners of pilotage to examine and license pilots, is permissive and not imperative.

DEBT for penalties under the pilot act, 6 G. 4, c. 125, s. 70.(a). Plea, the general issue. At the trial before Bayley, J., at the York Summer assizes, 1829, a *verdict was found for the plaintiff for one penalty, subject to
*285] the opinion of this Court upon the following case:—

The plaintiff is clerk to the wardens of the corporation of the Trinity House of Kingston-upon-Hull. The defendant, on the 11th of August, 1828, assumed the charge of a vessel called the *Amelia*, in the river Ouse, between Goole and Hull Roads, after one Robert Rawson had, in due manner, offered himself to take charge of the vessel as pilot, producing at the same time the license after mentioned. The defendant was not a duly licensed pilot, or duly licensed to act as a pilot within the limits in which the vessel then was. Rawson was a person examined, appointed, and licensed by the corporation of the Hull Trinity House under their seal, to act as a pilot for one year, “for the port of Goole and the waters thereof, and upon any part of the river Humber, between the said port and a certain part of the said river Humber, called Hull Roads.” Rawson had never been examined by any sub-commissioners pursuant to 6 G. 4, c. 125, s. 6,(b), nor did it appear that any had been appointed by the Hull Trinity House before this action was commenced.

*286] *The *Amelia* was bound from Goole to Hamburg. The defendant went on board with the intention only of taking charge of her from Goole to Hull Roads, and she there took a pilot licensed by the Hull Trinity House. The port of Kingston-upon-Hull is an ancient port, at which the king’s duties of customs have been received from a very early period to the present time. Goole is nearly thirty miles above Hull, between it and Selby, and was constituted a port in 1828.(c)

The guild or brotherhood of masters and pilots seamen of the Trinity House of Kingston-upon-Hull, is an ancient corporation exercising various powers and franchises under a charter (among others) of the twenty-third year of Queen Elizabeth, by which her Majesty authorized them to take certain duties “within the port of our said town of Kingston-upon-Hull, and in all places within the limits and liberties thereof; that is to say, in all havens, creeks, and other places *where our customer of Hull, by virtue of his office, hath any authority to*

(a) Which enacts, “That it shall be lawful for any licensed pilot within the limits of his license, and the extent of his qualification therein expressed, to supersede in the charge of any ship or vessel any person not licensed to act as a pilot, or not licensed so to act within such limits, or acting beyond the extent of his qualification; and every person assuming or continuing in the charge or conduct of any ship or vessel, without being a duly licensed pilot, or without being duly licensed to act as a pilot within the limits in which such ship or vessel shall actually be, or beyond the extent of his qualification as expressed in his license, after any pilot, duly licensed and qualified to act in the premises, shall have offered to take charge of such ship or vessel, shall forfeit for every such offence a sum not exceeding 50*l.* nor less than 20*l.*”

(b) Which enacts, “That it shall be lawful for the corporations of the Trinity Houses of the ports of Hull and Newcastle respectively to appoint sub-commissioners of pilotage to examine pilots, and give licenses for them to pilot ships and vessels into or out of any ports, harbours, or places within the limits of their respective jurisdictions, anything in this act contained to the contrary notwithstanding:” but that sub-commissioners already appointed by the said corporations respectively, or by the Trinity House of Deptford Strond, shall continue to act.

(c) See more as to the history and respective situations of Goole and the port, &c., of Hull, in *The Hull Dock Company v. Browne*, 2 B. & Ad. 38.

take any custom by the name of primage," &c. They were also, by this charter, empowered to decide upon complaints made against owners of ships by mariners dwelling in or belonging to Kingston-upon-Hull, or any place within the limits and liberties thereof as aforesaid. Moreover, the charter gave power and authority to the corporation as follows:—"To forbid, stay, and keep back any manner of seaman or mariner of the port of Hull, or the limits thereof before specified, to begin to take charge upon him or them as master or pilot of any ship or vessel to cross the seas, or to pass from Humber beyond Flamborough Head northward, or Wintertonness *southward, other than such as shall be first examined by them, whom, if they shall find to be sufficient and na- [*287] turally our subject born within our obeisance, they shall receive unto their guild or brotherhood, and give him a writing under the seal of their house, signifying thereby the countries, coasts, and places for which he is found by them sufficient to take charge."—"And whosoever hereafter shall or doth take upon him charge as master or pilot from the said port of Kingston-upon-Hull, or the limits thereof to cross the seas, or to pass from Humber beyond Flamborough Head or Wintertonness, before he be examined or allowed as aforesaid, it shall be lawful unto the said wardens, elders, and assistants, or some of them, to punish such offender or offenders by imprisonment or fines, according to their discretions." A charter of King Charles the Second contained similar clauses.

The king's customer of Hull, before the granting of these charters, and until the erection of the port of Goole, took customs at Selby and other places along the Ouse, including the site of Goole; and the Trinity House of Hull has always taken primage according to the charters within the port of the town of Kingston-upon-Hull, and in all places where the customer, by his office, had any authority to levy custom.

By an act, 20 G. 2, c. 38, for the relief of disabled seamen, s. 29, the corporation of the Hull Trinity House were empowered to collect, receive, and apply a certain sum of 6*d.* per month in the act mentioned, to be paid at the said town and port for the benefit of seamen employed on board merchant vessels belonging thereto. Until Goole was made a port, the Trinity House corporation have always appointed receivers of *this duty at Selby above, [*288] and at Grimsby below Hull (but not at Scarborough or Bridlington), for the benefit of mariners of ships belonging to places up the Ouse, and have relieved such mariners with the money so collected. They have also, from time to time since 1582, decided disputes as to wages of mariners belonging to Selby, (but such right has not been exercised at Scarborough, Bridlington, or Grimsby), and mariners of Selby have, during that time, been appointed brethren of the corporation.

The Hull Trinity House has continually, from 1603 till 1828, licensed mariners to act as pilots from Hull out to sea, but not up the Humber above Hull Roads, or on the Ouse, till after 1828. Until that year the coasting trade was the only traffic carried on to any extent up the rivers above Hull, except on some few occasions. (a) Before the corporation began to appoint pilots to act on the Humber and above Hull Roads, all masters of vessels navigating those parts provided for their own pilotage. A person who had acted as pilot for forty-two years above Hull Roads without license, applied to two of the brethren for a license as a protection, and they refused it, saying, "they had nothing to do with the river;" and he received the same answer on another occasion, when he applied to the corporation for the recovery of wages from the master of a ship, for pilotage up the river. The Hull pilots had frequently brought vessels up to Hull Roads and left them there, upon which unlicensed pilots took charge of them up the Humber, Trent, and Ouse, and no objection was made. Unlicensed pilots had also brought vessels down to Hull Roads, and there left them to the Hull pilots.

(a) See the most important of these mentioned in *The Hull Dock Company v. Browne*, 2 B. & Ad. p. 50.

*Several pipe-rolls, commissions and returns, and other documents *289] (most of which are referred to in *The Hull Dock Company v. Browne*, 2 B. & Ad. 43), were given in evidence at the trial, and to these, as well as the act 39 & 40 G. 3, c. 10 (public local, &c.), for the regulation of the Hull pilots,^(a) and to all documents above cited, either party was at liberty to refer, as part of the case.

This case was argued on a former day in the term by Alexander for the plaintiff, and Wightman for the defendant. The principal point relied upon for the *290] latter was; that the port of Goole was not within the *port of Kingston-upon-Hull, and that the Hull Trinity House jurisdiction did not extend to the piloting of vessels from Goole to Hull Roads, whether on foreign or coasting voyages. It was contended that the words of the charter "where our customer of Hull hath any authority to take any custom," must be construed as referring always to the authority of the customer for the time being, and that that authority had ceased at Goole when this alleged cause of action arose. It was further argued, that the rights given by the charter with respect to pilots extended only to the piloting of vessels "to cross the seas;" that this construction was supported by usage, and by the preamble of the local pilot act 39 & 40 G. 3, c. 10; and that the words "port of Kingston-upon-Hull," there, must be taken in the same limited sense as in *The Hull Dock Company v. Browne*. But to this it was answered that the case cited was upon a statute in which the word "port" was evidently used in two distinct senses, and that the clause there in question was one imposing a public burthen: that case, therefore, could not govern the present. And to this the Court^(b) assented. Sections 2 and 46, of the act 39 & 40 G. 3, c. 10, were also relied upon for the plaintiff. Another point made for the defendant was, that the pilot who offered to take charge of the *Amelia* as stated in the declaration, was not properly appointed, but ought to have been examined and licensed by sub-commissioners pursuant to the general pilot act 6 G. 4, c. 125, s. 6. But it was contended on the other hand, that this clause must, upon a general view of the statute, be considered merely permissive, and *291] it was contrasted with the *previous section, which enacts, that it shall be lawful for the corporation of Trinity House of Deptford Strond, and they are thereby required to appoint sub-commissioners at the places there mentioned, to examine into the qualifications of persons to act as pilots: and *Rex v. The Bailiffs and Corporation of Eye*, 1 B. & C. 85, and *Rex v. The Mayor and Burgesses of West Looe*, 5 D. & R. 414, were cited. The Court intimated

(a) The parts of this act referred to in argument were, for the defendant, sect. 1, which recites that the corporation of the Hull Trinity House have by usage and charters exercised the power of appointing pilots to conduct ships and vessels from the river Humber to cross the seas, or to pass from the said river Humber beyond Flamborough Head northward, and Wintertonness southward; but they are not invested with sufficient powers to prevent other persons from acting as pilots within the said limits; and that it would greatly tend to the safety of ships and vessels sailing or trading from and to the port of Kingston-upon-Hull, if effectual powers were given for appointing and regulating of pilots for conducting of such ships and vessels between the said port and the sea, and for a small distance out at sea, and for preventing persons not so appointed from acting as pilots of such ships, or any ships destined from the said port to cross the seas, or to pass beyond Flamborough Head, &c.: power is then given to the Trinity House to license river pilots for conducting vessels into, out of, and below the said port, and to a certain distance out at sea; and a penalty is imposed for acting without license. For the plaintiff were cited, sect. 46, which provides that nothing in the act shall extend to take away, impeach, &c., the rights, powers, privileges, jurisdictions, or authorities of the guild of the Hull Trinity House, about or concerning the haven, dock, roadsteads, or other premises vested in them, or which they might have used and enjoyed by virtue of any charter, patent, act of parliament, or title whatsoever, if this act had not passed, otherwise than as they are by this act expressly altered. And sect. 2, which provides that nothing in this act contained shall extend to prevent any owner, &c., of any ship inward bound from conducting or piloting such ship into and up the river Humber, in case none of the river pilots should be ready and offer to conduct and pilot the same.

(b) Lord Tenterden, C. J., Littledale, Taunton, and Patteson, Js.

an opinion in the course of the argument that the clause was permissive only, and the point was not further insisted upon on behalf of the defendant. The judgment afterwards delivered upon the rest of the case is sufficiently full to render a more particular detail of the argument unnecessary.

Cur. adv. vult.

Lord TENTERDEN, C. J., now delivered the judgment of the Court.

Upon the argument in this case, two objections to the plaintiff's recovery were taken on behalf of the defendants.

First, which is the principal and only important question in this matter, that the corporation of the Trinity House of Kingston-upon-Hull had no authority to license persons to pilot vessels from Goole, to the exclusion of all other persons.

Secondly, That if the Trinity House had such authority, the license must be for the entire extent of their authority, and not confined, as this is, to the space between the port of Goole and the waters thereof, and Hull Roads.

This second objection is answered by a reference to *the charter of Queen Elizabeth, which requires the Trinity House to signify by their [*292 license the countries, coasts, and places for which a mariner is found sufficient to take the charge of vessels. Indeed, without such a particular provision, it should seem that those who have authority to license for the whole distance, may, if not restrained by some particular provision, reasonably and conveniently license a person for a part only, for which he might be deemed competent, provided no greater charge was thereby imposed on the vessel; and nothing of that sort appears in the present case.

In support of the first objection it was urged, first, that the charters must be confined in construction to places at which the customer *for the time being* had authority. Secondly, that there had not only been no usage to license pilots for the waters above Hull Roads, but that unlicensed persons had been in the habit of taking the charge of vessels from Hull Roads up the rivers Trent and Ouse, and that upon one occasion, when one of those persons applied to the Trinity House for a license, and on another, when he applied for assistance to recover his wages, he had been told by some of the brethren that they had nothing to do with the river navigation. It was also observed, that no pilots had ever been appointed for Grimsby, which is clearly within the large limits mentioned in the charter of Elizabeth; and it was also insisted, that the Hull pilot act of the 89 & 40 G. 3, was conformable to the then existing practice, and showed that the Trinity House had no authority above Hull Roads.

The authority of the crown to grant the charters mentioned in the case was not nor could not be disputed. The language of the charter of Queen Elizabeth is free from *all ambiguity: "In all havens, creeks, and other places where our customer of Hull, by virtue of his office, hath any authority [*293 to take any custom by the name of primage." And it is very plainly shown in the case as stated, that the customer of Hull, long before the charter of Queen Elizabeth, and, indeed, from very remote times, had exercised his authority at Selby on the Ouse, which is several miles above the place where the port of Goole has been recently established. And we find nothing in the words of the charter or in reason, to put that narrow construction on the charter for which the defendant contends, or to limit the generality of the expression to the authority of the customer as it might happen to be varied, narrowed, or extended in after times.

It is true, that until the establishment of the port of Goole, the Trinity House did not exercise the right of appointing pilots for the waters above Hull Roads; but for coasting vessels they had no authority to do so, and the trade from the waters above Hull Roads, was almost exclusively of that description; the instances of vessels foreign bound passing from above these roads being very few, and those within a very short period, and on very particular occasions. And it appears that the Trinity House was in the habit of exercising another of the powers given by the charter, viz., that which relates to the wages, &c., of

mariners, with regard to mariners belonging to Selby. It appears also, that this corporation appointed persons at Selby and at Grimsby to collect the head penny duty from mariners under the authority of the statute 20 G. 2, c. 38, by which they are empowered to collect that duty at the town and port of Kingston-*294] upon-Hull. Whatever, therefore, the usage as to pilots *may have been before the establishment of the port of Goole introduced a foreign trade in the waters above Hull Roads, we are of opinion that the forbearance of the corporation to exercise a power in regard to places where its exercise could be so rarely warranted or required, cannot narrow the construction of the charter or defeat the rights given thereby; much less can they be affected by any mistaken opinion entertained or expressed by any of its members.

We are also of opinion that the pilot act of the 39 & 40 G. 3, does not affect the present claim. That statute was passed before the establishment of the port of Goole; it provides affirmatively in the first section for the then existing state of the navigation and trade, and the then exercise of the right in conformity thereto. And the forty-sixth section expressly provides that the act shall not affect the rights, powers, privileges, jurisdictions, or authorities of the Trinity House otherwise than as expressly altered or restrained by that act, and the act contains no restrictive clause. We are, therefore, of opinion that the plaintiff is entitled to maintain his action, and the *postea* is to be delivered to him.

Postea to the plaintiff.

*295] *MANSER *v.* HEAVER and Another. *Jan. 30.*

A defendant may move to set aside a judgment entered upon an irregular award, though the time for setting aside the award itself has elapsed, if the defect insisted on be apparent on the face of it; and an objection grounded on such defect need not be stated in the rule nisi.

An arbitrator, to whom a cause and all matters in difference were referred, directed a verdict to be entered for the plaintiff, and certain works to be done by the defendant. He then added, that as disputes might arise respecting the performance, the plaintiff, if dissatisfied with it, might (on giving notice to the defendant) bring evidence before the arbitrator of the insufficiency of the work, and the defendant might also give evidence on his part, in order that a final award might be made concerning the matters in difference; but if no proceeding were taken by the plaintiff within two months after the work was done, the award then made should be final: and he enlarged the time for making his further and final award, if requested, to six months.

Held, that the latter part of this award was bad, as it assumed to reserve a power over future differences; but that it might be rejected, and the former part was final, and might stand.

THIS was an action on the case for penning back a stream of water called Broxbourn Mill Stream, and thereby impeding the wheel of the plaintiff's mill. The cause was tried before Lord Tenterden, C. J., at the Hertford Summer assizes, 1831, when a verdict was taken by consent for 1000*l.*, subject to the award of a barrister as to that action and all matters in difference between the parties, with power to the arbitrator, before making his final award, from time to time to regulate the use of the waters. The arbitrator, by his award dated September 3, 1831, directed that the verdict should stand for 50*l.*, and also, among other things, that the defendants should forthwith, and as soon as it could reasonably be done, scour and cleanse out the bed of the stream: and then, after premising that different opinions had been expressed by witnesses as to the cause of obstructions in certain parts of the stream, upon which he, the arbitrator, could not form a decided judgment till the channel should be cleansed, and also that after such cleansing, disputes might arise between the parties whether or not it had been properly performed, which disputes might lead to litigation and prevent the award from operating as a determination of all

*matters in difference, he further directed and ordered as follows: "That if, after the cleansing, scouring, and clearing out of the said stream hereby directed shall have taken place, the said plaintiff shall not be satisfied that the same has been properly done, he shall be at liberty, on giving notice thereof to the defendants, to bring evidence before me to show that the said cleansing, &c., has been insufficiently performed, and the said defendants shall be allowed to produce evidence to show that the said work has been properly done, in order that a final award may be made concerning all matters in difference between the parties; but if no such proceedings shall take place on the part of the plaintiff within the space of two months from the day when the defendants shall give him notice that the cleansing, &c., has been completed, then I award, order, and direct that this award shall be final and conclusive between the parties. And I do hereby enlarge the time for making such further and final award, if it should be requested, till the first day of March, 1832."

The defendants partly cleansed out the channel, and then desisted, and paid no attention to a notice which the plaintiff gave them to proceed. The plaintiff then obtained an appointment for attending the arbitrator, but the defendants did not appear; whereupon the plaintiff signed judgment in the action, and issued execution. A rule was obtained in this term, calling on the plaintiff to show cause why the judgment and execution should not be set aside; but no objection to the award was stated in the rule.

Campbell and Platt, in showing cause, took two preliminary objections:—first, that the award had not *been set aside, nor any application made for that purpose, and that the time for doing so had now elapsed, *Raws-* [*297 *thorn v. Arnold*, 6 B. & C. 629; the judgment and execution, therefore, could not be impeached: secondly, that the rule nisi did not state the objections to the award, which it ought to do by the rule of court, Easter term, 2 G. 4, 4 B. & A. 539.

Thesiger and Butt, contrd. The award here is invalidated by a defect appearing on the face of it, namely, that it is not final; and, therefore, *Doe dem. Turnbull v. Brown*, 5 B. & C. 384, and *Pedley v. Goddard*, 7 T. R. 73, are an answer to the first objection. And the defect being apparent on the award, it was unnecessary to state the objection in the rule nisi.

The Court said, that if there appeared a defect on the face of the award, it might be taken advantage of to invalidate a judgment and execution, as well as to prevent an attachment, though after the time for setting aside the award; and that an objection grounded on such defect need not be stated in the rule nisi.

Campbell and Platt then contended that the award, as far as the end of the direction for cleansing the channel of the stream, was a final award as to all matters in difference between the parties, and could not be rendered null by the directory clauses that followed, which, if faulty, might be rejected without setting aside the whole.

**Thesiger and Butt, contrd.* The arbitrator has left it dependent on an uncertain event, whether or not his award shall be final: in contem- [*298 plation of that event he provides for a rehearing, "in order that a final award may be made concerning all matters in difference;" and he gives an extension of time for the making of his "further and final award," if required. This case is like *Pedley v. Goddard*, 7 T. R. 73, where it was awarded that a certain sum should be paid, unless within twenty-one days certain matters should be made to appear on affidavit, in which event a different sum was to be paid; and the award was held not to be final. The arbitrator could only make one award; if he has now made one, he has himself declared it not to be conclusive. It is true, an award may be good in part, and bad in part; but still, the portion to be held good must be final in itself. Here the operation of those clauses which the plaintiff seeks to reject is such that no part of the award can be deemed final.

Lord TENTERDEN, C. J. I am of opinion, upon the whole, that this award is final and conclusive upon the subjects which were in difference at the time of the submission, and that its validity is not affected by the introduction of matters beyond the scope of the arbitrator's authority. By this award he first directs what shall be done by the parties, and he then endeavours to reserve to himself a power of examining into the manner in which his direction shall have been followed. That he could not do. The clause as to making a further *299] and final award must be considered as having reference *only to prospective differences: so much, then, of the award as relates to these, may be rejected as surplusage, and the rest retained. The rule must, therefore, be discharged.

LITTLEDALE and TAUNTON, Js.,(a) concurred.

Rule discharged.

(a) Patteson, J., had gone into the Bail Court to dispose of motions.

DOE dem. Sir W. ABDY v. STEVENS and Another. Jan. 30.

Proviso in a lease, giving power of re-entry if the lessee "shall do or cause to be done any act, matter, or thing contrary to and in breach of any of the covenants," does not apply to a breach of the covenant to repair, the omission to repair not being an *act done* within the meaning of the proviso.

EJECTMENT for messuages, dwelling-houses, and land in the parish of St. John, Southwark, in the county of Surrey, for a forfeiture alleged to have been incurred by the defendants' non-performance of a covenant to repair. At the trial before Bayley, B., at the Spring assizes for Surrey, 1831, it appeared that the defendants held the premises by a lease granted in 1792, by the father of the lessor of the plaintiff, for forty-three years. The lease contained covenants by the lessee, first, to pay the rent; secondly, to lay out 150*l.* in repairing and improving the premises; thirdly, well and sufficiently to repair, support, sustain, maintain, amend, and keep the premises; fourthly, to insure the buildings during the term against fire; fifthly, not to permit any reed stack to be made, or any considerable quantity of pitch to be kept or laid in or upon any part of the premises without carefully housing the same; sixthly, to permit and suffer the lessor to view the premises; seventhly, not to assign without *300] leave of the lessor. *There was a proviso for re-entry, "if the rent should be in arrear for fourteen days, or the lessee should assign without leave of the lessor, or *do or cause to be done any act, matter, or thing whatsoever contrary to or in breach of any one or more of the covenants thereinbefore contained.*" Covenant by the lessor "that the lessee, his executors, &c., paying the rent and *performing all and every* the covenants and provisoes according to the true intent and meaning of the lease, should quietly enjoy the premises." It was objected, that the non-performance of the covenant to repair was not a doing or causing to be done any act, matter, or thing within the meaning of the proviso. The learned Judge was of that opinion, and directed a nonsuit, with liberty to the plaintiff to move to enter a verdict. A rule nisi having been obtained for that purpose.

Platt, on a former day of the term, showed cause.(a) A proviso for re-entry must be construed strictly. In order to bring a case within the terms of this proviso, the plaintiff should have shown some act done by the tenant in breach of a covenant; but here he has shown only an omission to do certain acts. There are other covenants in the lease to which the words of the proviso may be referred, particularly that whereby the lessee undertakes not to permit any reed stack, &c. to be made, or any considerable quantity of pitch to be kept on any part of the premises without housing the same.

(a) Before Lord Tenterden, C. J., Littledale and Taunton, Js.

Gurney and Dowling, contra. Covenants must be interpreted according to the real intent of the parties *expressed by their own words; and if there be any doubt as to the sense of the words, such construction shall [*301 be made as is most strong against the covenantor, lest by the obscure wording of his contract he should find means to evade and elude it, Bacon's Abr., tit. *Covenant* (F); and in the same work, tit. *Condition* (O 2), it is also said that conditions must be interpreted according to the real intention of the parties. Now, applying that rule to the present case, it may be collected from the lease that the intention of the parties was, that there should be a right of entry in case of the non-performance of any of the covenants. If that were not so, the proviso would be almost nugatory, for it would not apply to a breach of the covenant to pay rent, to lay out money in improving the premises, to repair, to insure the buildings against fire, or to suffer the lessor to view the premises. Besides, the covenant of the lessor for quiet enjoyment is, that the lessee, paying the rent and performing all and every the covenants, shall quietly enjoy, &c. The import of those words is, that on the breach of any of the lessee's covenants, the landlord's covenant for quiet enjoyment shall be at an end. Now, as the proviso for re-entry and the covenant for quiet enjoyment both relate to the termination or enjoyment of the estate, they ought to be construed together, and so as to make them consistent with each other, *Doe d. Spencer v. Godwin*, 4 M. & S. 265. If the tenant had been ousted by a stranger, and sued the lessor on the covenant for quiet enjoyment, it would have been an answer, to show that the lessee had broken the covenant to repair. The proviso is for breach of *any one* of the covenants; and as *several of the cove- [*302 nants can only be broken by an omission to do some act, they must be included in it. In *Doe d. Palk v. Marchetti*, 1 B. & Ad. 715, the action was brought on a proviso giving a power of re-entry if the tenant should make default in the performance of any of the covenants for thirty days after notice, and the clause was held not applicable to the breach of covenant "not to allow alterations in the premises, or permit new buildings to be made upon them without permission;" but the reason was, that the default was of such a nature that the parties could not have contemplated a notice not to make it; and there Lord Tenterden said, "The words *make default* properly apply to affirmative covenants, though the expression to *make default* has been applied to negative ones." So the words here, "do or cause to be done any act, matter, or thing contrary to or in breach of any of the covenants," apply strictly to negative covenants, but they may be extended to affirmative covenants, if that appears to be the intention of the parties. Here that intention, for the reason already stated, is manifest. *Curr. adv. vult.*

Lord TENTERDEN, C. J., now delivered the judgment of the Court.

This was an ejectment brought for a forfeiture supposed to have been incurred by the non-performance of a covenant to repair. The clause reserving the right of re-entry was, "if the lessee shall do or cause to be done any act, matter, or thing whatsoever contrary to or in breach of any one or more of the covenants and agreements hereinbefore contained." The clause, being [*303 *in this peculiar and special form, it was contended, did not apply to an omission to repair. It is a general rule of construction, that the words of a covenant must be taken most strongly against the covenantor, and that rule applies more strongly to a proviso for re-entry which contains a condition that destroys or defeats the estate. In *Doe v. Godwin*, 4 M. & S. 265, the lessee covenanted that he would not assign without leave of the lessor, proviso that if the rent be in arrear, "or if all or any of the covenants *hereinafter* contained on the part of the lessee shall be broken, it shall be lawful for the lessor to re-enter;" and there were no covenants on the part of the lessee *after* the proviso, but only a covenant by the lessor, that the lessee, performing all and every the covenants *hereinbefore* contained on his part to be performed, should quietly enjoy. The question was, whether the proviso for re-entry would apply to the

breach of a covenant preceding the proviso; and although Lord Ellenborough doubted whether the covenant for quiet enjoyment and the proviso for re-entry, relating to the same subject-matter (the enjoyment or the termination of the estate), ought not to be construed together, and the words *hereinafter* and *hereinbefore* in each of them (evidently relating to the same covenants) be taken in the same sense, yet, on the whole, the Court held that the word *hereinafter* in the proviso could not be rejected, and consequently that that clause did not apply to the breach of a covenant preceding it in the lease. Here the words *do or cause to be done* import an act, and there is nothing in the other parts of the instrument from which we can clearly collect that it was the intention of

[*304] the parties that it should apply to an omission to do an act. We are therefore of opinion that the mere omission to repair cannot be considered as doing or causing to be done an act within the meaning of the clause for re-entry, and consequently that the nonsuit was right. The rule must therefore be discharged. Rule discharged.

MASON v. HILL and Others. Jan. 31.

The proprietor of lands contiguous to a stream, may, as soon as he is injured by the diversion of the water from its natural course, maintain an action against the party so diverting it; and it is no answer to the action, that the defendant first appropriated the water to his own use, unless he has had twenty years' undisturbed enjoyment of it in the altered course.

CASE.—The first count of the declaration stated, that the plaintiff was lawfully possessed of a mill, manufactory, and premises in the county of Stafford, and by reason thereof ought to have had and enjoyed the benefit and advantage of the water of a certain stream which had been used to run and flow, and of right ought still to run and flow unto the said mill, &c., in great purity and plenty to supply the same with water for working, using, and enjoying the same, and for other necessary purposes. That the defendants by a certain dam and obstructions across the stream above the plaintiff's premises, impounded, penned back, and stopped the water, and by pipes and tiles, &c., diverted it from the plaintiff's premises, and prevented it from flowing along the usual and proper course. And farther, that the defendants injuriously heated, corrupted, and spoiled the water, so that it became of no use to the plaintiff, whereby he was prevented from using his mill and premises in so extensive and beneficial a manner as he otherwise would have done. Plea, not guilty. At the trial before Bosanquet, J., at the last Spring assizes for the county of Stafford, the following appeared to be the *facts of the case. The plaintiff and the defendants had land contiguous to the stream, the land of the defendants being situate on a part of the stream above the land of the plaintiffs. The stream acted as a sewer to part of the town of Newcastle-under-Line, and the water was consequently foul and muddy. It had been unprofitable to both parties until it was diverted by the defendants. This diversion took place in 1818, by the defendants' erection of a weir or dam across the stream, at the part contiguous to their own land, and by means of this weir and of channels and reservoirs made in their land, great part of the water was conveyed to certain buildings belonging to them at some distance from the weir, and there used as part of the supply of water necessary for a steam-engine. About ten years after this diversion, the plaintiff made a channel in his land contiguous to the stream, for conveying the water to some buildings belonging to him at a little distance from the stream, for the purpose of some process of manufacture not previously carried on there. Some attempts at accommodation between the parties took place, but were ineffectual, or unsatisfactory; and before the action was brought, the plaintiff's works were occasionally suspended for want of the

water diverted by the defendants, and which after it had been used by them was suffered to pass away into a level below the plaintiff's works. It was contended on the part of the defendants, that as they had first appropriated the use of the water in the sewer to beneficial purposes without injuring the plaintiff, they had acquired a right therein, and were not answerable for the diversion, and *Williams v. Morland*, 2 B. & C. 910, was cited. The learned *Judge acting upon that authority, directed the jury to find a verdict for the defendants. In the ensuing term Campbell obtained a rule nisi for a new trial, on the ground that the defendants who had diverted the water could acquire no right to have it flow in its new channel by mere appropriation without twenty years' unmolested enjoyment. [*306]

Sir *James Scarlett* and *Godson* on a former day in this term showed cause. (a) Supposing that the plaintiff has in fact sustained any damage in this case, which is not admitted, still the Judge's direction was right, and the defendants are entitled to retain the verdict. *Wright v. Howard*, 1 Sim. & Stu. 190, will be cited to show that unless a party has enjoyed the use of running water for twenty years, he can acquire no property in such use of it, but any person who has lands lower down the stream may maintain an action against him for diverting it; but the dictum of the Master of the Rolls in that case cannot be supported. It is no doubt generally true that a person must have had twenty years' undisturbed possession of many similar rights (as light and air) before he can make an exclusive title thereto, but that cannot be extended to flowing water. For general convenience requires when a man first appropriates water to valuable purposes without the dissent of any one else, and without doing any damage or injury to another, he should gain a title to the use, *Williams v. Morland*, 2 B. & C. 910. *Bealy v. Shaw*, 6 East, 208, shows that where water is left unappropriated, twenty years need not elapse before the person who possesses himself of that water *can bring an action for an injury done to his newly-acquired right. There Lord Ellenborough says, "I take it that less than twenty years' enjoyment may or may not afford a presumption of a grant, according as it is attended with circumstances to support or rebut the right." And *Le Blanc, J.*, said, "The true rule is, that after the erection of works, and the appropriation by the owner of the land of a certain quantity of the water flowing over it, if a proprietor of other land afterwards take what remains of the water before unappropriated, the first-mentioned owner, however he might before such second appropriation have taken to himself so much more, cannot do so afterwards." In that very case the plaintiff had had an enjoyment of the water previously unappropriated by the defendant, without objection from him, for four years only; and Lord Ellenborough was of opinion that that occupation was a sufficient title. In *Cox v. Matthews*, 1 Vent. 237, Lord Hale said, "If a man hath a watercourse running through his ground and erects a mill upon it, he may bring his action for diverting the stream, and not say *antiquum molendinum*; and upon the evidence it will appear whether the defendant hath ground through which the stream runs before the plaintiff's, and that he used to turn the stream as he saw cause, for otherwise he cannot justify it, though the mill be newly erected." And in *Saunders v. Newman*, 1 B. & A. 258, it was finally decided that it was not necessary to state the mill to be ancient; and *Holroyd, J.*, there recognised the law laid down by *Le Blanc, J.*, in *Bealy v. Shaw*, as to the right to use flowing water. If the position here contended for prevail, then on *a stream where twenty mills have been erected, the owner of the lowest may require the nineteen above him to be pulled down, and thus put a stop to all improvement; and the person who builds a mill on an unappropriated stream will be entirely at the mercy of the land-owners lower down. The plaintiff cannot now be in any other situation than he was when the diversion was first made; and as he then sustained no damage, for he had made no use of the water, the case of *Williams v. Morland*, 2 B. & C. 910, shows that this action is not maintainable. [*308]

(a) Before Lord Tenterden, C. J., Littledale, Taunton, and Patteson, Js.

Campbell, R. V. Richards, and Whateley, contrd. The water not having flowed for twenty years in that channel into which the defendant had diverted it, he did not acquire any right to have it to continue in that course, and the plaintiff's right to the flow of water in its natural and usual channel is not lost. It is true that the defendant might have taken the water with impunity, if he thereby caused no damage to the plaintiff or the other proprietors of the land on the bank of the stream, because to give a right of action there must be both *damnum* and *injuria*, and for that *Williams v. Morland*, 2 B. & C. 910, is an authority. There the injury alleged in the declaration was not proved. Flowing water, like light and air, is *publici juris*; every person having land on the banks of a stream, is entitled *primâ facie*, to have the water flow in its natural course, and that right cannot be lost except by grant or a long uninterrupted enjoyment from which a grant may be presumed. As to light, every man on

*309] his own land, has a right to as much as will come to him. If he erect *on the extremity of his land a building with windows, and they continue unobstructed for a period of twenty years, the law then implies the consent of the owner of the adjoining land to that mode of enjoyment; though the latter may, undoubtedly, within twenty years build on his land, and thereby obstruct the light which would otherwise pass to the building of his neighbour. So that the title to the enjoyment of the light in prejudice of another's right is not acquired by mere appropriation, but by occupancy continued for twenty years. The right to flowing water is of the same description. Every proprietor of land on the banks of an ancient stream is *primâ facie* entitled to the benefit of the water as it exists in its natural state, and no one proprietor without the consent of the others, has a right to make use of the flow in such a manner as will be to their prejudice. Their consent may be inferred from an unmolested continuance of a particular mode of enjoyment for twenty years. But there is no reason why a grant should be presumed within a less period in the case of water, than of light. And the authorities clearly show that there must be the same length of enjoyment. The opinion delivered by the Master of the Rolls in *Wright v. Howard*, 1 Sim. & Stu. 190, was not a mere *arbitrè dictum*, but was an essential point of the cause. A bill had been filed for the specific performance of a contract for the purchase of, amongst other things, a right to impound the water of a river, and to divert a stream from it, and the Court refused to decree performance, because the vendor had no such right as against some of the proprietors of land on the bank of the river. In *Cox v.*

*310] *Matthews*, 1 Vent. 237, Lord Hale intimated, that although it was not necessary for the plaintiff to allege the mill to be ancient, yet if the defendant proved *he used to turn the stream as he saw cause*, that would be an answer to the action. In *Prescott v. Phillips*, cited in *Bealey v. Shaw*, 6 East, 213, it was ruled by Mr. Serjt. Adair, Chief Justice of Chester, that nothing short of twenty years' undisturbed possession of water diverted from its natural channel, or raised by weir, could give a party an adverse right against those whose lands lay lower down the stream, and to whom it was injurious. This right is put, not on mere appropriation, but on long occupation, by Lord Ellenborough in *Bealey v. Shaw*, 6 East, 215; by Holroyd, J., in *Cross v. Lewis*, 2 B. & C. 690; by Abbott, J., in *Saunders v. Newman*, 1 B. & A. 261; and by Mr. Starkie in a note to his *Treatise on Evidence*, 3 Stark. 1673. The dicta relied upon in argument to show that the right to have the water flow into a new channel may be acquired by mere appropriation, without long enjoyment, do not apply. They refer to the right of the proprietors of land on the banks of a stream to have the water flow in its natural and ancient channel. The true distinction is this. Every proprietor of land on the banks of a stream, independently of any occupation, being entitled of right to have the water flow in its natural channel, may maintain an action for diverting it as soon as he sustains a damage. In such an action he must show an appropriation of the water to his own use, not because that is necessary to give him a right to the

enjoyment of the water as it flows in its natural channel, but because, in order to sustain the action, he *must show a damage. On the other hand, the party who diverts the water from its natural channel without the consent [311 of the other proprietors of the land on its banks, is guilty of a wrongful act. He can acquire no right to have the water flow in the new channel but by license from them, or by a long enjoyment from which a grant may be presumed. It is no answer, therefore, to an action brought against him for diverting the water, that he first appropriated it to his own use. He must show a grant or license from the plaintiff, or twenty years' uninterrupted enjoyment, which will be evidence of that grant; see *Liggins v. Inge*, 7 Bing. 682.

Cur. adv. vult.

Lord TENTERDEN, C. J., on a subsequent day of the term, delivered the judgment of the Court.

This case was argued before us in the course of the present term on cause shown against a rule for a new trial. It was an action for diverting a stream of water, and the verdict was given for the defendants. His lordship then, after stating the facts of the case, proceeded as follows:

In this state of things the present action was brought, and for the defendants it was insisted that, they having first appropriated the water beneficially to their use at a time when the appropriation was not injurious to the plaintiff, had a right to the water and to the use of it, notwithstanding the diversion had by subsequent acts of the plaintiff become injurious to him. The plaintiff, on the other hand, insisted that the defendants did not, nor could by law, acquire a right to the water by a diversion *and enjoyment for a period short of [312 twenty years. The several decisions and dicta of learned judges on this subject were quoted at the bar, and need not be repeated. It appears to have been held that a person could not complain of a diversion or obstruction of water, from which at the time of his complaint he suffered nothing: which seems to have been on the ground that in such a case it was *injuria sine damno*. It is not now necessary to say whether such a principle should be admitted. The only decision upon a question like that in the present case is the judgment of the present Master of the Rolls, then Vice-Chancellor, in the case of *Wright v. Howard*, 1 Sim. & Stu. 190. This judgment is expressed in language so perspicuous and comprehensive, that I shall here quote it. "The right to the use of water rests on clear and settled principles. *Prima facie*, the proprietor of each bank of a stream is the proprietor of half the land covered by the stream, but there is no property in the water. Every proprietor has an equal right to use the water which flows in the stream; and consequently no proprietor can have the right to use the water to the prejudice of any other proprietor. Without the consent of the other proprietors, who may be affected by his operations, no proprietor can either diminish the quantity of water which would otherwise descend to the proprietors below, nor throw the water back upon the proprietors above. Every proprietor, who claims a right either to throw the water back above, or to diminish the quantity of water which is to descend below, must, in order to maintain his claim, either prove an actual grant or license from the proprietors *affected by his operations, or must [313 prove an uninterrupted enjoyment of twenty years: which term of twenty years is now adopted, upon a principle of general convenience, as affording a conclusive presumption of a grant." The learned Judge then adds, that an action will lie "at any time within twenty years, when injury happens to arise in consequence of a new purpose of the party to avail himself of his common right."

We all agree in the judgment thus delivered; and upon the authority of that decision, and the reasoning of the learned Judge, we are of opinion that the defendants did not acquire a right by their appropriation, against the use which the plaintiff afterwards sought to make of the water, and consequently that the rule for a new trial must be made absolute. Rule absolute.

GRAVES v. KEY and Another.

A bill of exchange was drawn by A. on B., and endorsed to C. The bill was not satisfied when due, but part payments were afterwards made by the drawer and acceptor. Two years after it had become due, D. paid the balance to C., the holder, and the latter endorsed the bill and wrote a receipt on it in general terms: Held, that that receipt was not conclusive evidence that the bill had been satisfied either by the acceptor or drawer, but that parol testimony was admissible to explain it; and it appearing thereby that D. paid the balance, not on account of the acceptor or drawer, but in order to acquire an interest in the bill as purchaser, it might be endorsed by D. after it became due, so as to give the endorsee all the rights which C., the holder, had before the endorsement, and such endorsee might, therefore, recover from the drawer the balance unpaid by him.

ASSUMPSIT by the endorsee against the defendants as drawers of a bill of exchange, accepted by Almon, and as payees and endorsers of a promissory note made by Almon. Plea, the general issue. At the trial before Lord Tenterden, C. J., at the London sittings after Hilary term, 1831, the following facts appeared:

*314] The action was brought by Graves, who was the *nominal plaintiff only, the real plaintiff being Mr. Tilleard, on a bill of exchange for 50*l.* drawn by the defendants on and accepted by Almon, dated the 16th of April, 1824, and payable two years after date; and on a promissory note of Almon's in favour of the defendants, for 97*l.* 2*s.* 7*d.*, dated 27th of November, 1823, and payable thirty months after date; of both which instruments the defendants were endorsers. Neither was paid when due; and at that time both were in the hands of one Webber, having been duly endorsed to him. The defendants suspended payment, and made payments by instalments to their creditors, and amongst the rest an instalment of 5*s.* in the pound to Webber, who had a debt due to him on another account, as well as on the bill and note. Almon also became insolvent, compounded with his creditors, and paid Webber several instalments on the bill and note; memoranda of which, *as received from Almon*, were made on the back of each security. On the 8d of January, 1828, long after the dishonour of both the bill and the note, a meeting took place between Tilleard, Webber, and the defendant, Key, at which both these securities were transferred by Webber to Tilleard, under circumstances stated by a witness named Keighley, as follows:

Mr. Tilleard paid Webber a cheque for 102*l.* 16*s.* 1*d.*, as balance due on a bill and note. T. first claimed a further deduction of 5*s.* in the pound paid by Key & Co., and not credited in an account produced. Webber said, what he had received was generally on account of his debt, which Key admitted, but in answer to some observations of Tilleard, stated that Webber had received more by 5*s.* on the amount of the bill and note, than would have been paid if he had *315] not held them; but that Webber would *not sign anything, and would only receive the money generally on account. Tilleard then said he would pay the balance due to Webber, and become himself the holder of the bill and note, and required a receipt to be endorsed on them, acknowledging the money to be received of him, Tilleard. Webber wrote a receipt for it as paid by Almon: on reading it Tilleard objected. Webber said he did not see Tilleard's name at the front or back of the bill or note, and therefore would not give him a receipt, and wanted to know, unless Tilleard paid the money on behalf of Almon, why he paid at all. Tilleard said he paid it out of affection for Almon, in order to get them out of the hands of Webber, but with a view of ranking upon Key's estate for the amount of the bill. Key suggested to Webber to write a receipt generally, and he did so on the bill, and struck Almon's name out of the receipt on the note. Tilleard protested formally against these endorsements, stating that if W. supposed there was any magic in his endorsement, he, T., was willing to take them without any endorsement. The bill and note were afterwards endorsed by him to the plaintiff.

On the back of the note, when produced at the trial, there was a memorandum at the foot of the several instalments stated to have been received from *Almon*, to this effect:—"Received 60*l.* 14*s.* 1*d.* for the balance," &c., with the words "from *Almon*" struck out; and a similar memorandum appeared on the back of the bill, of a receipt for 31*l.* 5*s.*, without any statement of the name of the person from whom the amount was received; and, on both, the balance was said to include *interest and noting*.

Upon these facts Lord Tenterden was of opinion, that *these being negotiable instruments, and all principal and interest secured by them [316 appearing, by the memoranda endorsed, to have been fully paid, they must be deemed to have been satisfied by the acceptor and maker, and no action could be maintained upon them, and he directed a nonsuit. In the following term a rule nisi was obtained by Sir J. Scarlett for a new trial, on the ground that the receipts endorsed on the bill and note were not conclusive, but only *prima facie* evidence that they had been paid by the acceptor and maker: and that the parol evidence (which was admissible to explain the receipts; *Scholey v. Walmsley*, 1 Peake, N. P. C. 34; *Lampon v. Corke*, 5 B. & A. 606; *Skaife v. Jackson*, 3 B. & C. 421, showed that Tilleard paid the money and balance due to Webber, with a view of becoming the purchaser of the bill and note, and not as the agent of Almon; which being so, the bill was not satisfied, it might be endorsed after it was due, and the action was maintainable: and he cited *Callow v. Lawrence*, 3 M. & S. 95, to show that an endorsee, who pays a bill, may endorse or negotiate it, because his endorsement will make no person liable but himself, and those whom he may sue.

Gurney and Kelly on a former day in this term showed cause. It is clearly established, that a bill or note cannot be endorsed or negotiated after it has been once paid, if such endorsement or negotiation will make any of the parties liable, who would otherwise be discharged, *Beck v. Robley*, 1 H. Bl. 89, n. Here, there was not only payment of the bill and note, but a receipt given. The negotiability of the bill and note was destroyed by that *receipt. It is true that a receipt may be explained by parol evidence; but here, [317 the clear import of the receipt is, that the money therein mentioned was paid on account of Almon, who was the acceptor of the bill and maker of the note, and the party primarily liable. Tilleard, therefore, must be taken to have made the payments on his behalf, and not on account of Key.

Sir James Scarlett and D. Pollock, contra. It cannot be disputed, that if a bill of exchange be paid on behalf of the acceptor, it is not afterwards negotiable. The question in this case is, whether the payments made by Tilleard were on account of the acceptor; for if they were not, the bill and note continued negotiable. Now, it appears clearly from the testimony of Keighley, that the balance due on those instruments was not paid by Tilleard in order to discharge Almon from liability, but as the purchase-money for those securities. *Our. adv. vult.*

Lord TENTERDEN, C. J., now said: The rule for a new trial must be made absolute. We all think that the payments made by Tilleard to Webber on account of the bill and note, were made by him, not as the agent, or on account of Almon, but with a view of becoming the purchaser of the bills in his own right. That being so, the negotiable quality of those instruments was not destroyed, and they might be endorsed after they became due; the action, therefore, was maintainable. The reasons on which our judgment is founded, have been *committed to writing, but the paper containing them has unfortunately been mislaid. (a) Rule absolute. [318

(a) The reporters were afterwards favoured with a copy of the judgment alluded to by the Lord Chief Justice. It was as follows:

We all think, upon a full consideration of the case, that the action is maintainable. It is not necessary for us to say what the effect of these endorsed memoranda of receipts would be, supposing that it were incompetent for the plaintiff to contradict or explain

them by parol evidence; because it seems to us that the plaintiff may by law give such contradiction or explanation, and that in this case the parol evidence does satisfactorily explain the last memoranda made on each security, and shows distinctly that the balance was not paid by either Almon or the defendants.

A receipt is an *admission* only, and the general rule is, that an admission, though *evidence* against the person who made it and those claiming under him, is not *conclusive* evidence, except as to the person who may have been induced by it to alter his condition; *Straton v. Rastal*, 2 T. R. 366; *Wyatt v. Marquis of Hertford*, 3 East, 147; *Herne v. Rogers*, 9 B. & C. 586. A receipt, may, therefore, be contradicted or explained; and there is no case to our knowledge, in which a receipt upon a negotiable instrument has been considered to be an exception to the general rule; on the contrary, *Lord Kenyon*, in the case of *Scholey v. Walsby*, 1 Peake N. P. C. 34, cited at the bar, was of opinion, that a receipt on the back of a bill might be explained by parol evidence, and shown to be a receipt from the drawer, and not from the acceptor. If, then, parol evidence be admissible here to show why the receipt endorsed on the bill and note in question was so endorsed, and by whom the money therein mentioned was paid, there can be no doubt as to the effect of the evidence given for that purpose.

It is clear from the testimony of *Keighley*, that the balance was not paid by *Almon*, or by *Tilleard* on account of *Almon*, to discharge his debt, and by way of satisfaction of his liability on the bill and note; but it was paid by *Tilleard* as the purchase-money for those securities, of which he wished to become the holder, in order to constitute himself a creditor both of *Messrs. Key, Brothers, and Almon*, with a view, no doubt, of dealing more favourably with the latter than *Webber* would have done. The evidence of *Keighley* is confirmed by the form of the receipts for the balance; for one of these receipts omits the mention of *Almon*, and in the other his name is struck out, all the antecedent endorsements purporting to be receipts from him. And, indeed, if there were any doubt upon this part of the case, that would be a reason for a new trial, as the nonsuit *proceeded on the ground that the receipt was conclusive evidence that the bill had been paid by the acceptor.

It is to be observed, that one of the defendants was present at the arrangement, and both must therefore be taken to have been fully conversant of the transaction, and to have known that no part of the remaining balance of the bill was in fact paid by or on account of *Almon* or themselves.

These securities, therefore, having been neither of them paid by the defendants nor by *Almon*, were capable of being endorsed so as to give a valid title to the residue against both; but having been endorsed after the instruments were over-due and dishonoured, the endorsee could take only such title as the endorser could give. The plaintiff is, therefore, in the same situation as *Tilleard*, but *Tilleard* has acquired all the title which *Webber* had before the endorsement; and as *Webber*, being the legal holder, could have sued the defendants for the balance, the plaintiff may do the same. For these reasons, the rule must be made absolute. Rule absolute.

*320]

*TAYLOR v. KYMER and Another. Jan. 31.

N. and Co., commission agents, employed the defendants, who were sworn brokers, to buy eighteen chests of indigo for them at one of the *East India Company's* sales. *N. & Co.* dealt on behalf of another party (the plaintiff), but this was not mentioned. The defendants paid for the chests and kept the *India warrants*, and the goods remained in the company's warehouses. The principal, being informed of the purchase, paid *N. and Co.* the amount. They afterwards directed the defendants to sell the indigo, and apply the proceeds in reduction of a balance due to them from *N. & Co.*, which was done; the defendants, not knowing that any other party had a claim to the goods, and never having been paid, specifically, for the advance which they had made in respect of them.

There had been a running account between *N. and Co.* and the defendants for some time, during which the latter held a number of warrants for indigos purchased by them for *N. & Co.*, and for which the defendants had made advances. *N. & Co.* occasionally withdrew the warrants, and at or near the same time paid in money to their account with the defendants, to about the value. There was no express agreement as to this, but an understanding that the warrants were not to be taken away upon credit. The payments were made and entered generally. Between the time of purchasing the eighteen chests, and that of the direction to re-sell them, *N. & Co.* had paid in this manner more than the value of the eighteen chests, but had also, during all that time, been indebted to the defendants in a larger amount.

On trover brought by the principal against the defendants: Held, that the above payments on account could not be considered as appropriated to the discharge of the

defendants' claim on the eighteen chests, and that they consequently had a lien upon these at the time of the sale, which, under the circumstances, was an answer to the present action.

N. and Co. purchased and paid for twenty-three chests of indigo on behalf of the same principal, and were paid the amount by him, but retained the warrants, and the chests remained in the East India Company's warehouses. Being desirous of withdrawing some other warrants which they had in the hands of the defendants, they deposited these in lieu of them; and they afterwards authorized the defendants to sell the twenty-three chests, and appropriate the proceeds, which they did, not knowing that any party was interested in them but N. and Co. At the time of this transaction, N. and Co. were creditors in account with their principal to an amount much below the value of the indigo:

Held, that the sale of the twenty-three chests was a conversion, and that the defendants were liable to the principal in trover. For, that

The transfer of these warrants by N. and Co. was not a *sale or disposition* by factors, within 6 G. 4, c. 94, s. 2;

Nor a pledge as security for negotiable instruments, within the same clause, East India warrants not being "negotiable instruments."

And if the warrants were deposited as security for a previously existing debt, the defendants (by s. 3 of the act) could have no greater right in respect of them, than the factors had at the time of the deposit.

TROVER, for forty-one chests of indigo. At the trial before Parke, J., at the Lancaster Spring assizes, 1830, a verdict was found for the plaintiff, subject to the opinion of this Court upon the following case:—

The indigo in question was purchased for the plaintiff by Messrs. William Nevett and Sons, under the circumstances after-mentioned. Nevett and Sons were general *brokers and dealers in Liverpool, where the plaintiff resided, and they had also a house in London, where they transacted business [*321 as commission agents, and dealt largely in indigo on their own account. The defendants were sworn brokers of the city of London. Nevett and Sons were not.

In September and October, 1828, the defendants bought considerable quantities of indigo for Nevett and Sons at the East India Company's sales. Among these were eighteen chests, parcel of the forty-one mentioned in the declaration. The defendants paid for them, received and kept the warrants, and sent Nevett and Sons the usual notes, stating that the eighteen chests, with others, had been bought on their account by the defendants. Nevett and Sons sent the plaintiff an invoice of the eighteen chests, expressing that they were bought of Nevett and Sons by the plaintiff; and, in January, 1829, he paid them the amount. In June and July following, the defendants sold the chests, which had remained in the company's warehouses, and delivered the warrants to the purchasers.

On the first of January, 1829, Nevett and Sons bought of the East India Company, through a sworn broker, thirty-five more chests of indigo, including twenty-three which formed the residue of the forty-one claimed in this action. N. & Sons sent an invoice to the plaintiff, stating the twenty-three chests to be bought of them by him, and he paid them the amount in January, 1829. They paid the broker, and received the warrants from him. In the following April, Nevett and Sons, being desirous of withdrawing from the defendants nineteen other warrants for indigoes purchased and paid for by the defendants for account of Nevett and Sons, which had *always been in the hands [*322 of the defendants, and on which they had a lien for the amount of the purchase-money and charges, applied to them to deliver up these nineteen warrants, and to receive in lieu thereof the twenty-three before mentioned; and this being agreed to, the nineteen warrants were so delivered to Nevett and Sons, and replaced by the twenty-three warrants, which were endorsed in blank in the usual form. The defendants had no notice that Nevett and Sons were not the owners of the twenty-three warrants, and they remained in the defendants' hands as security for the above-mentioned purchase-money and charges, and also as part security for the payment of the prompt, which the

defendants advanced for Nevett and Sons in the same month of April to a large amount, according to the usual course of business between the parties. They also paid for drawing samples of the twenty-three chests, and for warehouse rent due for part of them to the East India Company. Between the 16th of May and the 28th of July, 1829, the defendants sold sixteen of the chests, and delivered the warrants to the purchasers of the East India Company; and consigned seven for sale to Hamburgh.

The case then set out the following letter from the plaintiff to Nevett and Sons, the date of which did not appear:—"I request you will advise whatever information you have to communicate as to the market. I wish to know if the present prices of the market correspond with those paid on my account. If you think you cannot realize a profit by holding them, it will be advisable to sell. I would be contented with a small profit at the time of purchase. I have left the sales in your hands."

*323] *The defendants were in the habit of selling for Nevett and Sons, the indigoes which they held on their account, and of shipping such indigoes, by their direction, to foreign places for sale.

On the 8th of April, 1829, Nevett and Sons wrote to the defendants as follows:—"We hereby authorize you to dispose of, for our account, any indigo held by you for us, in order to reimbursing yourselves the different sums advanced by you either in cash or by acceptances, as such acceptances fall due." The defendants, after receiving this letter, disposed of forty-one chests in the manner already mentioned.

On the 17th of June, Nevett and Sons stopped payment, and a commission of bankrupt afterwards issued against them. At that time, and also when the warrants for the twenty-three chests were deposited with the defendants, the balance of account between the plaintiff and Nevett and Sons was 38*l.* in their favour.

The East India Company's warrant for delivery of indigo is in the following form.

No.

To the East India Company's warehouse-keeper
for private trade, Billiter Lane.

You are desired to deliver to A. B. or his assigns by endorsement hereon, and the bearer giving a receipt on the back hereof, the following indigo, viz.:

(Then follows a description of the lot, its price, weight, &c.)

Sold him by the United East India Company.

Treasury, East India House, this day of

Counter Signature.

E. F.

Signature of the Company's
Treasurer or Assistant.

C. D.

*324] *The case stated these warrants to be negotiable instruments. They are endorsed, usually in blank, by the persons therein named, and are afterwards transferred by delivery, and by endorsement and delivery.

With respect to the eighteen chests of indigo first mentioned, it became a question at the trial, whether or not they had been paid for in account by Nevett and Sons to the defendants. It was referred to a barrister to examine into the accounts and certify as to this point, and to state for the opinion of the Court any facts, deemed material by the parties, upon which his certificate might be founded. He certified that the eighteen chests had not been paid for in account, and stated the following facts, which were embodied in the case.

In June, 1827, Nevett and Sons, who were commission agents, began to make purchases of indigo through the firm of Kymer and Co. (the defendants). Nevett and Sons gave them orders to buy certain parcels of indigo, sometimes at the sales of the East India Company, and sometimes of individuals, and Kymer and Co. effected the purchases in their own names, and made the necessary deposits and payments as they became due, and debited the account of Nevett and Sons with the sums so paid. Kymer and Co. received and kept the

warrants; and Nevett and Sons, when they wanted warrants, applied to Kymer and Co. for them, and at the same time, or sometimes a day or two before or after, paid them a sum or sums of money amounting to nearly the value of the indigo for which they so obtained the warrants. The value was not on such occasions accurately ascertained, nor was there any express agreement between Kymer and Co. and Nevett and Sons, that the latter should pay for the warrants at the time they received *them; but, from the nature of the dealings [*325 between them, Nevett and Sons considered that there was an implied agreement that they should not take warrants on credit from Kymer and Co., and that when they took warrants, Kymer and Co. should be placed in as good a situation as if the warrants had remained in their hands. Nevett and Sons sometimes paid cash and bills to Kymer and Co. without receiving warrants, but never received warrants without making a payment at or about the same time. In several instances, Nevett and Sons directed Kymer and Co. to effect sales for them of indigo purchased on their account. This Kymer and Co. accordingly did, and delivered the warrants to the purchasers, and received payment of the price, which was carried to the credit of Nevett and Sons' account. The sums so received, and also the moneys paid from time to time by Nevett and Sons, were entered generally to their credit, and not as having been received specifically in payment of the warrants delivered at the time when such payments were made, either to the purchasers or to Nevett and Sons as before mentioned. On a few occasions Kymer and Co. lent money to Nevett and Sons, and, in a few days after each loan, the precise sum lent was repaid. These sums were entered generally in the account. On the debit side they were not mentioned as loans to Nevett and Sons, nor was the money, when repaid, entered as discharging the corresponding item on the other side of the account.

The arbitrator then went into a detail of the state of accounts between the parties from the 31st of December, 1828, till the 9th of April following, by which it appeared that Nevett and Sons during that period had made payments exceeding the sum due for the eighteen chests, *but had always re- [*326 mained indebted to the defendants, upon the whole, in more than that amount.

In January, 1830, the plaintiff demanded the forty-one chests of the defendants, offering to pay any brokerage or usual mercantile charges that might be due. Delivery was refused.

On this case the points stated as relied upon by the defendants were: that in respect of the eighteen chests, they had a lien for the advances they had made, and which, as the arbitrator certified, had not been repaid. And as to the twenty-three chests, that they had also a lien by the statute 6 G. 4, c. 94, s. 2: that Nevett and Sons had been authorized to sell by the plaintiff, and might execute that authority through the defendants, who had in fact sold and consigned for sale the twenty-three chests before any demand was made: that, at all events, Nevett and Sons had a lien on those chests to the amount of 38*l.*, and might pledge them to that extent, no tender having been made of the amount: and that the defendants had a lien on these chests to the amount of the charges they had paid, of which there had been no tender. The case was argued on a former day of this term. (a)

Wightman, for the plaintiff. First, as to the eighteen chests. The arbitrator has found that the defendants were not paid for them in account: but the contrary appears from the facts stated by him as the ground of his finding. There was a running account between Nevett and Son and the defendants, and payments made from time to time without any specific appropriation; *the [*327 payments, therefore, must go in liquidation of the earlier items according to their order. *Devaynes v. Noble* (Clayton's case, 1 Mer. 572). But even if this were not so, the defendants can found no right, as against the plaintiff, upon their payment of the prompt. As regarded him, who had authorized no

(a) Before Lord Tenterden, C. J., Littledale, Parke, and Taunton, Js.

such advance, it was a payment in their own wrong. It was in fact a loan by them to Nevett and Sons. The defendants, then, can only rely on the act 6 G. 4, c. 94, s. 2.(a) But that clause only contemplates a specific dealing, some single transaction in which a definite agreement is made in respect of a present advance of cash or negotiable instruments. Here no specific agreement took place for depositing the India warrants as a pledge; they were only suffered to remain in the hands of the defendants as a sort of general security for the balance of a running account. The expressions, "contract or agreement for the deposit or pledge of the said goods as a security for any money or negotiable instrument advanced or given upon the faith of such bill of lading, *328] warrant," &c., cannot extend to the uncertain series of dealings, and *the mere implied understanding between the parties, which this case describes.

Then, as to the twenty-three chests; they were not paid for by the defendants. The warrants were delivered to them by Nevett and Sons, merely to replace other warrants (for nineteen chests) which the defendants held at the time, as a security. It was a mere substitution of one set of warrants for the other. It was neither a sale nor a pledging within sect. 2 of the act. Before the statute, a factor could not *barter*, *Guerreiro v. Peile*, 3 B. & A. 616, and the statute has not given him that power. Besides, the substituted warrants can only have been given as security for a debt already contracted; and in that case, by sect. 3 of the act (b), the party receiving the deposit acquires no further right in the goods than might have been enforced by the party pledging. Now in this case, Nevett and Sons, at the time of their depositing the warrants for twenty-three chests with the defendants, had only a claim of 38*l.* against the plaintiff; and there was no need that he should tender that sum to the defendants, in order to bring an action, for they had sold the goods, and that was such a conversion as made a tender unnecessary, *Taylor v. Trueman*, M. & M. 453.

F. Kelly, contrd. With respect to the warrants for the eighteen chests, it is not necessary to resort to the factors' act, 6 G. 4, c. 94, which, indeed, does not apply. No question of deposit or pledge arises, for Kymer and Co. were never divested of these warrants. The facts here are the same as if A. employed B. to buy a horse or *other chattel for him, and B., without saying *329] that he was agent for another party, commissioned C. to make the purchase. If C. bought in his own name, and paid or became liable for the money, could A., the original employer, insist on having the chattel delivered up to him, alleging that he had paid his own agent, though neither of them had paid C.? Here Nevett and Sons, being commissioned by the plaintiff to purchase indigoes, but not being sworn brokers, employed the defendants, who were such brokers; they bought the eighteen chests in their own names, paid the deposit, and were liable for the prompt. Could Nevett and Sons, who so employed the defendants, without mentioning any principal, have claimed the warrants without first discharging the lien? And if not, can the plaintiff do so? But, it is contended, the defendants have been paid in account for these warrants. The arbitrator, however, has found otherwise, and is justified by the facts. The course of dealing was, that when Nevett and Sons withdrew any warrants, they

(a) By that clause, any person intrusted with and in possession of any bill of lading, India warrant, &c., shall be deemed the true owner of the goods described in the said documents respectively, so far as to give validity to any contract or agreement thereafter to be made or entered into by such person so intrusted and in possession as aforesaid, with any person or body politic or corporate, for the sale or disposition of the said goods or any part thereof, or for the deposit or pledge thereof, or of any part thereof, as a security for any money or negotiable instrument advanced or given by such person, body politic or corporate, upon the faith of such documents, or either of them: provided such person or body politic or corporate shall not have notice by such documents, or either of them, or otherwise, that such person so intrusted as aforesaid is not the actual and bona fide owner or proprietor of such goods so sold or deposited or pledged as aforesaid.

(b) Its substance is given in the judgment of the Court, p. 386, post.

paid in, almost immediately, a sum amounting to about the value; there was an understanding that the warrants were not to be taken out on credit. The rule, as settled by the preponderance of authorities with respect to payments made without specific appropriation, is, that they are to be applied at the option of the creditor. The single exception established in *Devaynes v. Noble*, 1 Mer. 585, has no bearing on this case: it relates to transactions between a banker and his customer, where there is a continuation of dealings all of one kind, all the sums paid in form one blended fund, and (as the Master of the Rolls there says) there is no *room for any other appropriation (in the absence of express directions) than that which arises from the order in which the [*330 receipts and payments take place. But it cannot be said here, that a payment made by Nevett and Sons, for the purpose of redeeming a particular set of warrants, was to be applied to the general balance; that whenever they paid money on a more recent transaction, exceeding the value of warrants formerly deposited, the lien on those former warrants was gone; or (which would be the consequence of this) that when such money was paid in with a view to releasing some of the later warrants, those warrants might have been detained from their owner by the defendants, on pretence that the payment was applicable to an earlier part of the account.

Then, as to the warrants for twenty-three chests. First, the disposal of these was a transaction protected by the statute. *Taylor v. Trueman*, M. & M. 453, which may be considered an authority on the other side as to some parts of the case, was a nisi prius decision never brought before this Court, and the points are of great importance. The delivery of these warrants to Kymer and Co. was a sale or disposition within sect. 2. The statute, being remedial and framed for the purpose of extending the benefit of a former act, 4 G. 4, c. 83, must be construed liberally. (The Court expressing a decided opinion that this was not a sale, or disposition in the nature of a sale, within the act, *Kelly* gave up this point.) Then, at all events, the transaction was a deposit or pledge of the warrants as a security for negotiable instruments. These warrants are such instruments. The case states them to be so, and they are universally [*331 *treated as such in the city of London. They resemble bills of exchange, both in their nature and the mode in which they are transferred. To say that a negotiable instrument, to come within the meaning of the statute, must be for the payment of money, would be construing the act with a strictness not answerable to its intention.

Then, secondly, Nevett and Sons were authorized to sell the twenty-three chests by the plaintiff's letter, which must have been prior to their own letter of the 8th of April, or, at all events, to their failure; and which, if it even came after the sale of some of the chests, would operate as a sanction of it. It is true that although Nevett and Sons, by virtue of that letter, might direct others to sell, they could not authorize them to apply the proceeds to their own use. But where two authorities are given, one valid and the other void, they may be separated from each other, *Stierneld v. Holden*, 4 B. & C. 5: and although Nevett and Sons could not empower the defendants to appropriate the proceeds of these goods, yet, as they might empower them to sell, no action of trover will lie, the sale, under such circumstances, not being a conversion.

Wightman, in reply. In *Stierneld v. Holden*, the transfer of the bill of lading, and the sale, took place in the usual course of business, which distinguishes that case from the present. Here, the goods were in the first instance deposited as a pledge. The taking of the deposit was in itself a conversion; for that deposit was, in reality, not on account of the warrants that were withdrawn, but of preceding debts. The plaintiff's *letter, which has been [*332 relied upon, is not a direct authority to sell, and there is nothing to show when it was received.

Cur. adv. vult.

Lord TENTERDEN, C. J., now delivered the judgment of the Court. After stating the form and subject-matter of the action, his Lordship proceeded as follows.

This case divides itself into two parts; the one relating to eighteen chests of indigo, the other to twenty-three chests.

As to the eighteen chests, the short account of these is, that in September and October, 1828, Nevett and Sons bought, through the medium of the defendants, forty-one chests of indigo from the East India Company, of which the eighteen were part. The defendants paid the price of the eighteen chests to the East India Company, and received the warrants, which they kept in their possession. In this state of things, Nevett and Sons, on the 28th of October, made out an invoice to the plaintiff of the eighteen chests, and in January, 1829, the plaintiff paid the amount of the invoice to Nevett and Sons. The plaintiff, though he paid the price to Nevett and Sons, never had the possession of, or control over either the indigo or the warrants which represented it, neither had his agents, or the sellers, whichever of the two characters Nevett and Sons filled, either indigo or warrants: and no notice of the plaintiff's claim was ever given to the defendants, till after they had done what the plaintiff contends is a conversion. It seems very doubtful, therefore, whether the plaintiff ever had such a right of possession of the indigo as would enable him to maintain an *333] action of trover against these defendants, independent *of any claim which the defendants may themselves set up.

But, supposing the plaintiff had such a right to the possession as to enable him to maintain trover, then it must be considered whether the defendants had any such lien on the goods as would defeat the present action. They contend that Nevett and Sons have never paid them for the eighteen chests, and that, therefore, they have such lien. On the trial of the cause it was referred to Mr. Cresswell to ascertain and certify whether the eighteen chests had been paid for in account by Nevett and Sons to the defendants: and he has certified that they were not; but as he has stated the grounds on which he has given his certificate, it is examinable by the Court whether he has come to the right conclusion, and we are of opinion that he has. On the part of the plaintiff it is contended, that the items in the account are to be governed by the same rule as was laid down in the case of *Devaynes v. Noble*, 1 Mer. 608, and which has been acted upon since, that where money is paid to one party on a general account, and no direction given by the payer as to its appropriation, and no appropriation made by the payee, the money paid in is to go in discharge of the first items on the other side; and, therefore, the money here having been paid by the defendant for the indigo in 1828, and the payments made since that time by Nevett and Sons exceeding all their debit side of the account in 1828, it is contended that this debt has been paid. But we think the rule laid down in *Devaynes v. Noble* does not apply to a case like the present; for here it ap- *334] pears, that the general course of payments *which were made to the defendants had reference to and were connected with the warrants for indigo which Nevett and Sons received from the defendants, though not precisely of the same amount, and, consequently, are not to be taken to go in reduction of the first part of the account; and as Nevett and Sons, at the time of their bankruptcy, were indebted to the defendants, we are of opinion, that the lien of the latter continues. The lien of the defendants would not, however, authorize them to sell the eighteen chests; but, as Nevett and Sons, in April, 1829, authorized the defendants to sell any indigo they had in order to reimburse themselves, and as the plaintiff had not given the defendants any notice of his claim, we think that the sale of the eighteen chests did not amount to a conversion.

For if a broker sells or procures the sale of goods to another person, and that other sells the goods to a third person without delivering possession either corporally or symbolically, and the name of the third person is never mentioned to the broker, the broker has the same right as against the third person that he had against that person with whom he originally dealt, on the same principle that if a policy of insurance is effected by a broker in ignorance that it does not

belong to the persons by whom he is employed, he has a lien upon it for the amount of the balance they owe him; as was held by Lord Chief Justice Gibbs in *Westwood v. Bell*, 4 Campb. 394; and upon the same principle that if a factor sells goods in his own name, the purchaser has a right to set off a debt due from him in an action by the principal for the price of the goods.

Then, with regard to the twenty-three chests, they *formed part of [*335 thirty-five chests which on the 1st of January, 1829, were bought by Nevett and Sons, through the medium of Mocatta, a broker, and on the same day Nevett and Sons made out an invoice to the plaintiff of the twenty-three chests as bought of them, Nevett and Sons; and in that month of January the plaintiff paid Nevett and Sons for them. Nevett and Sons paid Mocatta for the twenty-three chests, and the warrants were delivered to them. These warrants, therefore, being in the hands of Nevett and Sons upon a purchase made of them by the plaintiff, and for which he had paid them, gave the plaintiff a right of possession of the warrants and the indigo by which the warrants were represented, and in that respect the plaintiff's right is to be treated differently from what it was as to the eighteen chests. On the 2d of April, 1829, Nevett and Sons were desirous of taking out of the hands of the defendants nineteen warrants for indigo, on which the defendants had a lien, and agreed with the defendants to deposit the twenty-three chests in lieu of the nineteen chests, which was done. In the months of May and July, 1829, sixteen of the chests were sold by the defendants to different purchasers, and in the same month of July the defendants sent the remaining seven to Hamburg to be sold. The defendants, therefore, have applied the twenty-three chests of indigo to their own use, and the question then is, whether they are justified in doing so? They say they are justified under the terms of 6 G. 4, c. 94.

The second section of that act says, that any person intrusted with and in possession of any bill of lading, India warrant, dock warrant, warehouse-keeper's certificate, wharfinger's certificate, warrant or order for delivery of goods, shall be deemed and taken to be the true *owner of the goods [*336 mentioned in those documents, so as to give validity to any contract or agreement thereafter to be entered into by such person so intrusted and in possession as before mentioned with any person for the sale or disposition of the said goods, or for the deposit or pledge thereof as a security for any money or negotiable instrument advanced or given upon the faith of such documents: with a proviso that this is not to apply in case there be notice.

Then the third section enacts, that in case any person shall accept and take any such goods in deposit or pledge from any such person so in possession and intrusted as before mentioned, without notice, as a security for any debt or demand due and owing from any such person so intrusted and in possession to such person before the time of such deposit or pledge, then and in that case such person so accepting or taking such goods in deposit or pledge shall acquire no further or other right in or upon or to the said goods, or any such documents, than was possessed or could have been enforced by the said person so intrusted and in possession as aforesaid at the time of such deposit or pledge as a security.

The fourth section cannot be considered as in any way applicable. The fifth section enacts, that any person may accept and take any such goods, or any such document, in deposit or pledge from any such factor or agent, notwithstanding that such person shall have notice that the person making such deposit or pledge is a factor or agent; but such person shall acquire no further right, title, or interest in, upon, or to such goods or documents than was possessed or could have been enforced by such factor or agent at the time of such deposit or pledge as a security.

*We are of opinion that the delivery of the twenty-three warrants [*337 does not, under any of the provisions of this act of parliament, give the defendants any right to hold these warrants from the plaintiff as a security for

the debt owing to him by Nevett and Sons. It is not a contract for the sale of the goods within the second section, neither is it a disposition; for to make it a disposition, there must be something in the nature of a sale. It is, however, a deposit or pledge of the warrants: but then is it such a deposit or pledge as is in the contemplation of the second section? To come within that section it must be a deposit or pledge for money or a negotiable instrument advanced or given by such person upon the faith of such documents.

Now, no money is advanced or given upon the faith of these documents. Then is any negotiable instrument given upon the faith of the twenty-three warrants? Other warrants are given upon the faith of these: but we are of opinion that these warrants are not negotiable instruments within the meaning of the act.

The third section will not assist the defendants, for if the warrants are considered to be deposited as a pledge, not upon the faith of the documents as under the second section, but for any debt due and owing from the person making the deposit or pledge before the time of the deposit or pledge, the person who accepts the goods under such circumstances will acquire no further right than the person had who made the deposit or pledge. The fifth section applies to cases of deposits or pledges with notice, and there the person with whom the goods are pledged acquires no further right than the party pledging had.

*338] Then, if the defendants had no claim upon the goods, *have they been guilty of a conversion? There is no doubt they have; the sale of the sixteen chests is a conversion, and so is also the sending the seven chests to Hamburg for the purpose of sale.

We are therefore of opinion, that the plaintiff is not entitled to recover in respect of the eighteen chests; but that he is for the twenty-three chests. The damages are, by agreement, to be settled according to the price for which the goods were sold, and therefore the particular date of a letter mentioned in the case becomes immaterial. But these damages must be reduced by the amount of the debt owing from the plaintiff to Nevett and Sons, which appears to be 38*l.* 19*s.* 1*d.*

Judgment to be entered accordingly.

ROBERTSON v. SCORE.

By 6 G. 4, c. 16, s. 126, a certificated bankrupt may plead his bankruptcy to any action for a debt which was provable under the commission. By s. 127, if he has been bankrupt before, and does not pay 1*s.* in the pound under the second commission, his person only is protected by the certificate, and his future effects vest in the assignees.

Seem, that s. 127, extends to cases where the former bankruptcy and certificate were anterior to the statute: but, Held, that that section, where applicable, does not entitle a creditor to proceed against the bankrupt after a second certificate, for a debt which he might have proved under the commission.

ASSUMPSIT on three bills of exchange. This cause was tried before Lord Tenterden, C. J., at the sittings after Hilary term 1830, when a verdict was given for the plaintiff for 146*l.*, subject to the opinion of this Court on the following case. The declaration was on three bills of exchange, dated respectively in October 1824, June 1826, and on the 14th of August 1826: the first drawn and endorsed, the other two accepted, by the defendant. They were *339] payable two months after date *respectively. Pleas, the general issue, and a general plea of bankruptcy, on which issue was joined. The plaintiff's case on the bills was admitted, and the defendant relied on these facts: A commission of bankrupt, bearing date the 27th of May 1823, was issued against the defendant, under which he was duly declared a bankrupt,

and obtained his certificate in July following. A second commission was issued against him, dated the 26th of August 1826, under which he was also declared a bankrupt, and obtained his certificate in the following November; but, under this last commission, he did not pay 15s. in the pound. The question for the opinion of the Court was, whether the certificate under the second commission was a bar to this action. If it were, a nonsuit was to be entered; if not, the verdict to stand. The case was argued on a former day in this term. (a)

Follett, for the plaintiff. This case depends upon the effect of the 6 G. 4, c. 16, s. 127. (b) There is a difference between this enactment and the 5 G. 2, c. 30, s. 9, where it was provided that the bankrupt's person should be free, but his future effects should be liable to his creditors. *By the present act, [*340 they are vested in his assignees. The question is whether, when they do not interfere, the bankrupt can plead his certificate in bar of an action brought by his creditor, for here the plea is in bar of the action, and not in relief of the person. Such plea is not available to the bankrupt. It was determined under the old act, that the future property did not so vest in the assignees as to prevent a subsequent commission from issuing against the bankrupt, *Ex parte Baker*, 1 Rose, B. C. 452, *Ex parte Hodgkinson*, 2 Rose, B. C. 172, 19 Ves. 291, and *Hovil v. Browning*, 7 East, 154. It has, indeed, been decided otherwise under the new act, with respect to a commission issued where there had been two previous ones, under which the bankrupt had not paid 15s. in the pound, *Fowler v. Coster*, 10 B. & C. 427; but still the right of creditors is not taken away in cases of this kind, where the assignees do not interfere. The effect of the law as it at present stands, is, that the assignees under the second commission may, if they think fit, interpose and take the effects; but if they do not, then, as between the bankrupt and a creditor who sues him, he is in the same situation as a bankrupt who has not obtained his certificate under a former commission. Now, it has been decided in many cases that an uncertificated bankrupt may dispose of and sue for property accruing to him after his bankruptcy, if his assignees do not interfere. *Ashley v. Kell*, 2 Str. 1207, *Fowler v. Down*, 1 B. & P. 44, Co. B. L. 462, *Chippendall v. Tomlinson*, 4 Dougl. 318, *Webb v. Fox*, 7 T. R. 391, and *Drayton v. Dale*, 2 B. & C. 293. The same principle must prevail in *the present case. The point was raised, but [*341 not decided, in *Eicke v. Nokes*, M. & M. 303.

Cary, contra. First, the 6 G. 4, c. 16, s. 127, does not apply to this case; and, secondly, if it do so apply, still the certificate discharges the defendant. In the first place, the prior commission here was in 1823, and the certificate was in the same year, which was before the 6 G. 4, c. 16 was passed. Now the 127th section of that act is prospective only, and does not apply to a certificate granted before it was enacted. It has been determined that the second section does not apply to the case of a party who traded before the act, but not after, *Surtees v. Ellison*, 9 B. & C. 750. The discharge mentioned in the act is "by such certificate as aforesaid," which must mean one granted under this act, and not one under the 49 G. 3, c. 121, s. 18, which required the certificate to be signed by a proportion of the creditors different from that prescribed by section 122,

(a) Before Lord Tenterden, C. J., Littledale, Taunton, and Patteson, Js.

(b) Which enacts, "that if any person who shall have been so discharged by such certificate as aforesaid, or who shall have compounded with his creditors, or who shall have been discharged by any insolvent act, shall be or become bankrupt, and have obtained or shall hereafter obtain such certificate as aforesaid, unless his estate shall produce (after all charges) sufficient to pay every creditor under the commission 15s. in the pound, such certificate shall only protect his person from arrest and imprisonment; but his future estate and effects (except his tools of trade and necessary household furniture, and the wearing apparel of himself, his wife, and children), shall vest in the assignees under the said commission, who shall be entitled to seize the same in like manner as they might have seized property of which such bankrupt was possessed at the issuing of the commission."

of the present act. Secondly, if the section do apply, still the bankrupt may plead his certificate. By the old act, the future property did not vest in the assignees, and could not be taken under the commission, but was liable in judgment only, *Ex parte Hodgkinson*, 19 Ves. 291, 2 Rose, B. C. 172. This was a great inconvenience, which the new enactment was intended to remedy, and the property is now vested in the assignees. The plea is therefore a good bar. By section 121, the certificate shall discharge the bankrupt from all debts, subject to such provisions as are after specified. Section 126 allows this certificate to be pleaded. And section 127 makes no provisions inconsistent with this; the *342] future property *vests in the assignees, but the certificate is still a bar as against other persons. If the plaintiff could recover, the assignees would be entitled in their turn to sue him for the amount, which can never have been intended.

Follett, in reply. The point decided in *Surtees v. Ellison*, 9 B. & C. 750, was, that the trading was insufficient, on the ground that there was no bankrupt law in existence under which the trading had taken place. It was contemplated in s. 127, of the present act, that certificates had been granted before its passing, and the language used evidently applies to previous commissions. Indeed the case of *Fowler v. Coster*, 10 B. & C. 427, was exactly like this, for there the first certificate was before the statute, and the second after, yet the section was held to apply. If, in such a case, the construction contended for on the other side were to prevail, what would become of the bankrupt's future effects, the former act, which made them liable to the creditors, being repealed, and the present, as it is said, not applicable? Then, on the other point, no doubt it was intended to give the assignees power to interfere, but the bankrupt cannot set up their right.

Our. adv. vult.

Lord TENTERDEN, C. J., now delivered the judgment of the Court. The question is, Whether the certificate in this case is a bar to the action? Now the argument on the part of the defendant proceeded on two grounds. First, that the last bankrupt act, s. 127, does not apply to cases where the first certificate was granted under a commission issued before the passing of the act. We *343] are inclined to think that it does apply to such *cases. But it is not necessary to give an absolute opinion on that point; because, assuming that it does, we are of opinion upon the second point made by the defendant, that the certificate is a bar to the action. All the bills of exchange were provable under the second commission; and we think that the plaintiff, although he has not proved, is barred by the certificate. By sect. 126 of the act, the person of the bankrupt is clearly discharged, after certificate, from all debts provable under the commission. By sect. 127, his future effects, in the cases there specified, in which they are not discharged by the certificate, are vested in the assignees, as the former ones were by the assignment. The assignees are to distribute them rateably among the creditors; and the plaintiff, here, by proving under the commission, might have claimed his part in such distribution. If the certificate here were no bar, and the plaintiff could have execution against the goods by means of this action, it would be in effect an execution against the goods of the assignees, and he would thereby have the benefit of a full payment of his debt, instead of the property being fairly shared among the creditors. The verdict must, therefore, be set aside, and a nonsuit entered.

Judgment of nonsuit.

LOTON v. DEVEREUX. Jan. 31.

A defendant, on whose application a judgment has been set aside for irregularity in practice, without costs, cannot recover such costs as damages in an action of trespass against the plaintiff's attorney, for taking his goods under colour of the judgment.

In a case of *Loton v. Loton*, the Court of King's Bench set aside a judgment

and execution for irregularity, but without costs; the irregularity being that no rule *for judgment had been given. Afterwards, Loton, the former defendant, brought an action of trespass against Devereux (the attorney of [344 the former plaintiff) for taking the goods, and alleged as special damage, that the defendant had taken them under colour of a supposed judgment, whereby the plaintiff was put to great expenses and costs in procuring the judgment to be set aside. The defendant suffered judgment by default. The sheriff's jury found a verdict of 60*l.*, being 40*l.* for the seizure and detaining of the goods, and 20*l.* for the costs of procuring the judgment to be set aside. A rule nisi having been obtained to reduce the damages to 40*l.*,

R. V. Richards, on a former day in this term, showed cause. Although the Court might refuse to give costs to the plaintiff in the original action, they have no power to deprive the defendant in that action of the costs which he has incurred in consequence of the bad judgment. *Cash v. Wells*, 1 B. & Ad. 375, shows that the setting aside proceedings, in cases like the present, is not a matter in the discretion of this Court, and that it will not impose terms.

Godson, contrd. The matter of the rule having been by consent of the parties before the Court, it had the power to decide the whole question respecting the costs of the rule. In *Harmer v. Tappenden*, 3 Esp., N. P. C. 278, it was held that a party who had been amoved from being a member of a corporation, and who had been restored by mandamus, could not recover the costs of the mandamus.

Cur. atq. vult.

*Lord TENTERDEN, C. J., now delivered the judgment of the Court. After stating the facts of the case, his Lordship proceeded as follows:— [345

The question is, whether the costs of setting aside the judgment for irregularity can be made the subject of special damage in an action, after they have been refused by the Court on motion? and we are of opinion that they cannot. The irregularity was only a violation of a rule of practice. In such a case the Court have jurisdiction to say definitely whether there shall or shall not be costs, and they ordered the judgment to be set aside without costs. If costs might be recovered in this case, actions would frequently be brought for costs after the Court had refused to allow them. The rule, therefore, for reducing the damages must be made absolute.

Rule absolute.

WEST v. WILLIAMS.

Rule of Court, Trinity term 1 W. 4, directs, that if the notice of bail shall be accompanied by an affidavit of each of the bail, and if the plaintiff afterwards except to the bail, he shall, if they are allowed, pay the costs of justification:

Held, where the plaintiff was served with notice of bail, and with a copy of the affidavit of the bail, which did not purport on the face of it to be a copy, or state where the original was filed, and he afterwards excepted to them, he was not bound, on the bail being allowed, to pay the costs of justification.

ON the last day but one of Michaelmas term, a rule was obtained to show cause before a Judge at chambers why so much of the rule for the allowance of bail in this cause as directed payment of the costs of justification by the plaintiff to the defendant should not be discharged; and in the last vacation *Patterson, J.*, ordered it to be made absolute. In this term *White* moved for a rule nisi for rescinding that order. The circumstances of the case were as follows: On the 14th of *November the bail-piece was filed at Mr. Justice *Patterson's* chambers, with an affidavit of the due taking thereof, and also an [346 affidavit of justification by each of the bail, pursuant to the rule of Trinity term 1 W. 4. On the same day the plaintiff's attorney was served with notice of bail and with a copy of the above-mentioned affidavit of justification. The bail were excepted to, and justified, and the rule for their allowance directed

payment of the costs of justification by the plaintiff, according to the above-mentioned rule.

White now contended, that the direction for payment of costs was right, and that that part of the rule for allowance of bail ought not to have been discharged. By the rule of Court, "if the notice of bail shall be accompanied by an affidavit of each of the bail, according to the form thereto subjoined, and if the plaintiff afterwards except to such bail, he shall, if such bail are allowed, pay the costs of justification." The affidavit of each of the bail was filed with the bail-piece, at a Judge's chamber, and a copy of this affidavit was served on the plaintiff's attorney, together with the notice of bail. [Lord TENTERDEN, C. J. Did it purport to be a copy, or state that the original was so filed?] It did not. But the notice of bail pointed out the chambers at which the bail-piece was filed; and a search there for that bail-piece, and for the affidavit, of which a copy was served, would have succeeded. It is not necessary to accompany the notice of bail with the original affidavit of justification; and service of a copy, together with the notice of bail, is sufficient, although such copy was not stated to be a copy, and did not specify where the original was filed.

*347] The Court refused the rule in the terms prayed, until they should have consulted all the Judges, but they stayed the proceedings in the mean time: and, on a subsequent day of this term, Lord Tenterden said that he had consulted the other Judges, and they agreed with him that no rule should be granted. Here it has been contended that it was not necessary to serve an original affidavit of justification on the plaintiff's attorney. We think it was not; but we think also that the copy served should either have been entitled "copy," or should have borne some immediate reference to the original, and should have given information where it was filed. Rule refused.

DUMMER v. PITCHER. Jan. 31.

A cognovit was given, with a condition that if the ultimate decision of certain chancery suits between the parties should be for the plaintiff, the defendant should pay him 500*l.* within one month after such decision, or else execution should issue. The Vice-Chancellor made his decree in those suits, for the plaintiff, who at the end of a month, issued execution, the 500*l.* being unpaid. The decree had not been passed by the registrar, though the minutes had been settled; and the defendant had lodged a caveat, intending, as he stated, to appeal to the Lord Chancellor:

Held, that the chancery suits had not been ultimately decided within the meaning of the condition, and that the execution, consequently, was irregular.

SIR JAMES SCARLETT had obtained a rule nisi for setting aside the execution issued in this case with costs; against which Erle now showed cause. It appeared that the plaintiff had sued the defendant on a promissory note for 500*l.*, and had also filed a bill against him in Chancery. The defendant having filed a cross bill for an injunction against proceeding in the suit at law, it was agreed that the defendant should give a cognovit in that action, with a condition, that if the ultimate decision of the Chancery suits should be in favour of the plaintiff, *348] but not otherwise, the defendant should, within one month after the decision of the said Chancery suits in the plaintiff's favour, or within such time as the Court of Chancery should order, pay the plaintiff 500*l.*, and in default the plaintiff should be at liberty to sue out execution. Such cognovit was given: and on the 19th of last December the Vice-Chancellor made his decree in both the Chancery suits, in favour of the plaintiff. At the end of a month from that time the 500*l.* not being paid, the present execution was issued. Before the month had expired, the defendant (under the advice of counsel) lodged a caveat, with the intention, as he now stated, of appealing to the Lord Chancellor. The decree had not been passed by the registrar when the execution issued, though the minutes had been settled and agreed upon by the solicitor.

tors. On behalf of the plaintiff it was alleged that the defendant did not in reality intend to appeal, having called a meeting of his creditors to propose a composition; and that a docket had been struck against him. No petition of appeal had yet been presented. For the defendant it was urged that no ultimate decision of the Chancery suits had taken place, within the meaning of the condition above stated, and, therefore, that the execution was issued in violation of the agreement. And

The Court (a) was of this opinion, and made the Rule absolute.

(a) Lord Tenterden, C. J., Littledale, Taunton, and Patteson, Js.

***EVERETT v. YOUELLS. Jan. 31.**

[*349]

Discharging a jury by consent, does not terminate the suit, but is the same, in this respect, as withdrawing a juror. And where the plaintiff, instead of going on with such suit, brought a new action for a cause admitted to be the same, the Court stayed the proceedings, but would not grant the defendant his costs of the latter suit.

On the trial of an action between these parties at the last Summer assizes for Norfolk, the jury was discharged, by consent, without giving any verdict. The plaintiff having commenced a second action for the same cause, F. Kelly obtained a rule nisi to stay all proceedings in this latter suit, with costs.

F. Pollock and Storks, Serjt., now showed cause, and admitted that the plaintiff ought to proceed with the former action, and not with this, but contended that there was no ground for demanding the costs of the latter. Discharging the jury is the same in effect as withdrawing a juror, and was not a determination of the former suit, Sanderson v. Nestor, Ry. & Mood. 402. If this action had gone on, the defendant might have pleaded the pendency of the other in abatement, but then he would not have been entitled to costs if the plaintiff had confessed the plea.

Per Curiam.(a) The first action was no more ended by discharging the jury, than it would have been by withdrawing a juror: and as the defendant would not have been entitled to costs if he had pleaded in abatement that a former action was depending, he has no claim to them now.

Rule absolute, without costs.

(a) Littledale, Taunton, and Patteson, Js.

***HOBY v. BUILT, Gentleman.(a)**

[*350]

An attorney, retained to conduct a cause at the assizes, cannot abandon it, on the ground of want of funds, without giving the client reasonable notice; and, therefore, where an attorney so retained gave notice to his client on the Saturday before the commission day (which was on a Thursday) that he would not deliver briefs, unless he was furnished with funds for counsel's fees, and they not being furnished, counsel were not instructed, and a verdict passed against the client; it was held, in an action against the attorney for negligence, that the jury were properly directed to find for the plaintiff if they thought the attorney had not given reasonable notice to the client of his intention to abandon the cause.

ASSUMPSIT.—The first count of the declaration stated, that an action was depending between B. Rudge and Hoby, and that the now defendant, in consideration of a retainer as an attorney, undertook to attend to and manage it for Hoby; that notice of trial was given on the 26th of January 1830 for the next

(a) This case, which was argued and determined on Monday the 28d of January, was unavoidably omitted in its proper place.

Hereford assizes, and that it was the defendant's duty, and he undertook, within a reasonable time before the action came on, to deliver briefs to counsel, and instruct them to appear at the trial and defend the said action; that though he knew that Hoby had a good defence to the action, and had subpoenaed witnesses for his defence, yet he neglected to deliver briefs and instruct counsel, whereby the cause was taken as undefended, and a verdict passed for the then plaintiff, who had judgment for 99*l.* 10*s.* against Hoby, the present plaintiff, and took his goods in execution. The second count stated, that the defendant undertook to manage the cause in a skilful manner, but that he did not appear, and concluded like the first count; and the third charged negligence generally. The fourth, fifth, and sixth counts were similar in form to the first three, but referred to an action brought by H. Watkins against the present plaintiff, wherein he recovered 72*l.* 10*s.*, and took his body in execution. Plea, non-assumpsit.

At the trial before Bosanquet, J., at the Spring assizes for Hereford 1831, it *351] appeared in evidence, that two actions were depending against Hoby, one of them at the suit of Rudge, and the other at the suit of Watkins; and that Hoby had retained the defendant (an attorney) to defend both the actions at the assizes for that county, and the defendant Built, so late as Monday the 20th of March 1831 (Thursday the 24th being the commission day at Hereford), caused subpoenas to be issued in the cause, and on Saturday the 26th, the witnesses being in attendance, the causes were taken as undefended, and verdicts found for the plaintiffs; on which judgments were entered up, and Hoby was taken in execution. On the part of the defendant it was proved, that on the Saturday (18th of March) before the commission day, the defendant came to Hoby with one Woodhouse, an attorney, and said that he had recommended Hoby to let Woodhouse prepare the briefs, and conduct the rest of the defence; and Hoby directed Woodhouse to do so, and Woodhouse then engaged to prepare the briefs and conduct the defence, on condition that Hoby would furnish him with funds to fee counsel. Hoby never did supply those funds, and briefs were not delivered. It further appeared that Woodhouse had frequently before taken business into court for Built, and managed it for him; and that on the occasion in question, he had charged Built for the business done for Hoby, and considered him (Built) as paymaster. It was contended by the defendant's counsel, first, that the duty of delivering briefs had, by consent of the plaintiff, been transferred from Built to Woodhouse; and, secondly, assuming that Woodhouse acted merely as the agent of Built, still the latter had done all which, under the circumstances, he was bound to do; for an attorney *352] who undertakes a cause is not bound to continue it without funds, but may, at any time, refuse to go on with it, after giving his client notice.

The learned Judge told the jury that the plaintiff undoubtedly was not entitled to recover, if it was agreed between all the parties, that after Saturday the 18th of March, Built should cease to be the attorney; and he left it to them to say, whether, after that time, Woodhouse acted as the attorney of Hoby, or merely as the agent of Built.

As to the other point, he was of opinion that although an attorney who undertakes a cause is not bound, at all events, to proceed with it if he is not supplied with funds, yet, that an attorney who has undertaken a defence with a view to trial, cannot abandon it on the eve of the assizes, without giving his client a reasonable opportunity of resorting to other assistance; and he directed them to consider whether the notice given in this case was, with reference to all the circumstances, reasonable in that respect. The jury found a verdict for the plaintiff, with 166*l.* 10*s.* damages. In last Easter term, a rule nisi was obtained for a new trial, on the ground of misdirection.

Ludlow, Serjt., and Talfourd, now showed cause. The jury here have found that the defendant did not give a reasonable notice of the necessity of funds being produced. If so, he could not abandon his client on the eve of the trial.

In *Mordecai v. Solomon*, Sayer, 172, the Court said, that when an attorney has commenced a suit upon the credit of his client, he ought to proceed in it, although the client do not bring him money every time he *applies for it. And in *Cresswell v. Byron*, 14 Ves. 272, Lord Eldon said: "The Court of Common Pleas, when I was there, held, that an attorney having quitted his client before trial, could not bring an action for his bill." In *Rowson v. Earle*, 1 M. & M. 538, and see 1 Sid. 31, the attorney gave notice that he would give up the papers for want of funds, and no question was made as to the reasonableness of the notice; but here the jury have found there was not reasonable notice. [*353]

Thesiger, in support of the rule. It is not necessary to contend that an attorney may abandon his client at the eve of trial; but here, when the plaintiff was told in sufficient time that funds were required, he made no objection to the demand; and it is evident that there was an understanding that it should be complied with. He has, therefore, no right to complain of the defendant's not appearing at the trial. In *Mordecai v. Solomon*, Sayer, 172, it did not appear that the money was wanted for any particular purpose. And Lord Eldon, in *Creswell v. Byron*, does not say that notice was given before the attorney quitted his client. *Rowson v. Earle* is a very strong authority for the defendant. There Lord Tenterden says: "It is not to be expected that any attorney will carry on a cause of an indefinite length, unless he is furnished with funds so to do. He (the plaintiff) had a right, undoubtedly, to say he would not go on, unless he was furnished with the means so to do."

LORD TENTERDEN, C. J. The learned Judge's direction was quite correct. If an attorney desires to quit his client, he must give him reasonable notice. It was left *to the jury as a fact to say whether reasonable notice was given in this case or not, and they have found that it was not. [*354]

LITLEDALE, J. The law was laid down most correctly to the jury. There was not sufficient time to have the attorney changed between Saturday and Thursday, and there might have been a difficulty in the plaintiff's raising the money in that time. Under the circumstances of this case, the defendant should at least have had an application made to the Court to postpone the trial.

TAUNTON and PATTESON, Js., concurred.

Rule discharged.

STEPHENS, Clerk, v. BADCOCK. Jan. 31.

J., an attorney, who was accustomed to receive certain dues for the plaintiff, his client, went from home, leaving B., his clerk, at the office. B., in the absence of his master, received money on account of the above dues for the client (which he was authorized to do), and gave a receipt signed "B., for Mr. J." J. was in bad circumstances when he left home, and he never returned; but it did not appear that his intention so to act was known at the time of the payment to B. B. afterwards refused to pay the money over to the client, and on assumpsit brought against him for money had and received, it was

Held, that the action did not lie; for that the defendant received the money as the agent of his master, and was accountable to him for it, the master on the other hand being answerable to the client for the sum received by his clerk; and there was no privity of contract between the present plaintiff and defendant.

ASSUMPSIT for money had and received, &c. Plea, the general issue. At the trial before Taunton, J., at the Cornwall Lent assizes, 1831, the following facts appeared. The plaintiff was rector of Ludgvan, near Penzance; the defendant had been clerk to Mr. Samuel John, an attorney, whom the plaintiff had for several years employed to receive his rents and tithes. On the 10th of August, 1829, John, being in embarrassed circumstances, left his home; he had not returned, and *a commission of bankrupt had issued against him, when this action was brought. After his departure, and before the [*355]

cause of it was known in his office, Reynolds, his principal clerk, who had occasionally received payments for him in his absence, went to attend Bodmin assizes, leaving the defendant behind. At the assizes, at some time from the 18th to the 20th of August, Reynolds first heard that John was not likely to return. In Reynolds's absence, one of the plaintiff's parishioners called at the office to pay 9*l.* 0*s.* 2*d.*, on account of a composition for tithes. The defendant said that Mr. John was absent, but he would receive the money (which he was, in fact, authorized by Reynolds to do); it was paid to him, and he gave a stamped receipt for the sum, as follows:—"Received 20th August, 1829, of Mr. H. T., 9*l.* 0*s.* 2*d.*, for half a year's composition for tithes due to Rev. J. S. at Lady-day last past, for Mr. S. John. John Badcock." On Reynolds's return the defendant accounted to him for other sums received during his absence, but said nothing of this: nor did Reynolds know of this payment till the end of the year. Reynolds stated, that at the time of these transactions, John was indebted to the plaintiff on the balance of account between them. It did not appear that the defendant had any claim upon John. The defendant having refused to pay the plaintiff the 9*l.* (which he had not paid over to John or his estate), this action was brought to recover it. Two objections in point of law were taken at the trial: first, that, as the defendant acted only as clerk to John in receiving the sum in question, the action should have been brought against his principal; to which point Sadler v. Evans, 4 Burr. 1984, and Miller v. Aris, 1 Selw. N. P. 92, n., 8th ed., in which Lord *Kenyon recognised the principle of the former case, were cited: secondly, that the plaintiff could not recover the money as had and received by the defendant to his use, there being no privity of contract between them; as to which Williams v. Everett, 14 East, 582, was referred to. Taunton, J., thought the money was recoverable, as having been paid to the defendant under a mistake, and not paid over by him to his principal before notice. He therefore directed a verdict for the plaintiff, giving leave to enter a nonsuit. A rule nisi having been obtained for that purpose,

Praed, on a former day of the term showed 'cause. (a) This verdict ought not to be disturbed. The action for money had and received is a remedy in the nature of a bill in equity, and properly applicable where money has been paid into the hands of one person which, ex æquo et bono, belongs to another. The defendant cannot set up in defence his own liability to John, his employer; for if so, he might have claimed to hold the money against both the plaintiff and the party who paid it, as long as John continued absent. But it is clear, that if the defendant had paid over this money to the plaintiff, John, if he had afterwards returned, could not have maintained an action against the defendant for it. As to the first objection taken at the trial, that payment of this money to the defendant was, in fact, payment to his principal; to support that argument, it ought to be shown that the defendant was, at the time of payment, the lawfully constituted agent of John. But John had absconded ten days before: he could not constitute an agent for that purpose: it was as if a party had become lunatic, and an agent previously employed by him had continued to receive money in his name; as in Stead v. Thornton, (b) *decided this term. The money, therefore, having been paid to the defendant

(a) Before Lord Tenterden, C. J., Littledale, Taunton, and Patteson, Js.

(b) STEAD, Assignee of HARTLEY, v. THORNTON. Jan. 18.

Where the assignee of a bankrupt is removed, and a new one appointed, Quære, whether a party having money in his hands which he received on account of the bankrupt's estate, in the character of agent to the late assignee, be liable in assumpsit for money had and received to the use of the newly appointed one?

But, the former assignee having been insane when the money was received: Held, that such receiver was liable at all events; for he could not be the agent of an insane person, and, therefore, held the property as a mere stranger.

on a mistaken supposition that he was a lawful agent, may now be recovered from him by the party to whom it belongs. Then as to the objection that there is no privity of contract; where the defendant, by natural justice, is under an obligation to refund, the law implies a debt, and gives this form of action; "as for money the defendant has received from a third person, which he claims title to in opposition to the plaintiff's right: and which he had, by law, authority to receive from such third person." *Moses v. *Macferlan*, 2 Burr. 1008. There the plaintiff was held entitled to recover, though there was nothing like a contract of the kind stated in the declaration; and it was so in *Clarke v. Shee*, Cowp. 197. As to the cases relied upon on the other side, *Sadler v. Evans*, 4 Burr. 1984, was an action to try a right; and therefore, ought to have been brought against the principal. In *Miller v. Aris*, 1 Selw. N. P. 92, n., 8th ed., the decision itself is no additional authority for the

ASSUMPSIT for money had and received. At the trial before Parke, J., at the Yorkshire Lent assizes, 1831, it appeared that the money in question was part of the bankrupt's estate, and had been received by the defendant in the capacity, as it was alleged, of agent to his brother, who was assignee of the bankrupt, but who became insane, and was so during the whole time when the money was received. He was afterwards removed, and the present assignee, the plaintiff, appointed in his stead. At the trial it was contended that the money having been received by the defendant as agent for his brother, the late assignee, there was no privity of contract between the parties to this action, that it ought to have been brought against the representatives of the late assignee, and that the defendant was answerable to them alone. The learned Judge directed a nonsuit, with leave to move to enter a verdict for the plaintiff. A rule nisi having been obtained accordingly,

John Williams and *Starkie* now showed cause, and restated the ground of nonsuit. The imbecility of the former assignee makes no difference; he was assignee in point of law till removed, and the defendant would have been liable in an action brought by him for the money received on account of the estate. The assignee's want of intellect would have been no defence to such an action against his agent. The defendant then continues to be legally liable for this money to the representatives of the late assignee, and therefore no privity of contract can be raised between the defendant and the new assignee. Sect. 66 of the bankrupt act, 6 G. 4, c. 16, applies only to debts due to the bankrupt at the time of the first assignment; here the debt was not due to the bankrupt but to the former assignee.

F. Pollock (and *Alexander* was with him), *contra*. The former assignee having been insane, the defendant must be taken to have received the money on his own responsibility, and not as agent. Where a person receives money with the knowledge that another party is, or will, under certain circumstances, be entitled to it, there is sufficient privity to make the receiver liable at the suit of such other party. *Littlewood v. Williams* (1 Marsh. 589; 6 Taunt. 277). The argument on the other side would introduce a circuitry of action: a new assignee would have to sue the old, and he to sue the agent, who had received money and not paid it over. Such agent cannot indeed be liable to two sets of assignees at the same time, but he may be to both successively. *De Cosson v. Vaughan* (10 East, 61), shows that under the former bankrupt acts a new assignee might recover in debt upon a judgment recovered on behalf of the bankrupt's estate by an assignee who had been removed; and that case is applicable here. (Here he was stopped by the Court.)

LORD TENTEDEN, C. J. We are not called on to decide how the case would be if the defendant had received this money as the duly constituted agent of the former assignee. He could not be so, that assignee having been incompetent to appoint any agent. He is, therefore, in the situation of any other person who has received and has in his hands a part of the bankrupt's estate, and is undoubtedly liable to those who represent that estate.

PARKE, J. If the receipt of this money had taken place under such circumstances that the former assignee could have been charged with it, as he might if he had received it by his agent or clerk, I should have thought this action not maintainable. But here the receipt was that of the defendant alone, who stood in the situation of a mere stranger, and held the money subject to the claim of the assignees who might be afterwards appointed.

PATTESON, J. It is unnecessary to say what might have been the case if the defendant had received the money as agent to his brother. It is sufficient that he did not stand in that situation, the brother being incapable of having an agent.

Rule absolute.

defendant. In *Williams v. Everett*, 14 East, 582, it was held that no privity of contract existed, because the defendants, although they had received money with directions to apply it to the use of the plaintiff, had not only never assented, but expressly refused so to do. Here it is not disputed that the plaintiff is entitled to the money: the defendant, on the contrary, has represented himself to the party who paid it, as an agent, having the authority to receive it for the plaintiff, according to the intention of that party. His own receipt is conclusive on that head.

Follett, contra. This action should have been brought against John, and not against the defendant. It is true that an action like the present lies where the defendant has received money which *ex sequo et bono* belongs to the plaintiff: and that a privity of contract may be inferred in many cases, though not directly established. But here it is assumed that something is due *ex sequo et bono*, and that point cannot be tried between the present parties. The equity relied upon by the plaintiff, depends on the state of accounts between him and John, and a mere clerk or servant, which the defendant was * (for he cannot *360] be considered an agent), was not in a situation to judge of this. The form in which he signed the receipt, shows the capacity in which he took the money. [Lord TENTERDEN, C. J. He signs the receipt on behalf of John, the money being received for the plaintiff and belonging to him.] If a bill of exchange were so signed, the party signing would not be liable either on the special or common counts. Great inconvenience might arise if an action of this kind could be brought against a servant who has no means of contesting it, the master being abroad and having the accounts with him, which might furnish a defence. And nothing can be decided here on the assumption that John has absconded, and will not return: there is no regular proof of that: as far as appears on the evidence he might have returned at any time, and he might then have claimed this money from the defendant. The cases where it has been held that an action in the present form lay for sums to which the plaintiff had a claim, and which had been improperly received in the first instance, do not apply here. Some grounds must be shown for inferring a contract to pay over the money received to the plaintiff: here none appear. Such an assumption cannot be raised upon the facts in the present case, when the defendant, even if he had been compelled to pay this demand of the plaintiff, might, upon John's return, have been obliged by law to pay the same sum to him, if it had appeared that the plaintiff was debtor to John in that amount on the balance of accounts between them. As to the cases cited at the trial; it is said that *Sadler v. Evans*, 4 Burr. 1984, was an action * to try a right; but this is so *361] too. [Lord TENTERDEN, C. J. There is no proof that any right is in dispute.] *Williams v. Everett*, 14 East, 582, was cited at the trial to show that money had and received does not lie, except where the fact will raise an implied contract to hold the money received to the use of the plaintiff. Where money is paid to a servant, as it was here, no contract can be implied but to pay it over to his own master. It cannot be assumed that he received it with an implied undertaking to pay it into the hands of a person to whom his master might or might not be indebted. In *Edden v. Read*, 3 Campb. 338, it was held that this action did not lie against a banker's clerk for money alleged to have been paid to him in that capacity, and for which he had given a receipt in the names of his employers.

Cur. adv. vult.

Lord TENTERDEN, C. J., now delivered the judgment of the Court. After stating the facts of the case, his Lordship proceeded as follows:—Under these circumstances my learned brother who tried the cause, thought that the sum in question might be recovered from the defendant as money paid to him in a mistake. But we are of opinion that it cannot be so recovered. It is perfectly clear that the defendant received it as the agent or servant of John, and must have paid it over to him if he had returned. The receipt given was the receipt of John, and (if he had not been bankrupt) would have been evidence against

him in an action brought by the present plaintiff. This differs from the case decided in the former part of the term, where a *party was held to have received money belonging to a bankrupt's estate, on behalf of the general body of creditors, and not for an assignee who had become lunatic. There the defendant could have no authority to receive it for the lunatic assignee; here Badcock was clearly the agent of John when he received the money, and did receive it in that capacity. On the ground then that there was no privity of contract between the defendant and plaintiff, but that the privity of contract was between the defendant and John, and between John and the plaintiff, we think the rule for a nonsuit must be made absolute. Rule absolute. [362

R. S. SHEARS and J. H. SHEARS v. ROGERS, Executor of the last Will and Testament of JOHN MORGAN, the elder, deceased. Jan. 20.

Seemle, that to render a conveyance fraudulent within the statute 13 Eliz. c. 5, the party at the time of making it must be indebted to the extent of insolvency. But where a person owing 102*l.* on a bond, wrote to the obligee that he and his wife were bound down by pecuniary embarrassments, and that the obligee's proceeding to extremities would render the debtor's wife after his death perfectly destitute, and a month afterwards, for a nominal sum of ten shillings, and in consideration of natural love and affection, assigned a lease (of the value of 206*l.*) to A., in trust for his own benefit for life, and after his death for that of one of his daughters-in-law; and he soon afterwards died, having by will made the assignee of the lease his executor; by which assignment of the lease, the residue of his property became insufficient to discharge the bond-debt:

Held, that the assignment was within the meaning of the statute, and utterly void against creditors, and that the lease was assets in the hands of the executor.

DEBT on bond given by the testator, John Morgan, the elder, to the plaintiffs in the penal sum of 700*l.* Plea, plene administravit præter goods and chattels to the value of 106*l.* 3*s.* 11*d.* Replication, assets ultra that sum; upon which issue was joined. The plaintiffs also, by way of suggestion, as a breach of the condition of the bond (which was for *indemnifying [363 sureties), the neglect of Morgan, the younger, to pay certain interest, for the due discharge of which by him the plaintiffs had become bound, and which, in consequence of such neglect, they were forced to pay.

At the trial before Lord Tenterden, C. J., at the London sittings after Michaelmas term, 1830, a verdict was found for the plaintiffs for the debt, and 1*s.* damages; and upon the breach assigned the jury assessed the damages at the sum of 102*l.* 10*s.*, but the verdict upon the plea was taken subject to the opinion of this Court, whether or not the lease of certain premises belonging to the testator, hereafter mentioned, of the agreed value of 200*l.*, was assets ultra the said sum of 106*l.* 3*s.* 11*d.* confessed in the defendant's plea, upon the following case:—

The plaintiffs, as sureties for Morgan the younger in a bond recited in the above suggestion, had, before the 14th of January, 1829, been obliged to pay to J. Taggart, the obligee of that bond, 102*l.* 10*s.* for arrears of interest due upon the principal sum of 350*l.*, and which J. Morgan the younger had neglected to pay. Afterwards, and in the same month of January, one Mason, as the attorney of the testator, and on his behalf, wrote and sent the following letter to the plaintiffs respecting such payment: "29th January, 1829. I am requested by Mr. Morgan to write to you on the subject of the bond-debt from himself and son. Mr. Morgan, jun., has proposed to his father to execute a mortgage of his property in Milford as a security for the amount, for the payment of which you have, as I understand, been called upon by Mr. Taggart. Was this a debt of the father's I should not have a word to say, but as the son's, I hope you will view it in a different light, and assist me in *placing [364 the burthen on the shoulders which ought to bear it." The letter then

stated, that Morgan the elder was fast going into his grave, in consequence of fits, which had twice rendered him insensible; and that his wife had been seven weeks confined to her bed by a dangerous complaint: and it then added, "In short, in their present state, it is most afflicting to see them still further bowed down by *pecuniary embarrassments*. You have always been kind friends to John Morgan, and as such have been equally so to the father; and I therefore feel persuaded would not carry matters to extremities against him, which would render his wife, after his death, *perfectly destitute*." The plaintiffs in their reply stated that they had paid 102*l.* on account of interest, and that although they might allow time, they should hold Morgan, senior, responsible. At the time of sending the letter, the testator was possessed of a lease of a cottage and premises in the county of Hants for the remainder of a term of 2000 years at a pepper-corn rent, which cottage and premises were in his own occupation; and after the plaintiffs' answer to Mason's letter, a deed of assignment of such lease and premises was prepared by Mason, as the attorney of the testator, and on the 2d of March, 1829, was executed by the testator; by which deed it was declared, that for the nominal sum of 10*s.*, and in consideration of natural love and affection to the two daughters-in-law of his then late wife, deceased, the testator assigned the said lease and premises to the defendant, in trust to and for the use and benefit of the testator for life; and after his death, for the benefit of one of such daughters-in-law, subject to a charge of 5*l.* in favour of the other.

*365] The testator continued in possession of the above leasehold premises till his death, which happened on the 31st of May, 1829. By his will he appointed the defendant executor, and he, after the testator's death, took possession of his effects. The defendant was afterwards required by the plaintiffs to sell the leasehold premises, and repay them the 102*l.* 10*s.*; which not being done, the present action was brought.

The testator, at the time of executing the assignment to the defendant, was seised and possessed of the following property, viz. :—An estate for his life at Broughton, producing a rental of 50*l.* An annual superannuation allowance from the excise, 70*l.* The leasehold estate before mentioned. And a freehold field at Broughton, of the estimated value of 100*l.* He also died possessed of cash in a savings bank, 52*l.*, and household furniture, &c., 35*l.* The defendant, before he had notice of the bond, delivered to one R. Hayward, the husband of one of the daughters-in-law, and at his request, the deed of assignment of the 2d of March, 1829; and the other documents comprising the title were in the house with the testator's other effects, from whence they were taken by Hayward. The key of the leasehold premises was never delivered by Hayward to the defendant. The testator's effects remained on the premises until the month of December, 1829, when they were removed for the purpose of sale, and the testator's housekeeper and Hayward's daughter continued in the occupation for about six weeks or two months after his death; and after that period, the premises were unoccupied till the month of May, 1830, when Hayward let them to a tenant. No demand was made of the title deeds, or of possession, by the defendant, but within three months after the death of the testator, Hayward was sent for by the defendant's attorney and was *366] *informed by him that proceedings would probably be instituted respecting the estate; and Hayward said, he should not give up the premises unless obliged so to do.

Comyn, for the plaintiff. The lease was assets in the hands of the defendant as executor, for the assignment, being fraudulent, was utterly void by the statute 13 Eliz., c. 5, and the lease, being in the possession of the testator at the time of his death, passed to the executor. The statutes as to fraudulent conveyances have always been construed as authorizing the party who seeks the benefit of those statutes to treat the fraudulent gift as *void*, so that the case as to him is the same as if no such gift had been made, *Leonard v. Bacon*, Cro.

Eliz. 234. *Bethel v. Stanhope*, Cro. Eliz. 810, also shows that where a man makes a fraudulent gift of his goods and chattels, and dies indebted, the rule is to consider the gift as utterly void against all his creditors, and the debtor to have died in full possession with respect to their claims, so that the effects are just as much assets in the hands of the personal representative, or to creditors, as if no such attempt to alter the disposal of them had been made. If a chattel real be the subject of the voluntary and fraudulent gift, the rule of construction which attaches the thing so fraudulently given away to the assets of the deceased as parcel of his estate, will equally apply. Thus, where A., 2 Roll. Rep. 173, being indebted to B., made C. his executor, and died; and C., the executor, promised B., on good consideration, that if he could discover any goods, parcel of the testator's estate at the time of his death, he should have such goods in satisfaction; and the question was, whether a lease for years, conveyed to a stranger by the testator in his lifetime fraudulently, *should, in law, be parcel of his estate at the time of his death or not? it was resolved by the whole Court to be parcel of the estate of the [*367 testator at the time of his death. That case is precisely in point.

Kelly, contrâ. First, the testator, at the time when he made the assignment, was not a party indebted within the statute 13 Eliz. c. 5. That statute contemplates that the party should be indebted to the extent of insolvency. In *Lush v. Wilkinson*, 5 Ves. jun. 387; and see *Kidney v. Coussmaker*, 12 Ves. 148, Lord Alvanley, then Master of the Rolls, said "A single debt will not do. Every man must be indebted for the common bills for his house, though he pays them every week. It must depend upon this, whether he was in insolvent circumstances at the time." Now, here, it appears by the case that the testator, at the time when he made the assignment, was indebted to the plaintiff in 102*l.*, but that he had property to a much larger amount. He had an estate for life of 50*l.* a year, an annual allowance from the excise of 70*l.*, a freehold field worth 100*l.*, and money and household furniture. Assuming, however, that by his liability on the bond, and the state of his affairs in other respects, the testator was in insolvent circumstances at the time when he executed the assignment, still the lease was not assets in the hands of the defendant, for he held it as trustee for the testator for life, and after his death for one of his daughters-in-law. The assignment, at all events, being good against the maker, it would have been a breach of trust in his representative, the defendant, to apply the lease to any other purposes than those warranted by the trust. It is true that the defendant is also executor of the testator, but that gives him no additional power *over the lease at law. If a third person had been appointed executor, such party could not have recovered the lease in [*368 a court of law. And assuming that a creditor might set it aside in a court of equity, it does not follow that the defendant could interfere to set it aside, for that would be a breach of his trust. [Lord TENTERDEN, C. J. The assignment, if fraudulent within the meaning of the 13 Eliz. c. 5, is altogether void, and then the lease remained the property of the testator at the time of his death, and passed to his executor.] It was valid as against the testator, and his executor. In the case cited from Rolle, the executor promised the plaintiff, that if he could discover any assets of the testator parcel of his estate, he should have his debt satisfied thereout. If the plaintiff discovered the equitable property, the promise of the executor would attach, and the plaintiff might recover at law. It is true that if a testator makes a voluntary deed within the statute, it is void against creditors. His executor, however, can only obtain possession of the property purporting to be conveyed by the deed through the intervention of a court of equity; and if that be so, he cannot be liable at law for that property as assets. The defendant had the legal estate in the premises in his character of trustee, not in that of executor. He had two distinct duties to perform in the respective characters. And he is sued now, not as trustee, but as executor, on account of assets. [Lord TENTERDEN, C. J. Being trustee

for the two daughters, he should not have delivered up the assignment to the husband of one, but should have kept it; he cannot say that he delivered it in pursuance of his trust.] He may not have acted strictly in pursuance of his trust, though substantially the trust was duly discharged. But even a breach *369] of *trust would not vest the lease in him as executor, and so render it assets in his hands.

LORD TENTERDEN, C. J. I am of opinion that the plaintiff is entitled to judgment. The first question is, whether, to bring a case within the statute 13 Eliz. c. 5, the party at the time of making the conveyance must be indebted to the extent of insolvency? and whether that appears by the facts of this case? A man owing 500*l.*, and having property to that amount, may render himself insolvent by assigning it over to a third person. In the letter of the 29th of January, it is stated that the testator and his wife are bowed down by pecuniary embarrassments, and that the plaintiff's proceeding to extremities would render the wife of the testator, after his death, perfectly destitute. I should collect from that letter that he had no means of paying the debt, and after the disposition of this property in favour of his daughters-in-law, he clearly had none. There is undoubtedly high authority for saying that a party must be in insolvent circumstances to render a conveyance by him fraudulent within the statute of Elizabeth; but that must not be understood as importing that a person may not render himself insolvent by conveying his property to a person who is not a creditor. Then the deed of assignment being void, the lease remained the property of the testator, and was clearly assets in the hands of the defendant. The authorities show that wherever a man makes a gift of goods which is fraudulent and void as against creditors, and dies, he is considered to have died in full possession with respect to the claim of the creditors, and the goods are assets in the hands of his executor. It is impossible to say here that *370] the lease was not assets, for the *defendant had it in his possession, and he delivered the assignment to the husband of one of the daughters-in-law, in violation, and not in pursuance of the alleged trust, for that required that he should keep it. That was a devastavit by him.

LITTLEDALE, J. I am of opinion that this lease was assets. It is said that, to render a deed void within the statute of 13 Eliz. c. 5, it ought to appear that the party at the time of making it was in insolvent circumstances. Assuming that to be so, the question whether a party be or be not insolvent is to be determined, not only by taking an account of his debts and credits, and striking a balance, but also by looking to his conduct and the general state of his affairs. Now here the letter set out in the case sufficiently shows that the testator was in insolvent circumstances, according to this rule, at the time when he executed the assignment; and that being so, it was utterly void both at law and in equity against creditors. They had a right to the property which the deed purported to convey, and might enforce that right at law. The assignment was void as soon as the creditors claimed to treat it as such, though not until then.

TAUNTON, J. By the words of the statute 13 Eliz. c. 5, s. 2, a conveyance within its scope is altogether void at law, and a creditor who elects to treat it as void need not have recourse to a court of equity. It is established by a long series of decisions, that a voluntary assignment made without valuable consideration so as to defeat the rights of creditors, is fraudulent within the meaning of the statute. But then it is said, to bring a party assigning within the statute, he must be indebted *at the time to the extent of insolvency. Be *371] it so; was not the testator, under the circumstances stated in this case, insolvent? Look to the state of his property; he executed this assignment only two months before his death, and the letter written by his attorney shortly before the assignment shows that upon executing that instrument he must have been in insolvent circumstances. If so, the assignment is utterly void and frustrate against creditors, and the case is to be considered as if it had never

been executed; the intestate therefore died possessed of the lease, and it was assets in the hands of the executor. *Bethell v. Stanhope*, Cro. Eliz. 810 (if any authority were necessary), is expressly in point as to this.

PATTERSON, J. Whether the assignment was fraudulent or not, depends on the question, whether the party was insolvent at the time. The statement of the assets and debts, and the letter written at his desire by his attorney, show that he was. The only remaining question is, whether the lease was assets? As the statute says that the fraudulent deed shall be utterly void and frustrate, and as the lease was in the hands of the testator at the time of his death, it passed to the executor, and was assets in his hands. Another view of the case struck me. If the defendant had not been executor, then, by this assignment, after the testator's death, the defendant (as it is shown in *Roberts on Fraudulent Conveyances*, p. 593), would have been executor in his own wrong, and chargeable by the creditors in respect of the property taken by him under that instrument. Now the lease cannot be less assets, because the defendant is rightful executor.

Judgment for the plaintiff.

*BERNASCONI and Others v. FAREBROTHER, WINCHESTER, [*372
and WILTON.

In trespass against the sheriff and an execution creditor for seizing the goods of A., which the plaintiffs claimed as assignees under a joint commission against A. and B., the plaintiffs, in support of the joint commission, gave evidence of acts and declarations of B., for the purpose of shewing that he had become bankrupt.

Held, that this evidence was inadmissible: And that the Court, in granting a new trial on this ground, could not limit the inquiry on such second trial to the question of B.'s bankruptcy; for that in cases where a bill of exceptions might be tendered, but an application for a new trial is made instead, the new trial must be granted generally, and cannot be restrained to a particular point.

TRESPASS against the sheriff and an execution creditor of A. H. Chambers the elder for taking the plaintiffs' goods. (See the pleadings, 10 B. & C. 549.) At the trial before Lord Tenterden, C. J., at the Middlesex sittings after Hilary term, 1831, it appeared that the plaintiffs claimed the goods of A. H. Chambers now in question under an assignment made to them by virtue of a commission of bankruptcy issued against A. H. Chambers the elder and A. H. Chambers the younger. To prove the bankruptcy of Chambers junior, they gave evidence to show that he had applied for protection under the commission issued against him and his father; that he had called meetings of the commissioners earlier than usual; and that he had solicited creditors, and otherwise endeavoured to obtain his certificate. The evidence was objected to. A verdict having passed for the plaintiffs, a rule nisi was obtained for a new trial, on the ground that these acts of Chambers junior, who was not a party, or identified in interest with any party, to the record, were not admissible in evidence in the present action.

Sir James Scarlett and F. Pollock, on a former day in this term, showed cause, and contended that the acts done by Chambers junior were admissible, as part of the *res gestæ*. Assuming they were not, the Court, if they grant a new trial, will restrain the inquiry to the single question, whether Chambers junior committed an act of bankruptcy?

*Campbell and Butt, *contra*. The action was brought to try the validity of a joint commission against Chambers the elder and Chambers the younger: the act of bankruptcy of Chambers junior was denied on the trial, and it was contended, that no such act was proved. There is no connexion between the sheriff and Chambers jun. The defendants justify taking the goods of the elder Chambers under a judgment obtained against him separately. The commission under which the plaintiffs claim being a joint

commission against the two, it was necessary, in order to support that commission, to prove an act of bankruptcy by Chambers junior; and his declarations or acts after the commission issued cannot, as against the present defendants, dispense with such proof. There ought, therefore, to be a new trial; and if granted, it must be upon the whole matter. *Cur. adv. vult.*

Lord TENTERDEN, C. J., now delivered the judgment of the Court.

We have considered the subject, and think that the evidence was improperly received. That being so, we have considered also whether we could limit the inquiry upon the new trial to one point. In *Hutchinson v. Piper*, 4 Taunt. 555, Gibbs, C. J., lays it down, that in certain cases, of which he gives instances, a new trial may be restrained to one point. But in the particular case now before the Court, the objection which arose as to the admissibility of the evidence might have been taken by bill of exceptions. The application for a new trial was substituted for a bill of exceptions. Now, if there had been a bill of exceptions in this case, and the judgment were that the evidence had
 *374] been improperly received, the *court of error could only have awarded a venire de novo, sending the whole to a new trial: and as the application for a new trial is substituted for a bill of exceptions, we think that, by analogy to that proceeding, the defendants are entitled to a new trial generally.

Rule absolute.

REGULÆ GENERALES.

Hilary Term, 2 W. 4.

I.

WHEREAS it is expedient that the practice of the Court of King's Bench, Common Pleas, and Exchequer of Pleas, should, as far as possible, be rendered uniform: IT IS ORDERED, That the practice to be observed in the said Courts, with respect to the matters hereinafter mentioned, shall be as follows; that is to say,—

Authority to Prosecute or Defend.

1. Warrants of attorney to prosecute or defend, shall not be entered on distinct rolls, but on the top of the issue roll.
2. A special admission of prochein amy or guardian, to prosecute or defend for an infant, shall not be deemed an authority to prosecute or defend in any but the particular action or actions specified.

Affidavit.

3. No affidavit of the service of process shall be deemed sufficient if made before the plaintiff's own attorney, or his clerk.

*375] 4. An affidavit sworn before a Judge of any of the Courts of King's Bench, Common Pleas, or Exchequer, shall be received in the court to which such judge belongs, though not entitled of that court; but not in any other court unless entitled of the court in which it is to be used.

5. The addition of every person making an affidavit shall be inserted therein.

6. Where an agent in town, or an attorney in the country is the attorney on the record, an affidavit sworn before the attorney in the country shall not be received; and an affidavit sworn before an attorney's clerk shall not be received in cases where it would not be receivable if sworn before the attorney himself; but this rule shall not extend to affidavits to hold to bail.

Arrest.

7. After non pros, nonsuit or discontinuance, the defendant shall not be arrested a second time without the order of a judge.

8. Affidavits to hold to bail for money paid to the use of the defendant, or for work and labour done, shall not be deemed sufficient unless they state the money to have been paid, or the work and labour to have been done, at the request of the defendant.

9. No supplemental affidavit shall be allowed to supply any deficiency in the affidavit to hold to bail.

10. A variance between the *ac etiam* and the declaration, or the want of an *ac etiam*, where the defendant is arrested, shall not be deemed ground for discharging the defendant, or the bail; but the bail bond or recognisance of bail shall be taken with a penalty or sum of forty pounds only.

** Writ, when and how to be filed.*

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11. When the rule to return a writ expires in vacation, the sheriff shall file the writ at the expiration of the rule, or as soon after as the office shall be open.

12. And the officer, with whom it is filed, shall endorse the day and hour when it was filed.

Bail.

13. If any person put in as bail to the action, except for the purpose of rendering only, be a practising attorney, or clerk to a practising attorney, the plaintiff may treat the bail as a nullity, and sue upon the bail bond as soon as the time for putting in bail has expired, unless good bail be duly put in in the mean time.

14. In the case of country bail, the bail piece shall be transmitted and filed within eight days, unless the defendant reside more than forty miles from London, and in that case, within fifteen days after the taking thereof.

15. When bail to the sheriff become bail to the action, the plaintiff may except to them though he has taken an assignment of the bail bond.

16. It shall be sufficient, in all cases, if notice of justification of bail be given two days before the time of justification.

17. If bail, either to the action or in error, are excepted to in vacation, and the notice of exception require them to justify before a judge, the bail shall justify within four days from the time of such notice, otherwise on the first day of the ensuing term.

18. Notice of more bail than two shall be deemed irregular, unless by order of the court or a judge.

19. Affidavits of justification shall be deemed insufficient, unless they state that each person justifying is **worth* the amount required by the practice of the courts, over and above what will pay his just debts, and over and above every other sum for which he is then bail. [*377]

20. Bail, though rejected, shall be allowed to render the principal without entering into a fresh recognisance.

21. Bail shall only be liable to the sum sworn to by the affidavit of debt, and the costs of suit; not exceeding in the whole the amount of their recognisance.

22. Bail shall be at liberty to render the principal at any time during the last day for rendering, so as they make such render before the prison-doors are closed for the night.

23. A plaintiff shall not be at liberty to proceed on the bail bond pending a rule to bring in the body of the defendant.

24. No bail bond taken in London or Middlesex shall be put in suit, until after the expiration of four days; nor, if taken elsewhere, till after the expiration of eight days exclusive, from the appearance day of the process.

25. The time allowed for excepting to bail put in upon a habeas corpus shall be twenty days.

26. A recognisance of bail in error shall be taken in double the sum reco-

vered, except in case of a penalty; and in case of a penalty, in double the sum really due, and double the costs.

27. In ejectment, the recognisance of bail in error shall be taken in double the yearly value and double the costs.

Bail bond and action thereon.

28. An action may be brought upon a bail bond by the sheriff himself in any court.

*378] 29. In all cases where the bail bond shall be directed *to stand as a security, the plaintiff shall be at liberty to sign judgment upon it.

30. Proceedings on the bail bond may be stayed on payment of costs in one action, unless sufficient reason be shown for proceeding in more.

Appearance.

31. A defendant who has been served with process by original, shall enter an appearance within four days of the appearance day, if the action is brought in London or Middlesex, or within eight days of the appearance day in other cases, otherwise the plaintiff may enter an appearance for him according to the statute; and any attorney who undertakes to appear, shall enter an appearance accordingly.

Irregularity in process and proceedings.

32. Where the defendant is described in the process or affidavit to hold to bail by initials or by a wrong name, or without a Christian name, the defendant shall not be discharged out of custody or the bail bond delivered up to be cancelled on motion for that purpose, if it shall appear to the court that due diligence has been used to obtain knowledge of the proper name.

33. No application to set aside process or proceedings for irregularity shall be allowed, unless made within a reasonable time, nor if the party applying has taken a fresh step after knowledge of the irregularity.

34. If a party plead several pleas, avowries, or cognisances without a rule for that purpose, the opposite party shall be at liberty to sign judgment.

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**Declaration and time for.*

35. A plaintiff shall be deemed out of Court unless he declare within one year after the process is returnable.

36. When the plaintiff declares against a prisoner, it shall not be necessary to make more than two copies of the declaration, of which one shall be served and another filed with an affidavit of service; upon the office copy of which affidavit a rule to plead may be given.

37. Where a cause has been removed from an inferior court, the rule to declare may be given within four days after the end of the term in which the writ is returned.

38. It shall not be necessary for a defendant in any case to give a rule to declare, except upon removals from inferior Courts; but the plaintiff may have a rule for time to declare in the Court of Exchequer as well as in the other Courts.

39. A rule to declare peremptorily may be absolute in the first instance.

40. A declaration laying the venue in a different county from that mentioned in the process shall not be deemed a waiver of the bail.

41. It shall not be deemed necessary to express the amount of damages in a notice of declaration.

42. Where an amendment of the declaration is allowed, no new rule to plead shall be deemed necessary, whether such amendment be made of the same term as the declaration, or of a different term.

Plea and Time for.

43. A demand of plea may be made at the time when the declaration is delivered, and may be endorsed thereon.

*44. If a defendant after craving oyer of a deed omit to insert it at the head of his plea, the plaintiff on making up the issue or demurrer [*380 book may, if he think fit, insert it for him, but the costs of such insertion shall be in the discretion of the taxing officer.

45. If the declaration be filed or delivered so late that the defendant is not bound to plead until the next term, the defendant may plead as of the preceding term, within the first four days of the next term, any plea to the jurisdiction or in abatement, or a tender, or any other similar plea.

46. The defendant shall not be at liberty to waive his plea without leave of the Court or a Judge.

Particulars.

47. A summons for particulars and order thereon may be obtained by a defendant before appearance, and may be made, if the Judge think fit, without the production of any affidavit.

48. A defendant shall be allowed the same time for pleading after the delivery of particulars under a Judge's order, which he had at the return of the summons; nevertheless, judgment shall not be signed till the afternoon of the day after the delivery of the particulars, unless otherwise ordered by the Judge.

Notices and Rules and Service thereof.

49. Where the residence of a defendant is unknown, notices of declaration may be stuck up in the office, but not without previous leave of the Court.

50. Service of rules and orders, and notices, if made before nine at night, shall be deemed good, but not if made after that hour.

*51. It shall not be necessary to the regular service of a rule, that the original rule should be shown, unless sight thereof be demanded, [*381 except in cases of attachment.

52. Where a term's notice of trial or inquiry is required, such notice may be given at any time before the first day of term.

53. A rule to reply may be given at any time when the office is open.

54. Service of a rule to reply, or plead any subsequent pleading, shall be deemed a sufficient demand of a replication, or such other subsequent pleading.

Payment of money into Court.

55. In all cases in which money may be paid into Court, leave to pay it in may be obtained by a side bar rule.

56. On payment of money into Court, the defendant shall undertake by the rule to pay the costs, and in case of non-payment, to suffer the plaintiff either to move for an attachment, on a proper demand and service of the rule, or to sign final judgment for nominal damages.

Trial and Notice thereof.

57. Notice of trial and inquiry, and of continuance of inquiry, shall be given in town, but countermand of notice of trial, or inquiry, may be given either in town or country, unless otherwise ordered by the Court, or a Judge.

58. The expression "short notice of trial" shall, in country causes, be taken to mean four days.

59. In all cases where the plaintiff in pleading concludes to the country, the plaintiff's attorney may give *notice of trial at the time of delivering his replication, or other subsequent pleading, and in case issue shall [*382

afterwards be joined, such notice shall be available; but if issue be not joined on such replication, or other subsequent pleading, and the plaintiff shall sign judgment for want thereof, and forthwith give notice of executing a writ of inquiry, such notice shall operate from the time that notice of trial was given as aforesaid; and in all cases where the defendant demurs to the plaintiff's declaration, replication, or other subsequent pleading, the defendant's attorney, or the defendant, if he plead in person, shall be obliged to accept notice of executing a writ of inquiry on the back of the joinder in demurrer; and in case the defendant pleads a plea in bar or rejoinder, &c., to which the plaintiff demurs, the defendant's attorney, or the defendant, if he plead in person, shall be obliged to accept notice of executing a writ of inquiry on the back of such demurrer.

60. Notice of a trial at bar shall be given to the proper officer of the Court, before giving notice of trial to the party.

61. In country causes, or where the defendant resides more than forty miles from town, a countermand of notice of trial shall be given six days before the time mentioned in the notice for trial, unless short notice of trial has been given.

62. In town causes where the defendant lives within forty miles of town, two days' notice of countermand shall be deemed sufficient.

63. The rule for a view may in all cases be drawn up by the officer of the Court, on the application of the party, without affidavit, or motion for that purpose.

*383] **New trial, motion in arrest of judgment, &c.*

64. If a new trial be granted without any mention of costs in the rule, the costs of the first trial shall not be allowed to the successful party, though he succeed on the second.

65. No motion in arrest of judgment, or for judgment non obstante veredicto, shall be allowed after the expiration of four days from the time of trial, if there are so many days in term, nor in any case after the expiration of the term, provided the jury process be returnable in the same term.

Judgment and time for signing.

66. Judgment for want of a plea after demand may in all cases be signed at the opening of the office in the afternoon of the day after that on which the demand was made, but not before.

67. After the return of a writ of inquiry, judgment may be signed at the expiration of four days from such return, and after a verdict, or nonsuit, on the day after the appearance-day of the return of the distringas, or habeas corpora, without any rule for judgment.

Judgment as in case of nonsuit.

68. A rule nisi for judgment as in case of a nonsuit may be obtained on motion without previous notice, but in that case it shall not operate as a stay of proceedings.

69. No motion for judgment as in case of a nonsuit shall be allowed after a motion for costs for not proceeding to trial for the same default, but such costs *384] may be moved for separately (i. e.) without moving at all for *judgment as in case of a nonsuit, or after such motion is disposed of: or the Court on discharging a rule for judgment as in case of a nonsuit may order the plaintiff to pay the costs of not proceeding to trial, but the payment of such costs shall not be made a condition of discharging the rule.

70. No entry of the issue shall be deemed necessary to entitle a defendant to move for judgment as in case of a nonsuit, or to take the cause down to trial by proviso.

71. No trial by proviso shall be allowed in the same term in which the default of the plaintiff has been made, and no rule for a trial by proviso shall be necessary.

Warrant of attorney and cognovit.

72. No warrant of attorney to confess judgment, or cognovit actionem, given by any person in custody of a sheriff, or other officer upon mesne process, shall be of any force, unless there be present some attorney on behalf of such person in custody expressly named by him, and attending at his request to inform him of the nature and effect of such warrant or cognovit, before the same is executed, which attorney shall subscribe his name as a witness to the due execution thereof, and declare himself to be attorney for the defendant, and state that he subscribes as such attorney.

73. Leave to enter up judgment on a warrant of attorney, above one and under ten years old, must be obtained by a motion in term, or by order of a Judge in vacation; and if ten years old or more, upon a rule to show cause.

** Costs.*

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74. No costs shall be allowed on taxation to a plaintiff, upon any counts or issues upon which he has not succeeded; and the costs of all issues found for the defendant shall be deducted from the plaintiff's costs.

Execution.

75. It shall not be necessary that any writ of execution should be signed; but no such writ shall be sealed till the judgment-paper, postea, or inquisition, has been seen by the proper officer.

76. A writ of habere facias possessionem may be sued out without lodging a præcipe with the officer of the Court.

77. In actions commenced by bill, a ca. sa. to fix bail shall have eight days between the teste and return, and in actions commenced by original, fifteen, and must in London and Middlesex be entered four clear days in the public book at the sheriff's office.

Scire Facias.

78. A plaintiff shall not be allowed a rule to quash his own writ of scire facias, after a defendant has appeared, except on payment of costs.

79. A scire facias to revive a judgment more than ten years old, shall not be allowed without a motion for that purpose in term, or a Judge's order in vacation, nor, if more than fifteen, without a rule to show cause.

80. A scire facias upon a recognisance taken in Serjeant's Inn, or before a commissioner in the country, and recorded at Westminster, shall be brought in Middlesex only, and the form of the recognisance shall not express where it was taken.

*81. No judgment shall be signed for non-appearance to a scire facias without leave of the Court or a Judge, unless the defendant has been [*386] summoned; but such judgment may be signed by leave after eight days from the return of one scire facias.

82. A notice in writing to the plaintiff, his attorney or agent, shall be a sufficient appearance by the bail, or defendant on a scire facias.

Error.

83. A writ of error shall be deemed a supersedeas from the time of the allowance.

84. To entitle bail to a stay of proceedings pending a writ of error, the application must be made before the time to surrender is out.

Supersedeas.

85. The plaintiff shall proceed to trial, or final judgment against a prisoner within three terms inclusive after declaration, and shall cause the defendant to be charged in execution within two terms inclusive after such trial or judgment; of which the term in, or after which the trial was had shall be reckoned one.

86. The marshal of the King's Bench prison, and the warden of the Fleet, shall present to the Judges of the Courts of King's Bench, Common Pleas, and Exchequer, in their respective chambers at Westminster, within the first four days of every term, a list of all such prisoners as are supersedeable; showing as to what actions and on what account they are so, and as to what actions (if any) they still remain not supersedeable.

87. If by reason of any writ of error, special order of the Court, agreement
*387] of parties, or other special matter, *any person detained in the actual custody of the marshal of the King's Bench prison or warden of the Fleet, be not entitled to a supersedeas or discharge to which such prisoner would, according to the general rules and practice of the Court, be otherwise entitled for want of declaring, proceeding to trial or judgment, or charging in execution, within the times prescribed by such general rules and practice, then and in every such case the plaintiff or plaintiffs at whose suit such prisoner shall be so detained in custody, shall, with all convenient speed, give notice in writing of such writ of error, special order, agreement, or other special matter, to the marshal or warden, upon pain of losing the right to detain such prisoner in custody by reason of such special matter; and the marshal or warden shall forthwith after the receipt of such notice cause the matter thereof to be entered in the books of the prison, and shall also present to the Judges of the respective Courts from time to time a list of the prisoners to whom such special matter shall relate, showing such special matter, together with the list of the prisoners supersedeable.

88. All prisoners who have been or shall be in the custody of the marshal or warden for the space of one calendar month after they are supersedeable, although not superseded, shall be forthwith discharged out of the King's Bench or Fleet prison as to all such actions in which they have been or shall be supersedeable.

89. The order of a Judge for the discharge of a prisoner on the ground of a plaintiff's neglect to declare, or proceed to trial, or final judgment, or execution, in due time, may be obtained at the return of one summons served two days before it is returnable, such order in town causes being absolute, and in
388*] country causes, unless cause *shall be shown within four days, or within such further time as the Judge shall direct.

90. A rule or order for the discharge of a debtor who has been detained in execution a year for a debt under twenty pounds, may be made absolute in the first instance, on an affidavit of notice given ten days before the intended application, which notice may be given before the year expires.

Attorney and his Bill.

91. An order to deliver or tax an attorney's bill may be made at the return of one summons, the same having been served two days before it is returnable.

92. One appointment only shall be deemed necessary for proceeding in the taxation of costs, or of an attorney's bill.

93. No set-off of damages or costs between parties shall be allowed to the prejudice of the attorney's lien for costs in the particular suit against which the set-off is sought, provided, nevertheless, that interlocutory costs in the same suit, awarded to the adverse party, may be deducted.

Miscellaneous.

94. It shall not be necessary that a pluries capias be stamped by the clerk of the warrants to authorize the exigenter to make out an exigent.

95. In order to charge a defendant in execution, it shall not be necessary that the proceedings be entered of record.

96. Side bar rules may be obtained on the last as well as on other days in term.

*97. A rule may be enlarged, if the Court think fit, without notice.

98. An application to compel the plaintiff to give security for costs must in ordinary cases be made before issue joined. [*389]

99. Leave to compound a penal action shall not be given in cases where part of the penalty goes to the crown, unless notice shall have been given to the proper officer, but in other cases it may.

100. Where the defendant, after having pleaded, is allowed to confess the action, he may withdraw his plea in person without the appearance of the attorney or his clerk for that purpose before the officer of the Court.

101. There shall be no rule for the sheriff to return a good jury upon a writ of inquiry, but an order shall be made by a Judge upon summons for that purpose.

102. An order upon the lord of a manor to allow the usual limited inspection of the court rolls, on the application of a copyhold tenant, may be absolute in the first instance upon an affidavit that the copyhold tenant has applied for and been refused inspection.

103. In cases where the application for a rule to change the venue is made upon the usual affidavit only, the rule shall be absolute in the first instance; and the venue shall not be brought back except upon an undertaking of the plaintiff to give material evidence in the county in which the venue was originally laid.

104. Where money is paid into Court in several actions which are consolidated, and the plaintiff, without taxing costs, proceeds to trial on one and fails, he shall be entitled to costs on the others up to the time of paying money into Court.

*105. After judgment by default, the entry of any subsequent continuances shall not be required. [*390]

106. To entitle a plaintiff to discontinue after plea pleaded, it shall not be necessary to obtain the defendant's consent, but the rule shall contain an undertaking on the part of the plaintiff to pay the costs, and a consent, that if they are not paid within four days after taxation, defendant shall be at liberty to sign a non pros.

107. It shall not be necessary that any pleadings which conclude to the country be signed by counsel.

108. In all special pleadings, where the plaintiff takes issue on the defendant's pleading, or traverses the same, or demurs, so that the defendant is not let in to allege any new matter, the plaintiff may proceed without giving a rule to rejoin.

109. It shall not be necessary that imparlances should be entered on any distinct roll.

110. Where a pauper omits to proceed to trial, pursuant to notice, or an undertaking, he may be called upon by a rule to show cause why he should not pay costs though he has not been dispaupered.

II.

AND IT IS FURTHER ORDERED, That upon every bailable writ and warrant, and upon the copy of any process served for the payment of any debt, the amount of the debt shall be stated, and the amount of what the plaintiff's attorney claims for the costs of such writ or process, arrest, or copy and service

and attendance to receive debt and costs, and that upon payment thereof, within four days, to the plaintiff or his attorney, further proceedings will be stayed.

*391] But the defendant shall be *at liberty, notwithstanding such payment, to have the costs taxed; and if more than one-sixth shall be disallowed, the plaintiff's attorney shall pay the costs of taxation.

The endorsement shall be written or printed in the following form:—

"The plaintiff claims — for debt, and — for costs. And if the amount thereof be paid to the plaintiff or his attorney within four days from the service hereof, further proceedings will be stayed."

III.

AND IT IS FURTHER ORDERED, That in Hilary and Trinity terms, a plaintiff in any country cause may file or deliver a declaration *de bene esse*, within four days after the end of the term, as of such term.

IV.

AND IT IS FURTHER ORDERED, That the rules heretofore made in the Courts of King's Bench and Common Pleas respectively, for avoiding long and unnecessary repetitions of the original writ in certain actions therein mentioned, shall be extended and applied in the Courts of King's Bench, Common Pleas, and Exchequer of Pleas, to all personal and mixed actions; and that in none of such actions shall the original writ be repeated in the declaration, but only the nature of the action stated, in manner following, viz.: A. B. was attached to answer C. D. in a plea of trespass, or in a plea of trespass and ejectment, or as the case may be, and any further statement shall not be allowed in costs.

*392]

*V.

AND IT IS FURTHER ORDERED, That upon staying proceedings, either upon an attachment against the sheriff for not bringing in the body, or upon the bail-bond on perfecting bail above, the attachment or bail-bond shall stand as a security, if the plaintiff shall have declared *de bene esse*, and shall have been prevented for want of special bail being perfected in due time from entering his cause for trial, in a town cause in the term next after that in which the writ is returnable, and in a country cause at the ensuing assizes.

VI.

AND IT IS FURTHER ORDERED, That the expense of a witness called only to prove the copy of any judgment, writ, or other public document, shall not be allowed in costs, unless the party calling him shall, within a reasonable time before the trial, have required the adverse party, by notice in writing, and production of such copy, to admit such copy, and unless such adverse party shall have refused or neglected to make such admission.

VII.

AND IT IS FURTHER ORDERED, That the expense of a witness called only to prove the handwriting to, or the execution of, any written instrument stated upon the pleadings, shall not be allowed, unless the adverse party shall, upon summons before a Judge, a reasonable time before the trial (such summons stating therein the name, description, and place of abode of the intended witness), have neglected or refused to admit such handwriting or execution, or unless the Judge, *393] upon attendance before him, shall endorse upon such *summons, that he does not think it reasonable to require such admission.

VIII.

AND IT IS FURTHER ORDERED, That in all cases in which any particular number of days, not expressed to be clear days, is prescribed by the rules or Vol. XXIII.—12

practice of the Courts, the same shall be reckoned exclusively of the first day and inclusively of the last day, unless the last day shall happen to fall on a *Sunday, Christmas-day, Good Friday*, or a day appointed for a public fast or thanksgiving, in which case the time shall be reckoned exclusively of that day also.

AND IT IS FURTHER ORDERED, That the above Rules shall take effect on the first day of next Easter term.

TENTERDEN,	J. VAUGHAN,
N. C. TINDAL,	J. PARKE,
LYNDHURST,	W. BOLLAND,
J. BAYLEY,	J. B. BOSANQUET,
J. A. PARK,	W. E. TAUNTON,
W. GARROW,	E. H. ALDERSON,
J. LITTLEDALE,	J. PATTESON.
S. GASELEE,	

END OF HILARY TERM.

CASES

ARGUED AND DETERMINED

IN THE

COURT OF KING'S BENCH,

IN

Easter Term,

IN THE SECOND YEAR OF THE REIGN OF WILLIAM IV.(a)

REGULA GENERALIS.

IT IS ORDERED, That the days between Thursday next before, and the Wednesday next after Easter day, shall not be reckoned or included in any rules or notices, or other proceedings, except notices of trials and notices of inquiry, in any of the Courts of Law at Westminster. Signed by all the Judges.

MEMORANDA.

IN the course of the vacation, John Gurney, Esquire, one of his Majesty's Counsel, and John Taylor Coleridge, Esquire, were called to the degree of the coif, and gave rings with the following motto: *Justo discernere iniquum*.

J. Gurney, Esquire, was afterwards appointed one of the Barons of His Majesty's Court of Exchequer, in the room of Mr. Baron Garrow, who resigned; and received the honour of knighthood.

*395]

*STRUTT v. ROBINSON. April 17.

By an agreement of demise, the land was to be farmed according to covenants contained in an expired lease. The expired lease being produced in an action brought for not farming the land according to those covenants: Held, that it was not a schedule, catalogue, or inventory containing the conditions or regulations for the management of a farm within 55 G. 3, c. 184, Sched. pt. 1, and therefore did not require a stamp of 25s.

DECLARATION upon an agreement, whereby the plaintiff demised land to the defendant for fourteen years, at a certain yearly rent, to be farmed according to a lease granted to W. Hart and Margaret Carter, dated the 9th of March, 1811. The breaches were, for not farming according to the covenants in that

(a) Taunton, J., usually sat in the Bail Court this term.

lease. At the trial before Lord Lyndhurst, C. B., at the Spring assizes for the county of Essex, 1832, the agreement of demise was proved. The lease therein referred to, which had been impressed with a lease stamp and had expired, was then produced to show the mode in which the land was to be farmed. It was objected that it was inadmissible, not having a stamp of 25s., as required by the statute 55 G. 3, c. 184, Sched., part 1, for a schedule, inventory, or catalogue referred to in, and given in evidence as part of, a lease. Lord Lyndhurst over-ruled the objection, and a verdict having been found for the plaintiff, *Adolphus* now moved for a new trial. The instrument had done its duty as a lease, and was tendered in evidence to show the mode in which the land was to be farmed: it was a schedule, inventory, or catalogue containing the terms of a lease, and the conditions and regulations for the cultivation and management of a farm leased thereby. And being distinct from, and referred to in the agreement of demise, it required a stamp of 25s.

*Lord TENTERDEN, C. J. To make it liable to that stamp it must fall within one of the three descriptions, of a schedule, an inventory, or a catalogue. I think it does not come within any of them. [*396]

LITTLEDALE, J. The old lease is certainly not an inventory or catalogue. The only question is, whether it can be considered a schedule containing the conditions and regulations for the cultivation and management of the farm? I think it is not a schedule.

PARKE and PATTESON, Js., concurred.

Rule refused.

PEARSE v. MORRICE. April 17.

In covenant by lessor against lessee, on an indenture of demise, it is no variance if the plaintiff in his declaration makes profert of the "*said indenture*," and at the trial produces the counterpart executed by the lessee.

COVENANT. The breach alleged was non-payment of rent of a toll-house, and tolls demised to the defendant by indenture, of which profert was made as follows: "*which said indenture*, sealed with the seal of the said defendant, the said plaintiff now brings here into court." Plea, non est factum. At the trial before Vaughan B., at the last Spring assizes for Bedford, the deed was produced bearing a 30s. stamp, and a question arose whether the stamp were sufficient for such lease; but it was answered that, however this might be, the instrument produced was only a counterpart, and, therefore, by 55 G. 3, c. 184, Sched. part 1., chargeable only with a stamp 1*l.* 10s. It was then contended that the instrument, if a counterpart, and, as such, distinguishable *from an original deed, was improperly described in the profert as the indenture [*397] itself. A verdict was taken for the plaintiff, and leave given to move to enter a nonsuit.

Kelly now moved accordingly, and restated the objections taken at the trial. Where profert is made of a deed, and the issue is, whether or not it be the deed of the defendant, it is indispensably necessary that the deed proffered should be the same instrument which is produced to the Court, *Smith v. Woodward*, 4 East, 585. The instrument here produced was not the original indenture, and did not even furnish proof that such an original had ever existed.

Per Curiam. (a) The plaintiff, as lessor, must be understood to make profert of the part of the indenture executed by the lessee: as in an action against the lessor, it would not be expected that the lessee's part should be produced. The terms of this declaration were sufficiently answered by the production of the counterpart. Rule refused. (b)

(a) Lord Tenterden, C. J.; Littledale, Parke, and Patteson, Js.

(b) See Littleton, s. 370.

PIERCE v. STREET. *April 17.*

In an action for a malicious arrest, proof that no declaration was filed or delivered within a year after the return of the writ, is sufficient to show a determination of that suit.

DECLARATION for maliciously and without probable cause suing out a writ
*398] endorsed for bail for 66*l.* and causing the plaintiff (Pierce) to be arrested
*for that sum. The declaration, after setting out the writ and the arrest, and that Street had not any reasonable or probable cause of action against the plaintiff to the amount of 66*l.*, averred that no proceedings were thereupon had in the said suit, and that the defendant (Street) did not declare against the plaintiff (Pierce), nor prosecute his said writ against him with effect, but voluntarily permitted the said suit to be discontinued for want of prosecution thereof, whereupon and whereby, and according to the practice of the court, the suit became determined. Plea, not guilty. At the trial before Lord Lyndhurst, C. B., at the Spring assizes for the county of Sussex, 1832, it appeared that the writ in the original action was sued out by Street on the 18th of June, 1830, returnable in fifteen days of the Holy Trinity. No declaration was delivered or filed, and the present action for malicious arrest was not commenced until one year after the return of the writ. It was objected that there was no evidence of the determination of the suit to satisfy the averment in the declaration. Lord Lyndhurst thought there was, and overruled the objection, but reserved liberty to the defendant to move to enter a nonsuit. A verdict having been found for the plaintiff,

Platt now moved accordingly. There was no evidence to show that the suit had been determined. It was not sufficient for the plaintiff to show that the suit was not continued, but some act ought to be done in Court in order to determine it. Here there was no judgment of non pros, or rule of Court determining the suit.

LORD TENNERDEN, C. J. I think there was quite sufficient proof that the
*399] suit was at an end at the time *when this action was commenced. There was no declaration filed for a year after the return of the writ. The length of time which had elapsed, shows that the suit was abandoned altogether.

LITTLEDALE, J. The suit was determined by the plaintiff's not declaring within a year.

PARKE, J. When the cause is out of Court, it must be considered as determined. *Arundell v. White*, 14 East, 216, is a case very like the present. It was an action for maliciously arresting the plaintiff on a plaint in the sheriff's court in London. The practice of that court, upon the abandonment of a suit by the plaintiff, being to make an entry in the minute book, proof of such entry was held sufficient to show that the suit was at an end.

PATTESON, J., concurred.

Rule refused.

WHIPPY and Another v. HILLARY. *April 18.*

The statute of limitations is not barred by a letter in which the defendant states "that family arrangements have been making to enable him to discharge the debt; that funds have been appointed for that purpose, of which A. is trustee; and that the defendant has handed the plaintiff's account to A.; that some time must elapse before payment, but that the defendant is authorized by A. to refer the plaintiff to him for any further information."

For, by the statute 9 G. 4, c. 14, s. 1, the acknowledgment in writing to bar the statute must be signed by the party chargeable *thereby*; and such letter does not charge the defendant.

ASSUMPSIT for goods sold and delivered. Pleas, the general issue and statute of limitations, upon which issue was joined. At the trial before Littledale, J., at the sittings for Middlesex after last Hilary term, the only question was, whether or not the following letter, *written by the defendant to the plaintiffs, was sufficient to take the case out of the statute. [*400

"I have hitherto deferred writing to you regarding your demand upon me, in consequence of some family arrangements through which I should be enabled to discharge your account, and which were in progress, not having been completed. I have now the satisfaction to inform you, that an appointment of sufficient funds has been made for this purpose, of which H. Y., Esq., Essex Street, Strand, is one of the trustees, to whom I have given in a statement of your account, amounting to 98*l.* 8*s.* It will, however, be unavoidable that some time must elapse before the trustees can be in cash to make these payments, but I have Mr. Y.'s authority to refer you to him for any further information you may deem requisite on this subject."

The learned Judge directed a nonsuit, giving leave to move to enter a verdict for the plaintiffs.

Campbell now moved accordingly. This letter takes the case out of the statute. A direct promise to pay is not requisite, and the letter contains a plain, unqualified admission of the debt and its amount, upon which the law will raise a promise. This would have been the construction of a verbal acknowledgment in the same terms before the act 9 G. 4, c. 14, *Tanner v. Smart*, 6 B. & C. 603, and that statute makes no difference in the interpretation, *Haydon v. Williams*, 7 Bing. 163, but only requires that the acknowledgment shall have been reduced to writing. The defendant here says, that the debt is to be liquidated out of certain funds in the hands of trustees; but there *is no authority for saying, that the mere indication of a particular manner in which the debt is to be discharged will rebut the implied [*401 promise raised by an unconditional acknowledgment.

LORD TENTERDEN, C. J. The words of the act are, "unless such acknowledgment or promise shall be made or contained by or in some writing to be signed by the party *chargeable thereby*." The defendant himself must be chargeable by the instrument relied upon to bar the statute. That was not so here. I think, therefore, the rule ought not to be granted.

LITTEDALE, J., concurred.

PARKE, J. The endeavour here is to raise a promise on the letter produced, contrary to what the instrument itself implies. It is clear the defendant did not mean to render himself personally chargeable; he only refers to others by whom the debt is to be paid. There is no ground for the rule.

PATTESON, J., concurred.

Rule refused.

*DOE dem. ANTROBUS v. JEPSON and Another. April 18. [*402

A lease contained a covenant, among others, that the tenant should not carry any hay, &c., off the premises, under a penalty of 5*l.* per ton, and a clause followed which enumerated all the covenants except the above, and provided, that upon breach of *any of the covenants* the lessor might re-enter: Held, that the penalty of 5*l.* did not prevent the clause of re-entry from applying to the above covenant, the words of the proviso being large enough to comprehend it.

In ejectment under the statute 11 G. 4, and 1 W. 4, c. 70, s. 36, it is no ground for setting aside a verdict for the plaintiff, that he did not give six clear days' notice of trial as required by that section; the defendant having appeared and made his defence.

EJECTMENT under the statute 11 G. 4, and 1 W. 4, c. 70, s. 36, upon a proviso for re-entry. At the trial before Bosanquet, J., at the last Spring assizes at Chester, it appeared that the defendants were tenants to the lessor of

the plaintiff under a lease for eleven years at a rent reserved. The lease contained the usual covenants, and amongst others a covenant to use, consume, and spend upon the premises all the hay, dung, &c., under a penalty of 5*l.* for every ton carried off; and also a clause for re-entry, which enumerated every covenant in the lease except the covenant to consume the hay, &c., on the premises, and then provided that for the breach of any of the covenants in the lease the lessor might re-enter. On the 5th of March, 1832, the defendants sold hay off the premises, whereupon the plaintiff insisted upon the forfeiture, and, on the 12th of the same month, served a declaration in ejectment, the demise being laid on the 9th of March. There was no proof that six clear days' notice of trial had been given to the defendants. It was objected that the plaintiff could not recover, first, because the lease gave the lessor no power to re-enter for a breach of the covenant to consume the hay upon the premises; and, secondly, because it was necessary to show that notice of trial had been given, that proof being by the statute a condition precedent to the lessor's right to recover. The learned Judge inclined against the defendants upon both *403] points, but gave them *leave to move to enter a nonsuit, and the lessor of the plaintiff had a verdict.

J. Jervis now moved accordingly. The proviso for re-entry was not meant to apply to the covenant for consuming the hay on the premises. That covenant expressly provides another remedy in case of breach, namely, the penalty of 5*l.* It cannot be contended that the landlord might turn the tenant out of possession, and afterwards recover the 5*l.*; and it is not shown here that the penalty was demanded and refused. The act requires (s. 36), that at least six clear days' notice of trial shall be given to the defendant before the commission day of the assizes. No proof of such notice was given at the trial. [Lord TENTERDEN, C. J. The defendants appeared.] That does not dispense with the proof of notice. In proceeding for the recovery of mesne profits under 1 G. 4, c. 87, s. 2, where the defendant in ejectment, after notice of trial, does not appear, it has always been considered necessary to prove the notice. The mere appearance of a defendant to prevent being turned out is no admission of a notice of trial. So in actions against justices of peace, and excise and custom-house officers, the notice of action must be proved, though the defendant appears, for that appearance does not show the proceedings to have been regular on the other side.

Lord TENTERDEN, C. J. The fair meaning of the covenant, not to remove any hay under a penalty of 5*l.* per ton, and of the subsequent proviso, is, that if the hay be so removed without payment of that sum, the right of re-entry *404] shall accrue. The proviso extends to *all breaches of covenant, and one covenant was broken by the defendants, by removing the hay without payment of the 5*l.* As to the six days' notice, I do not think the act makes it a necessary condition of the plaintiff's recovering, though if proper notice were not given, and the plaintiff proceeded against the defendant, he not appearing, that would be a ground for moving to set aside the verdict. The proof of notice in actions against justices, and excise and custom-house officers, is required by statute, and there no evidence can be given of any cause of action not contained in the notice. I am of opinion that there ought to be no rule.

LITTLEDALE, PARKE, and PATTESON, Js., concurred.

ROBERTS v. HAVELOCK. April 18.

A ship outward bound with goods, being damaged at sea, put into a harbour to receive some repairs which had become necessary for the continuance of her voyage, and a shipwright was engaged, and undertook, to put her into thorough repair. Before this was completed he required payment for the work already done, without which he refused to proceed; and the vessel remained in an unfit state for sailing:

Held, that the shipwright might maintain an action for the work already done, though the repair was incomplete, and the vessel thereby kept from continuing her voyage, at the time when the action was brought.

ASSUMPSIT for work and materials, &c. Plea, the general issue. At the trial before Bolland, B., at the last Spring assizes for Pembrokeshire, it appeared that, in November, 1830, a ship, of which the defendant was owner, and which was chartered with a cargo of iron from Cadiff to Alexandria, went into Milford Haven in a damaged state, and the plaintiff was employed, and undertook, to put her into thorough repair. Before this was completed, a dispute arose between the parties; the plaintiff was called upon to put the vessel into a fit state to continue her voyage, but refused to do so till he was paid for the work already done, and for which *this action was brought; the defendant, objecting to the charges, would not pay the sum demanded; and [*405 the vessel was, consequently, detained in an unfit state for sailing till the commencement of this action. For the defendant it was objected, that the action did not lie, inasmuch as the plaintiff had not completed his contract, and as long as that was the case, the work already done was unavailable to the purpose for which it had been required. The learned Judge directed a verdict for plaintiff, reserving leave to the defendant to enter a nonsuit.

Chilton now moved accordingly. The plaintiff's undertaking was to put the vessel into thorough repair, and this was, as the whole transaction shows, with reference to a particular purpose, the continuation of the voyage. Till the vessel was repaired sufficiently for that purpose, the plaintiff had no right to call for payment. His contract was entire, and he cannot recover for a part performance of it, *Sinclair v. Bowles*, 9 B. & C. 92. The work must be fully performed before an action of assumpsit can be brought in respect of it, 2 Wms. Saunders, 350, n. (2). The same may be inferred from *Mucklow v. Mangles*, 1 Taunt. 318. There is, indeed, an exception to this, where the defendant has derived some benefit from the work so far as it has been completed; but where the service has been abortive and no benefit received, the action does not lie, *Farnsworth v. Garrard*, 1 Camp. 38. Here, the vessel has not yet been delivered to the defendant, and her voyage has been lost: the object, therefore, for which the repairs were to be made, has been defeated.

*Lord TENTERDEN, C. J. I have no doubt that the plaintiff in this case was entitled to recover. In *Sinclair v. Bowles*, 9 B. & C. 92, the [*406 contract was to do a specific work for a specific sum. There is nothing in the present case amounting to a contract to do the whole repairs and make no demand till they are completed. The plaintiff was entitled to say, that he would proceed no further with the repairs till he was paid what was already due.

LITLEDALE, J. The plaintiff undertook this work in the same way as shipwrights ordinarily do. It does not follow from anything that passed, that he might not stop from time to time in the course of the work, and refuse to proceed till he was supplied with money.

PARKE, J. If there had been any specific contract on the part of the plaintiff for completing the work, the argument for the defendant might have had much weight. But this was only a general employment of the plaintiff by the defendant, in the same way as all shipwrights are employed. I think, therefore, there can be no rule.

PATTESON, J., concurred.

Rule refused.

*SMITH v. COMPTON and Others, Executors of SOUTH- [*407
WELL. April 18.

The defendant conveyed premises to the plaintiff, and covenanted for good title. An

action of formedon was afterwards brought against the plaintiff by a party having better title, and the plaintiff compromised it for 550*l*. : Held, that the plaintiff, in an action for the breach of covenant, might recover the whole sum so paid, and his costs as between attorney and client, in the compromised suit, though he had given no notice of that suit to the defendant. For in an action on a general guarantee, the only effect of such want of notice to the indemnifying party is to let in proof on his part, that the compromise was improvidently made, and it lies on him to establish that fact, which was not done in the present case.

JUDGMENT having been given for the plaintiff on demurrer in this action (on covenant for good title to convey, see p. 189 ante), a writ of inquiry was executed, and the jury gave damages to the plaintiff, including the sum of 550*l*., which he had been obliged to pay by way of compromise to the party claiming under a superior title; and also including the plaintiff's costs, as between attorney and client, of the action of formedon brought against him by that party.

Humfrey now moved for a rule to show cause why there should not be a new writ of inquiry, or why the damages should not be reduced. First, the plaintiff was not entitled to recover the money which he paid by way of compromise, having taken that step without giving notice to the defendants. Secondly, he ought not to recover the costs which he paid his own attorney for defending the action, without having given notice to the present defendants. And, thirdly, the costs, at all events, should not have been reckoned as between attorney and client. As to the 550*l*., the present defendants, if they had had notice, might have settled the action upon better terms. The costs also might have been less, if the defendants had had an opportunity of bringing the cause *408] to an earlier conclusion. In *Gillett v. Rippon*, 1 M. & M. 406, Lord Tenterden, C. J., says, "A man has no right, merely because he has an indemnity, to defend an action, and to put the person guaranteeing to a useless expense." *Knight v. Hughes*, 1 M. & M. 247, is to a similar effect. [Lord TENTERDEN, C. J. Defending an action without notice to the guaranteeing party is very different from making a compromise. PARK, J. On the strength of the covenant in this case the covenantee was justified in acting as if he had a good title. If he defended an action, it was the consequence of your covenant.] At all events, the plaintiff ought only to recover costs as between party and party.

Lord TENTERDEN, C. J. I am of opinion that there should be no rule. The only effect of want of notice in such a case as this, is to let in the party who is called upon for an indemnity to show that the plaintiff has no claim in respect of the alleged loss, or not to the amount alleged; that he made an improvident bargain; and that the defendant might have obtained better terms if the opportunity had been given him. That was not proved here, and we cannot assume it. As to the costs, the plaintiff here had a right to claim an indemnity, and he is not indemnified unless he receives the amount of the costs paid by him to his own attorney.

LITTLEDALE, J., concurred.

PARKE, J. I am of the same opinion. The effect of notice to an indemnifying party is stated by Buller, J., in *Duffield v. Scott*, 3 T. R. 374: "The purpose of giving notice is *not in order to give a ground of action; *409] but, if a demand be made, which the person indemnifying is bound to pay, and notice be given to him, and he refuse to defend the action, in consequence of which the person to be indemnified is obliged to pay the demand, that is equivalent to a judgment, and estops the other party from saying that the defendant in the first action was not bound to pay the money."

PATTERSON, J., concurred.

Rule refused.

WEAVER v. PRICE and Another. *April 19.*

Trespass lies against magistrates for granting a warrant to levy poor rates, if the party distrained upon has no land in the parish in which the rate was made.

TRESPASS for distraining and impounding a heifer. Plea, the general issue. At the trial before Bosanquet, J., at the Spring assizes for the county of Flint, 1832, the following appeared to be the facts of the case. The plaintiff was the occupier of a field called Wet Cushion Field, containing three acres of land, in the county of Flint. The defendants were two justices of the peace for that county, and they, on the 13th of April, 1831, on the application of the churchwardens and overseers of the parish of Overton, granted a warrant, reciting, that by a rate duly made, allowed, and published, the plaintiff, an occupier of land in the parish of Overton, was rated and assessed for and towards the relief of the poor of that parish in the sum of 3s., and it appeared to the justices, upon the oath of the overseer, that that sum had been demanded of the plaintiff, and he had refused to pay the same, and had not shown any *sufficient cause why it should not be paid; the warrant, therefore, required [410] the churchwardens and overseers to make distress of the goods and chattels of the plaintiff, &c. The money having been levied under this warrant, the question at the trial was, whether the field in question was in the parish of Overton, or in that of Erbistock. It was objected that in the present case trespass was not maintainable against the justices, but that the remedy was by appeal against the rate. The learned Judge was of opinion, that the magistrates had no jurisdiction to order the money to be levied upon the plaintiff if he had no land in the parish of Overton, and if so, that the action lay. A verdict having been found for the plaintiff,

Wightman now moved for a new trial. The proper remedy was by appeal, and not by the present action, *Durrant v. Boys*, 6 T. R. 580. [PARKE, J. There the objection to the rate was one which might be taken on appeal. The plaintiff was a parishioner. Here there was no rate affecting the plaintiff's land in the parish of Erbistock.] The plaintiff is rated as an occupier of land in Overton, and the magistrates, on the application of the overseers, grant the warrant for non-payment of the rate made upon him in respect of his land in Overton. He did not appear before them on the summons, to object that he had no rateable property in Overton; and how are the justices to know that he had none? If the action would lie in this case, every person who disputes the rateability of his property might try the question in an action against the justices. It would be hard upon magistrates, if they were bound to ascertain at their *own peril whether a party who appears on the face of the rate to [411] be duly rated, really has the property for which he is rated or not.

Lord TENTERDEN, C. J. There was not, in this case, any rate whereby the plaintiff could be duly assessed to the relief of the poor of the parish of Overton; for, in the result, it turned out that he was not an occupier of any land in that parish. That being so, the defendants had no authority to order any distress for a rate to be levied of his goods. They are, therefore, liable in trespass.

Rule refused.(a)

(a) See *Bonnell v. Beighton*, 5 T. R. 182.

The Mayor, Aldermen, and Burgesses of NEWPORT v. SAUNDERS.

April 19.

Assumpsit may be maintained by the owner of a market, for stallage, and that without showing any contract in fact between him and the occupier of the stall.

ASSUMPSIT for tolls and stallage. At the trial before Parke, J., at the

Spring assizes for Winchester, 1832, the jury found a verdict for the plaintiffs on the count for stallage, with 1s. damages; and were discharged of the issue as to the tolls.

Coleridge, Serjt., now moved for a rule to enter a nonsuit, on the ground that in the absence of evidence of any contract in fact, either express or implied, assumpsit was not maintainable for stallage. In the *Mayor of Northampton v. Ward*, 2 Str. 1239; 1 Wils. 115, it was said by the Court, "that trespass was the proper form of action, and that neither debt nor assumpsit would lie" (for *412] stallage); "nor could the owner of the soil distrain, because there *is not any certain fixed sum or duty, or contract express or implied." Here the evidence showed that there was no contract for stallage. Assumpsit for use and occupation may be maintained, because there is an implied contract to pay what the value may be found to be; but there is no such implied contract in the case of stallage. And there is no analogy between the two cases. In the ordinary case of occupation of land for agricultural or other purposes, the owner of the land may exercise an option; and therefore, where the fact is found, a contract may well be presumed; a permission on the part of the owner, and an acceptance of a demise on that of the tenant; but, in the case of stallage, the owner of the market has no option; he must permit the public to resort to the market, and cannot refuse to any one the right to occupy his land by a stall for the purpose of exposing his wares to sale, who will pay him the accustomed or reasonable stallage; the person, therefore, enters lawfully, though without the owner's consent; and by refusing to pay the stallage when due, he (to use the language of the Court in the case cited, 2 Str. 1239; 1 Wils. 115), "misbehaves and becomes a trespasser ab initio."

Lord TENTERDEN, C. J. I do not see any objection to the form of action. Tolls may be recovered in assumpsit, and no proof is given of anything like a contract by the party against whom the claim is made. Evidence is given of the right to receive them, and that is always deemed sufficient. Stallage is not distinguishable from tolls in that respect. The party entitled to stallage may waive the tort. In the *Mayor of Northampton v. Ward*, 2 Str. 1239; 1 Wils. *413] 115, the Court decided that trespass was *maintainable; but what was said as to bringing debt or assumpsit, was extra-judicial.

LITTLEDALE, J. Assumpsit lies for the use and occupation of premises at the suit of the owner. Now stallage is a satisfaction to the owner of the soil for the liberty of placing a stall upon it. If assumpsit be maintainable in the one case, there is no reason it should not in the other.

PARKE and PATTESON, Js., concurred.

Rule refused.

The KING v. The Inhabitants of LINKINHORNE. April 25.

A pauper was duly apprenticed to a farmer residing in parish A., and served him there, but before the expiration of the apprenticeship, the farmer having failed in business, placed the pauper with another farmer in parish B., and the pauper served the latter in B. for nine months, when becoming ill and disabled from service, he returned to his first master in parish A. The latter, having no accommodation for him, told him to go to his mother, who lived in that parish. The pauper did so, and his first master, a few days after, promised his mother to remunerate her for taking care of the pauper. The pauper continued to reside with his mother in A. for about eight weeks, his first master being resident there, but did not perform any actual service for him:

Held, that the pauper resided in A. in the character of apprentice, and thereby gained a settlement in that parish.

On appeal against an order of two justices, whereby William Wallis and his family were removed from the parish of Linkinhorne, in Cornwall, to the parish of St. Cleer in the same county, the sessions quashed the order, subject to the opinion of this Court on the following case:—

The pauper was duly bound apprentice by the church-wardens and overseers of the parish of St. Cleer, to John Gadgcombe of that parish, farmer; and served him in St. Cleer under the indenture for about six years, when Gadgcombe, having failed in business, agreed to place the pauper with T. Little, of the parish of St. Pinnock in the said county, farmer. No assignment or *transfer of the indenture was made; but the pauper, in March, 1816, went to and served T. Little in St. Pinnock, with the consent of Gadgcombe, [*414 for nine months. The pauper then becoming ill and disabled for service, went back to Gadgcombe in the parish of St. Cleer, and he having no accommodation for the pauper, told him to go to his mother who lived in St. Cleer, promising to come and agree with her for his board and maintenance. The pauper went to his mother accordingly, and, a few days after, Gadgcombe came and promised the mother to remunerate her for taking care of her son, and took the pauper to a medical man for advice. The pauper continued to reside with his mother in St. Cleer for about eight weeks, Gadgcombe also, during that time, being resident in St. Cleer, but the pauper did not perform any actual service for Gadgcombe during that period. The sessions were of opinion, that, for want of such service, the last legal place of settlement of the pauper was in St. Pinnock.

Coleridge, Serjt., in support of the order of sessions. As the pauper went into St. Pinnock more than forty days before the 1st of October, 1816, when the restrictive clauses of the 56 G. 3, c. 139, took effect, a settlement was gained there; and the only question is, whether a new settlement was gained in St. Cleer by the eight weeks' residence. It could not be acquired except by residence as an apprentice. The fact of service, actual or constructive, has always been considered an essential, or at least a material ingredient in determining the character of the residence. Here the master is found to have failed in business, and the apprentice was disabled from working; service, therefore, was neither rendered *nor, in fact, contemplated. In *Rex v. Barnby* in the Marsh, 7 East, 381, the residence with a grandmother on account [*415 of illness was held not to be referable to the apprenticeship, though it was with the consent of the master, and he received the apprentice again when his health was restored; and the Court said, this was no more than residence in an hospital, and there *Rex v. Charles*, Burr. S. C. 706, was cited. In *Rex v. Stratford* on Avon, 11 East, 176, the residence of an apprentice was with the mother in an adjoining parish to have his thumb cured; but, during the whole time, the pauper went almost every day to his master's, and was on some days employed by his master on errands, and was always ready when wanted by him, but was unable to work at his trade. The pauper was held to be still in the service of the master as an apprentice while he lodged with his mother. The Court decided this case on the service rendered, and distinguished it on that ground from *Rex v. Barnby* in the Marsh, 7 East, 381. In *Rex v. Chelmsford*, 3 B. & A. 411, the same ground of actual service was relied on, and *Holroyd, J.*, in his judgment, put that as the principle of the decision in the case of *Rex v. Stratford* on Avon, 11 East, 176. In *Rex v. St. Mary Bredin*, 2 B. & A. 382, a master mariner having no immediate occasion for his apprentice's service, the vessel being in dock, let him go back to school to learn navigation; a residence for that purpose was held not to give a settlement. *Bayley, J.*, there said, that service is one of the essential requisites to confer a settlement, and that the service must be either actually or constructively going on during the absence of the apprentice from his *master. In *Rex v. Brotton*, 4 B. & A. 84, there was an absence and want of service in pursuance of a stipu- [*416 lation in the contract of apprenticeship, and it was held no settlement was gained; yet there the master paid 6s. weekly for the maintenance of the apprentice during the time he was in Brotton, and the service was to be renewed when the winter was over. *Rex v. Foulness*, 6 M. & S. 351, will be relied upon by the other side, but what was decided before the cases of *Rex v. St. Mary Bredin*,

2 B. & A. 382; *Rex v. Brotton*, 4 B. & A. 84, and *Rex v. Chelmsford*, 3 B. & A. 411, and very much on the ground that the residence was under a continuance of the contract; but that is not the true principle, for the contract may continue with all its rights and relations, yet the want of service may give the residence such a character as to prevent its conferring a settlement.

Crowder, contrd. Residence for forty days by an apprentice will give a settlement, though no service be performed, and illness be the occasion of the residence in the particular parish, *Rex v. Charles*, Burr. S. C. 706. There it was contended, that actual service was necessary, but the Court said that the performance of actual service was not the thing material. It is the residence, the inhabitation of an apprentice in a parish for forty days, that gains the settlement. That case is precisely in point, and has never been overruled. In *Rex v. Foulness*, 6 M. & S. 351, an apprentice to a barge-master, who had slept thirty-five nights in the master's parish during his service, went with his master *417] on a voyage to London, *where the master absconded, and never returned during the continuance of the indentures; but the apprentice returned in the barge to the master's parish, and remained on board two days, when, in consequence of illness, he was, by direction of his master's wife, conveyed to the poor-house, she being unable to accommodate him in her own house, but was maintained there at her expense, in the expectation of her husband's return: it was held, that such residence in the poor-house, was virtually a residence in the master's house, under a continuance of the contract, and that a settlement was acquired by it. In *Rex v. St. Mary Bredin*, 2 B. & A. 382, and *Rex v. Brotton*, 4 B. & A. 84, the residence was not in any way connected with the apprenticeship. In the first of these cases, the apprentice was at school, and in both he ceased to be under the control of the master. In *Rex v. Ilkeston*, 4 B. & C. 64, an apprentice lived and worked with his master in the parish of Ilkeston, went home to his father's, in the parish of Radford, every Saturday, and slept there on Saturday and Sunday nights (with his master's leave), and returned to work on Monday morning. The apprentice having returned and worked as usual on a Monday, left his master in the evening, and never returned; and it was held, that the sleeping in R. being merely by way of indulgence, and not for the purposes of the apprenticeship, was not sufficient to confer a settlement, and there Abbott, C. J., stated, as the true construction of the 3 W. & M., c. 11, s. 8, that the inhabitation must be the character of an apprentice, and in some way or other in furtherance of the *418] object of the apprenticeship. Now, here it appears *that the residence of the apprentice with his mother in St. Cleer was in the character of an apprentice, for his master was to maintain him there, as he was bound to do by the indentures. In *Rex v. Foulness*, 6 M. & S. 351, the master himself had absconded, and the maintenance by the wife was held to be sufficient. Here, if the pauper had resided in his master's own house, it would have been in the character of an apprentice, yet if it be true that service is necessary, he would not have gained a settlement.

Lord TENTERDEN, C. J. The decisions on this branch of the law run very near to each other, and are hardly reconcilable. I agree that the mere continuance of the contract during the absence of the apprentice from his master is not sufficient, but I do not agree that the performance of some service by the apprentice is absolutely necessary to enable him to gain a settlement in a parish different from that where the master lives; I think less than that will do, and that it will be sufficient, if the residence be in pursuance of the contract of apprenticeship, and in a place where, but for that contract, it would not have been. The word service is not mentioned in the statute 3 W. & M., c. 11, s. 8, but *binding and inhabitation*. Here, I think, it is evident that the boy's residence with his mother in St. Cleer was in pursuance of the contract of apprenticeship; for, during all that time, the master was bound to maintain him, and did so in performance of his part of the contract. The pauper was therefore settled in St. Cleer.

LITTLEDALE, J. Although no actual service was rendered by the pauper while he resided in St. Cleer, the *last eight weeks, such residence was in pursuance of the contract of apprenticeship. He returned to his master with the intention to reside with him, and to perform service as soon as his health permitted. Illness alone prevented it. He went to his mother's house by desire of his master. His residence there is to be considered as if he had continued in the master's house; and if he had been taken ill while residing there, there could have been no doubt that he would have gained a settlement in St. Cleer, although he performed no service. That the master considered him as residing with his mother, in pursuance of the contract of apprenticeship, is shown by the fact of his having agreed to maintain him during that time. [*419]

PARKE, J. I am also of opinion that a settlement was gained in the parish of St. Cleer. The question arises on the statute 3 W. & M., c. 11, s. 8, which enacts, that "if any person shall be bound an apprentice by indenture, and inhabit in any parish, such binding and inhabitation shall be adjudged a good settlement." The statute says nothing of actual service. The true construction, as stated by Lord Tenterden, in *Rex v. Ilkeston*, 4 B. & C. 67, is, that the *inhabitation* must be in the character of an apprentice, and in some way or other in furtherance of the object of the apprenticeship. Now, applying that rule to the present case, the pauper's residence in St. Cleer was not casual, for he came to that parish because the master was bound to receive and maintain him. The residence there, consequently, was connected with the apprenticeship. The dictum, that service is one of the *essential* requisites to confer a settlement *cannot be supported. Service may be material, as showing [*420] that the residence is in the character of apprentice, but that may be shown by other facts. Here the residence appears undoubtedly to have been in the character of apprentice, and was so considered by the master, for he agreed to maintain the pauper during the time of such residence.

PATTESON, J. Service is a criterion, but not the only one whereby to determine the character of the residence, and the facts stated in this case abundantly show that the pauper resided in St. Cleer as an apprentice. *Rex v. Charles, Burr.* S. C. 706, is in point, and has not been overruled. The order of sessions must be quashed. Order of sessions quashed.

The KING v. The Inhabitants of DREMERCHION. April 25.

A hired servant is settled in that parish in which he last completes a forty days' residence, although he performs no service there for his master.

On appeal against an order of two justices, whereby John Williams, his wife and children, were removed from the parish of Northrop, in the county of Flint, to Dremerchion in the same county, the sessions confirmed the order of removal, subject to the opinion of this Court on the following case:—

The pauper, John Williams, hired with one W. Evans for a year, from the 1st of May, 1819, to the 1st of May, 1820, and served with him for a year, residing in Dremerchion from the 1st May, 1819, until November in the same year, when he married. From that time he resided *on the week days, from Monday to Saturday evening, at his master's house in Dremerchion, during which time he was working for his master; but Saturday night, the whole of Sunday, and until Monday morning, the pauper passed with his wife in St. Asaph parish. The pauper's year expired on Sunday the 30th of April, 1820. He had slept the night before in St. Asaph, and he slept there that night (Sunday night) also, and on Monday morning he returned to his master's residence in Dremerchion, and commenced working as a day labourer. The contract of hiring was agreed by the pauper and his master not to be dis- [*421]

solved by the marriage in November, 1819. The pauper slept more than forty nights during the year in St. Asaph, but no part of the time passed in St. Asaph was in furtherance of the service, being only allowed by the pauper's master as an indulgence, nor was there any service in fact performed by the pauper for his master in St. Asaph. The question reserved was, whether the pauper was properly removed to Dremarchion.

R. V. Richards and Miller, in support of the order of sessions. No settlement was gained in St. Asaph, because the residence of the pauper was not in pursuance of the contract of hiring. In *Rex v. Ilkeston*, 4 B. & C. 64, it was held that, to satisfy the words *binding* and *inhabitation* in the eighth section of the 3 W. & M. c. 11, which applies to apprentices, the residence must be in the character of apprentice, and in some way or other in furtherance of the object of the apprenticeship. Section 7 enacts, that if a person "shall be law-
*422] fully hired into a parish or town, for one year, such service *shall be deemed a good settlement therein." By analogy to the decisions as to apprentices, the residence must be in pursuance of the contract of hiring. *Rex v. Hedsor*, Cald. 51, 2 Bott. pl. 405, 6th edit., will be relied upon by the other side. There it was decided that a person who, during his service, married, and then lodged for the last forty days with his wife in another parish than that where the service was performed, gained a settlement in the parish where he lodged. *Rex v. Nympsfield*, Cald. 107, 2 Bott. pl. 405, n. (a), was decided on the authority of that case; but in *Rex v. Sutton*, 5 T. R. 657, where a yearly servant being deprived of his reason forty days before the end of the year, was taken home by his father, who lived in another parish, and who received the wages for the whole year; it was held that the servant was settled in the master's parish, though he continued in his father's house during the remainder of the year; and there Lord Kenyon said, "that he could not consider the pauper's residence with his father as a performance of service with his master; he was there *diverso intuitu*, in order to recover from his illness, and not for the purpose of serving his master." Here, after the pauper's marriage, from the Saturday night, until the Monday morning, the master had no control over him; his residence with his wife in St. Asaph was not at all connected with his service, and the sessions have so found.

Fynes Clinton, contrâ. This is the first instance in which an attempt has been made to extend the doctrine as to the residence of apprentices to cases of
*423] hired *servants. In *Rex v. Ilkeston*, 4 B. & C. 64, the decision proceeded on the construction of the words of 3 W. & M., c. 11, s. 8, *binding and inhabitation*. In cases of hiring and service, it has always been considered as established, that the servant is settled in the parish where he completes the last forty nights.

He was then stopped by the Court.

Lord TENTERDEN, C. J. There is a distinction recognised in several cases, between apprentices and hired servants. The last parish in which the servant completes a forty days' residence is that in which he is settled. But, as to apprentices, the residence must be in furtherance of the contract of apprenticeship. The 7th and 8th sections of the 3 W. & M. c. 11, are differently worded; the seventh provides that if a party be *hired into* any parish, *such service* shall be a good settlement; the eighth requires a *binding and inhabitation* in the parish. Why there should have been such a distinction I do not know, but it has been made. *Rex v. Hedsor*, Cald. 51, 2 Bott. pl. 405, is a stronger case than this; there the sleeping out of the master's parish was without his consent.

LITLEDAL, J., concurred.

PARKE, J. It is clearly established that a servant is settled in the parish where he sleeps for the last forty days of his service. Here it is agreed that there was no dissolution of the contract.

PATTESON, J., concurred.

Order of sessions quashed.

*The KING v. RICHARD BRETTELL and Another. April 25. [*424]

Appellants were rated to the poor for clay-pits which were excavations under ground, from whence glass-house pot-clay and fire-brick clay were extracted. A perpendicular shaft was sunk from the surface of the land, for the purpose of raising the clay out of the strata, which was done by a steam engine and other mining apparatus: the excavations were like those which are made for working coal and metallic mines, and the mode of raising the clay was the same as that used in a coal mine. Held, that the pits so assessed were clay *mines*, and, therefore, not rateable.

On appeal against a rate made for the relief of the poor of the parish of Oldswinford in Worcestershire, whereby the defendants were rated, amongst other property, at the sum of 4*l.* 10*s.* for three clay-pits; the sessions confirmed the rate, subject to the opinion of this Court on the following case:—

The appellants were the owners and occupiers of lands in Oldswinford, containing strata of a substance called "Glass-house Pot Clay," and Fire Brick Clay," and the term clay-pits was used in the rate to designate the excavations under ground from which the clay is extracted, and the perpendicular shaft sunk from the surface of the land for the purpose of raising the clay, which is done by a steam engine, whinsels, and other mining apparatus. These, and similar works, are sometimes called clay-pits, and sometimes clay-mines; and, in some local acts of parliament, they are referred to by the words, "mines of glass-house pot clay" and "fire-brick clay." These excavations and shafts are like those made for working coal and metallic mines, and the clay is raised in the same manner as coal out of a coal mine. Headways are driven for this purpose. The shafts are forty or fifty yards deep. The workmen are sometimes called clay getters, and sometimes miners. In some places the clay crops out at the surface, in others it is got within a foot or two of the surface, and it has been found as low as seventy yards. It does not *crop out on the appellants' lands, but the part which crops out elsewhere is a continuation of their [*425] strata. The clay has in some cases (but not on the appellants' lands) been dug out by open work to the depth of nine feet. It is found with strata of coal above it, and it is mixed with globules of iron-stone; but this is in small quantities, and is thrown away as refuse. The strata of clay are very hard, and cannot be got out without miners' tools, but it crumbles on exposure to the air. This clay, which is everywhere known by the name of Stourbridge clay, is able, when manufactured, to withstand intense heat, and is chiefly used for the making of glass-house pots, fire bricks, and crucibles. That which crops out and is got by open work, is used for common red building bricks, and for clay pots, and has been rated for twenty years. The clay is not good for fire bricks or glass-house pots at less than ten or fifteen yards from the surface. When raised to the surface, it is sorted and picked, and ground in mills, and afterwards tempered with water, and trodden, before it can be manufactured. These strata of clay are only found within a small circuit of land lying in Oldswinford, and extending a little way in an adjoining parish. The working is subject to some risk, and the profit is variable. The pits or mines in question have never been rated to the poor. If the Court should be of opinion that these clay-pits or clay-mines were not rateable to the relief of the poor, the rate on the appellants in respect of them was to be reduced by the sum of 4*l.* 10*s.*

Sir J. Scarlett, Godson, and Whitcomb, in support of the order of sessions. It must be conceded, after the *decision in *Rex v. The Inhabitants of Sedgley*, 2 B. & Ad. 65, that by the 43 Eliz. c. 2, s. 1, no mines but coal- [*426] mines are rateable to the relief of the poor. The only question in this case is, whether the clay-pits mentioned in the rate come within the description of mines. In *Rex v. Sedgley* the Court seemed to consider that to be a question of fact rather than of law, and they relied principally on the mode of working. But this is not the only criterion; the nature of the substance must also be considered, and

whether that be of such a kind that the term *mine* can, according to the popular use of words, be applied to the place which yields it. Now it is usual to speak of mines of silver, copper, and other metals, and of coal and other substances to which custom has made the term appropriate, but clay is not among these. The sessions, who are the proper judges, have decided this, and their determination on such a point should be followed. The judgment of this Court in *Rex v. Sedgley*, was in accordance with that of the sessions.

LORD TENTERDEN, C. J. I see no reason to depart from the opinion which I delivered in *Rex v. Sedgley*. The only difference between that and the present case, consists in the character of the commodity obtained. The mode of obtaining it is the same. Now that case establishes that, in order to determine whether an excavation in the earth constitute a mine or not, we are to look to the mode in which the article is obtained, and not to its chemical or geological character. Here, as in *Rex v. Sedgley*, the substance is obtained by what, in *427] the ordinary, and indeed, in every sense of the word, is mining: that being so, these clay-pits are mines, and, consequently, are not rateable to the relief of the poor.

LITLEDALE, J. I think we are bound by *Rex v. Sedgley*, and that the mode in which the substance is obtained decides this question.

PARKE, J. I also think we are bound by the authority of *Rex v. Sedgley*. That case was some time under the consideration of the Court; and the present is not, in any material point, distinguishable from it.

PATTESON, J. I am entirely of the same opinion.

Rate reduced by the sum of 4*l.* 10*s.*

Campbell, M' Mahon, and Shutt were to have argued in support of the order of sessions.

The KING v. The Inhabitants of BAILDON. April 25.

The consideration expressed in an indenture of apprenticeship was 4*l.* to be paid to the master by a public charity; but the apprentice's mother privately agreed to pay, and did pay the master, after execution of the indenture, 1*l.* in addition.

Held, that the indenture (though stamped) was void by 8 Anne, c. 9, s. 39, the full sum contracted for, with, or in relation to the apprentice not being inserted.

UPON an appeal against an order of two justices, whereby B. Hutton, and Mary his wife, and their children, were removed from the township of Baildon, in the West Riding of the county of York, to the township of Leeds in the said riding; the sessions quashed the order, subject to the opinion of this Court on the following case:—

The respondents proved an indenture, made on the 12th of August, 1811, *428] between B. Hutton, of the age of *fifteen years of the one part, and H. Braithwaite, of the township of Leeds, shoemaker, of the other part, whereby Hutton, with the consent of his mother, bound himself apprentice to Braithwaite to serve for the term of six years; and Braithwaite, in consideration of the sum of 4*l.* paid to him out of the charity of Christopher Topham by order of Charles Walker, Esq., and others, trustees of the said charity, for the township of Baildon, covenanted to teach Hutton the art or mystery of a boot and shoemaker. The indenture was executed by H. Braithwaite, B. Hutton, and by his mother Elizabeth Hutton, as consenting thereto. W. Wainman, agent to the trustees of the charity, which was created for the purpose of binding out poor children as apprentices, paid the sum of 4*l.* (mentioned in the indenture) to Braithwaite, the master, as the consideration for his taking the pauper. No other sum of money was contracted for, paid to, or received by the master that Wainman knew of; he was present and saw the indenture executed, and witnessed the same. The appellants, however, proved that, before the boy was

bound, the mother entered into an engagement with the master to give him 1*l.*, in addition to the 4*l.* to be paid by the charity; and that after the indenture was executed, she paid him the 1*l.* accordingly. The 1*l.* was not mentioned in the indenture, but there was a proper and sufficient stamp. The question for the opinion of this Court was, whether, under the circumstances stated, the consideration for the binding was set out in the indenture, according to the provisions of the statute 8 Ann. c. 9, s. 89? If the Court should be of opinion that it was not, then the order of sessions was to stand; but if they should be of *opinion that it was, then the case to be sent back to the sessions, to be [*429 further heard upon the merits.

Milner, in support of the order of sessions. The sum received or contracted for, with, or in relation to the apprentice, was not inserted in the indenture, and it is, therefore, void by the express words of 8 Ann. c. 9, s. 89; for the mother of the pauper, before the binding, engaged with the master to give him 1*l.*, in addition to the 4*l.* to be paid by the charity. *Rex v. Bourton* upon *Dunsmore*, 9 B. & C. 872, may be cited on the other side, but there the party making the engagement was a married woman, and incapable of contracting. It may be said that, as the 4*l.* was paid out of the funds of a public charity, it need not have been stated in the indenture, and that no duty being payable in respect of it, the stamp was sufficient for an indenture with a 1*l.* premium. But the statute enacts that *all* indentures, wherein shall not be truly inserted and written the full sum or sums of money received, or in any way, directly or indirectly, given, paid, secured, or contracted for, with, or in relation to the apprentice, shall be void; and a penalty is added, viz., incapacity to acquire freedom or to follow the trade; the indenture, therefore, is absolutely void, and not merely voidable. The Court here called upon

Starkie and *Sir G. Lewin*, *contra*. It appears by the indenture that 4*l.* was paid to the master as the consideration for his taking the apprentice; and no more was paid before the execution of the indenture. There was no binding contract to pay more: the promise by *the mother was a mere honorary [*430 engagement, and therefore not within the act according to *Rex v. Bourton* upon *Dunsmore*, 9 B. & C. 872. The master could not have maintained any action for the 1*l.*, after having admitted, by the indenture, that the 4*l.* was the consideration paid. The engagement to pay an additional 1*l.* was also void, as being a fraud on the trustees of the charity. Besides, it does not appear that the mother was not a married woman. [PARKE, J. She is mentioned as the consenting party to the indenture.] The statute 8 Ann. c. 9, is a mere revenue law; and the stamp being sufficient, the revenue could not be defrauded, and the 1*l.* need not be inserted. In *Rex v. Oadby*, 1 B. & A. 477, it was held that the premium given by the parish officers, upon the binding out of a poor apprentice, need not be set out in the indenture in words at length, such an indenture being exempted from any duty by 8 Ann. c. 9, s. 40, and the insertion of the premium being required for no other purpose than to ascertain the amount of the duty.

Lord TENTERDEN, C. J. The object of the legislature undoubtedly was to secure the insertion in the indenture of the whole sum paid or contracted for with the apprentice. But the thirty-ninth section evidently refers to cases where a duty is payable, whereas in *Rex v. Oadby*, 1 B. & A. 477, no duty whatever was payable, because the whole premium was defrayed by public charity. That is not so here. Then it is said, that according to *Rex v. Bourton* upon *Dunsmore*, 9 B. & C. 872, unless there be a binding contract for the payment of the sum with the apprentice fee, it need not be inserted in the indenture. But there *the decision turned upon the disability of the contracting party, who was a feme covert. Here we cannot presume [*431 that the pauper's mother (who is named as the consenting party in the indenture) was a feme covert. It is said that the contract for the additional sum was void by the act of parliament, and that the master could not have sued for this sum,

which was not mentioned in the indenture. We are not called upon to decide how that would have been, if an action had been brought by the master; because the clear intention of the legislature was, that everything received, given, paid, secured, or contracted to be paid with the apprentice, should be inserted in the indenture. Here there was a contract to pay a sum not inserted. A party capable of contracting, and making such a contract, though it were honorary, might not know that the statute would protect him from its performance; but a married woman must be presumed to know that she is not liable upon a contract made by her. Perhaps it would have been better if the legislature had enacted, that all engagements to pay more than the sum mentioned in the indenture should be utterly void. But the words of the statute, as they bear upon this case, are so unambiguous, that without repealing the clause we cannot hold this indenture to be valid.

LITLEDALE, J. The principal object of the statute of Anne was to compel the payment of a duty in proportion to the amount of premium paid with the apprentice. Section 32 directs that the duty shall be paid by the master. If it were to be paid by the person putting out the apprentice, it might then have been said to be sufficient to require insertion of the sum paid by *432] him; but the master must know, where two or three contribute, what is paid in the whole. The words of the statute are too plain to be got over.

PARKE, J. The indenture is void, within the express words of the 8 Ann., c. 9, s. 39. The question is, whether every sum of money contracted for, with, or in relation to the apprentice, was inserted in this indenture? Now, what was the sum contracted for at the execution of the indenture? It is stated that the pauper's mother (who must be taken to be a feme sole), before he was bound, entered into an engagement with the master to give him 1*l.*, in addition to the 4*l.* to be paid by the charity. In *Rex v. Bourton upon Dunsmore*, 9 B. & C. 872, the woman was married, and incapable of making any contract; and if she had been competent, the promise was not to pay any specific sum. It has been said that the present agreement was void, as being a fraud on the trustees of the charity; but the case does not show that they agreed to give 4*l.* on the faith that no more was to be given. If it had been so, the agreement by the mother might, perhaps, have been void, within the case of *Jackson v. Duchaire*, 3 T. R. 551.

PATTESON, J. The mother, in this case, contracted for payment of a sum *with or in relation to* the apprentice, within the words of section 39, and nothing can be stronger than those words are. See also sect. 43.

Order of sessions confirmed.

*433] *SHEPPARD *v.* HALL and Three Others. *April 26.*

In trespass for seizing weights and measures, four defendants pleaded, that they were sworn with divers, to wit, twenty others as a leet jury, according to the custom of the manor of Stepney; and that the custom was for the jury so sworn to examine weights and measures within the manor, and seize them if defective; and they alleged, that they, the defendants, *being on such jury* so sworn as aforesaid, examined and seized the plaintiff's weights and measures, which they found defective. Replication de injuria. There was evidence at the trial that only five of the leet jurors were actually in the plaintiff's shop when the defendants made the seizure there, though the rest were close at hand; but the Judge refused to let any question go to the jury on this part of the case, being of opinion that the objection was on the record: Held, that the objection was on the record, and was valid; it not appearing by the plea that the examination and seizure were made by the jury sworn at the court leet, according to the custom.

TRESPASS for breaking and entering the plaintiff's dwelling-house and taking his goods, to wit, scales, weights, &c. The defendants pleaded that they, with

divers, to wit, twenty others, were duly sworn as a leet jury of the manor court of Stepney, to inquire of weights, scales, and measures, according to the custom of the manor; and that the said jury so sworn, &c., were authorized by the custom to seize and carry away defective weights, scales, or measures, and to enter shops within the manor by day for the purpose of their inquiry. They then stated that the plaintiff was an inhabitant of the manor, using weights, scales, and measures in his trade; and that *the defendants, being on such jury* so sworn as aforesaid, made inquiry of and examined the said weights, scales, and measures, and for that purpose entered the plaintiff's shop by day, and found the weights, scales, and measures defective; wherefore *the said defendants, so being on such jury* sworn as aforesaid, seized and took away the same, being the goods and chattels mentioned in the declaration; and it was afterwards presented by them as such jurors so sworn as aforesaid, at the court leet, that the plaintiff had used the said defective weights, scales, and measures within the manor. Replication, de injuriâ, whereupon issue was joined. At the trial before Lord Tenterden, C. J., *at the sittings in Middlesex [434 after Trinity term, 1831, it appeared that on the day in question the jury sworn as above mentioned had gone out upon the inquiry, but only five were in the plaintiff's shop when the examination and seizure by the defendants took place: the rest, however, were close at hand in another shop in the same street, and the jurors were always in sight of each other. It was contended on behalf of the plaintiff, that upon this evidence it did not appear that twelve jurors were together, as they ought to have been, when the proceedings were taken. Lord Tenterden was of opinion that the objection, if it arose, was upon the record; he, therefore, left to the jury, as the only question of fact in the case, whether or not the defendants took away any scales or weights that were not defective, and the defendants had a verdict. A rule was afterwards obtained, calling upon them to show cause why judgment should not be entered for the plaintiff, non obstante veredicto, or a new trial had.

Campbell and R. V. Richards now showed cause. The plea is maintainable, and was supported by the evidence. The four defendants are charged with a trespass, and justify as having been on the leet jury when the acts in question were done. The words used sufficiently show that their acts were the acts of the jury; for it could not properly be said that the defendants were on the jury, unless the whole body were acting together in that character. It was not necessary to allege, that every jurymen was actually in the shop at the time the seizure was made. And admitting the averment here to be ambiguous, and that it is not alleged with sufficient precision that the defendants and the rest of the jury *were acting together, this is only a defective statement of the right on which the parties rely; and such defect is cured by verdict, where the matter so imperfectly stated must necessarily have been proved; *Wicker v. Norris*, Cases temp. Hardwicke, 116; *Avery v. Hooles*, Cowp. 825. So, in *Lord Huntingtower v. Gardiner*, 1 B. & C. 297, it was held that an ambiguous expression in a declaration must, after verdict for the plaintiff, be taken in that sense which will sustain the verdict. The evidence was sufficient; for although the jurymen were not all in the shop, yet there was such a constructive presence of those outside, as would make all parties principals in a case of burglary.

Sir James Scarlett and Steer, contrâ. The presumption that enough was proved on the trial to sustain a verdict does not arise here, because the defect of proof which is now relied upon was expressly pointed out at the trial; and the Lord Chief Justice held that no objection could be taken on that ground, and left the case to the jury solely upon the question, whether or not the weights and measures were deficient. Either that ruling was incorrect, or the objection arises on the record. The plea alleges that *the defendants* (who are only four of the jury), *being on the jury*, entered the shop and seized the weights and scales. That cannot be construed into an averment that the whole jury acted in the seizure.

LORD TENTERDEN, C. J. I am of opinion that this was a valid objection on the record, and that the plaintiff must have judgment non obstante veredicto.

*436] The custom of the manor is alleged in the plea to be, that "the jury, so sworn and adjourned as is before mentioned, may enter shops within the manor, and seize, take, and carry away such weights and measures as they find to be false and deficient. The plea also states, that the defendants, *with divers, to wit, twenty other residents* on the manor, were duly sworn as a jury to inquire concerning weights and measures, and that afterwards *the defendants, being on such jury*, entered the house of the plaintiff, and seized the weights and measures, which they found defective. The defendants, therefore, upon this record, do not bring themselves within the custom relied upon.

LITLEDALE, J. I am of the same opinion, and I think there is no ambiguity on this record. The allegation that the defendants, and divers, to wit, twenty other residents, were sworn on the jury, shows at all events that more persons than the defendants were on the jury, and the custom, as set out, is that *the said jury*, so sworn and adjourned, shall enter and seize. And independently of this objection, I think it could not have been intended after verdict that the leet jurors were proved to have been all acting together, because the plaintiff's counsel offered to put the case to the jury upon the fact that the defendants were acting separately; but the Lord Chief Justice was of opinion that he could not do so.

PARKE, J. I have had some doubt whether the objection properly arose on the record or on the evidence; but as it is evident that, either in one way or the other, the plaintiff would be entitled to succeed on one part of his rule, and as the rest of the Court think the objection is on the record, it is the less material that I should express a decided opinion.

*437] *PATERSON, J. I am of opinion that the objection is on the record; and it appears to me that there is no such ambiguity in the expression "being on such jury." I think that in *Lord Huntingtower v. Gardiner*, 1 B. & C. 297, the question of an ambiguous expression being cured by verdict did not properly arise; for it seems to me that the words "to give his vote" in that case were clearly prospective.

Judgment for the plaintiff, non obstante veredicto.

GREEN v. ELGIE. April 26.

In a bill of Middlesex; the *ac etiam* clause was on promises: the affidavit to hold to bail stated, that the defendant was indebted to the plaintiff on a judgment.

Held, this was an irregularity, which entitled the defendant to be discharged on entering into a recognisance of bail for 40*l* :

Held, secondly, that it was no ground for setting aside the proceedings for irregularity, that the plaintiff had issued two writs of *fi. fa.*, and caused part of the debt to be levied under the second; and that no return had been made to either.

In Michaelmas term 1829 the plaintiff Green recovered judgment against the defendant for 333*8l*. and 134*l*. damages and costs, and in May, 1830, he caused a *fi. fa.* directed to the sheriff of Worcester to issue against the defendant's goods. The sheriff of that county entered into possession of defendant's house and furniture, and continued in possession for several days, when he withdrew upon being told that the house and furniture were not the defendant's property. In December, 1830, the plaintiff caused another *fi. fa.* to be issued directed to the sheriff of Middlesex, and the latter seized and sold defendant's goods to the amount of 68*l*. There was no return to either of these writs. The defendant was afterwards arrested in this cause at the suit of Green, by virtue of a bill of Middlesex founded on an affidavit of Green, that the defendant was indebted *to him in 1800*l*., on a judgment for the sums of 333*8l*. and 134*l*. damages and costs, recovered in this Court by Green against the

defendant. The *ac etiam* clause was upon promises. A rule nisi had been obtained for setting aside the proceedings for irregularity, or for delivering up the bail bond to be cancelled upon the defendant filing common bail; on the grounds, first, that no return having been made to the writs of *fi. fa.*, the plaintiff could not arrest the defendant; secondly, that there was a variance between the affidavit to hold to bail and the *ac etiam* clause in the bill of Middlesex; the former stating the action to be founded on a judgment, the latter, on promises.

Campbell now showed cause. It must be conceded that where part of the debt and costs has been levied on a *fi. fa.*, the plaintiff cannot regularly sue out another *fi. fa.*, or a *capias ad satisfaciendum*, before the return of the first writ (*Tidd*, 996, 9th edit.); but that is upon the principle that an execution must be deemed a satisfaction of the debt until the contrary appears. Now here it does appear, by the affidavit of the plaintiff to hold to bail, that the debt has not been satisfied. The presumption, therefore, of its having been satisfied by the execution is rebutted by the oath of the plaintiff. The second objection is premature, there being no declaration.

White and Follett, contrd. The rule of law is, that if a man seize the goods of his debtor he cannot take his body also, except for the residue of his debt; and there must be a return of the sheriff to the first writ, in order to bind the creditor as to the residue; *Miller v. Parnell*, 2 Marsh. 78; *Wilson v. Kingston*, 2 Chitty's Rep. 203. That principle applies to the present case. [*439] Then as to the variance: the *ac etiam* clause states the action to be founded on promises; the affidavit to hold to bail is upon a judgment obtained in this Court, so that it must be in debt. The defendant, therefore, is entitled to be discharged upon filing common bail. (*Tidd*, 188, 294; 9th edit.)

LORD TENTERDEN, C. J. I think there is no weight in the first objection. The plaintiff might declare in an action on the judgment, without stating that a *fi. fa.* had ever issued or been returned, or that any part of the debt had been levied; and if the debt, or any part of it, had been levied, that might be pleaded in answer to the action on the judgment, but would be no ground for setting aside the writ for irregularity. As far as respects that point, therefore, there is no reason for the present application. As to the second objection, that in the bill of Middlesex, the action is stated to be founded on promises, and, in the affidavit to hold to bail, on a judgment obtained in this Court, in which case, the action must be in debt; it seems to me that that is an irregularity; but it is one which, since the rules of court, Hilary term, 2 W. 4 (Reg. 10), entitles the defendant to be discharged, not upon filing common bail, but on putting in bail to the amount of 40*l.*

LITLEDALE, J. It appears from the year book, 20 H. 6, 24 a, 25 b, cited in *Vesey v. Harris*, Cro. Car. 328, to have been once doubted whether the defendant could plead to an action on a judgment that the debt was levied under a **fi. fa.* It was held in the last-mentioned case that such a plea was good; and here, if any part of the debt has been levied the defendant [*440] may plead that in answer to the action either wholly or in part.

PARKE, J. If a judgment has been satisfied by a levy under a *fi. fa.*, the defendant may plead that to an action on the judgment; but it is no ground for setting aside the proceedings for irregularity.

PATTESON, J., concurred.

Rule absolute, that the recognisance of bail be confined to 40*l.*, and that all proceedings on the bail-bond be stayed on perfecting bail to that amount.

SABOURIN v. MARSHALL and Another. April 26.

The statute of Marlbridge extends to goods distrained for a poor rate, and the sheriff must replevy such goods on plaint.

DECLARATION stated, that a distress had been made by one R. H., under

colour and pretence of a certain warrant under the hand of J. B., a justice of peace for the county of Middlesex, upon certain goods and chattels of the plaintiff, to wit, &c., being in a certain house described in the declaration, for 1*l.* 1*s.*, alleged to be due on account of a poor-rate for the relief of the poor of the parish of St. Matthew, Bethnal Green, under colour and pretence of a local act of the 55 G. 3.; which distress had been impounded in a certain house also described; that the defendants were sheriff of the county of Middlesex, and it was their *441] duty to grant and make replevy of, and deliver the said goods *and chattels to the plaintiff upon being legally required so to do; and the plaintiff was legally entitled to replevy, and have back his said goods and chattels, in pursuance of the statute in that case made and provided, and to try the validity of the said distress upon finding and delivering to the sheriff pledges for pursuing his suit against the said R. H., for so taking and distraining the said goods and chattels, and for the return thereof, if a return should be awarded; and also upon causing two responsible persons as sureties to join him, the plaintiff, in a bond to the sheriff in double the value of the goods and chattels so distrained as aforesaid (the value to be ascertained according to the statute in such case made and provided), and conditioned for prosecuting the suit of replevin of the plaintiff against the said R. H. for the taking of the said goods and chattels with effect and without delay, and for duly returning the said goods and chattels so distrained in case a return should be awarded, to wit, at, &c. The declaration then stated that the plaintiff, within the time allowed by law for replevying the distress, was ready and willing, and offered to defendants, so being sheriff as aforesaid, to find and deliver to the said sheriff pledges for prosecuting his suit, &c.; and also for the return of the goods, if awarded; and also to cause two responsible sureties, to wit, C. D. and E. H., to join, and the plaintiff and the said two persons were ready and willing, and offered to join, in executing a joint and several bond to defendants as such sheriff, conditioned as aforesaid; yet the defendants, not regarding their duty, &c., nor the statute, refused to accept such pledges and sureties, or to take such bond, or to make de- *442] liverance or replevy of the said goods and chattels, &c. *By means whereof, &c. Plea, not guilty. A verdict having been found for the plaintiff, &c.

Burchell now moved to arrest the judgment. An action is not maintainable against a sheriff for refusing to grant a replevin on plaint without writ. At common law the proceedings in replevin commenced with suing out of Chancery a writ directed to the sheriff, complaining of an unjust taking and detaining of the goods, and that gave the sheriff a judicial authority to determine the matter in the county court; but great delay frequently arising from the necessity of such application to Chancery, the statute of Marlbridge, 52 Hen. 3, c. 21, provides, "that if the beasts of any man be taken, and wrongfully withholden, the sheriff, after complaint made to him thereof, may deliver them without let or gainsaying of him that took the beasts." That statute was made to remedy the oppression of great men against their *tenants*; 2 Inst. 103; and does not extend to goods distrained for a poor-rate, for in that case the distress is in the nature of an execution. It is said in *Gilbert on Distresses*, p. 13 (ed. 1794), that a distress, in the genuine sense of the word, was no more than a pain on the tenant, and a pledge in the *lord's* hands to enforce the service; and, therefore, it could not be sold till 2 W. & M. c. 5; but that distringas for a fine, as it was issued in the king's name, and as the lord might sell, was rather in the nature of an execution. It is laid down in the same work, p. 38, and was held in *Hutchins v. Chambers*, 1 Burr. 582, that the statute 51 Hen. 3, st. 4 (which *443] enacts, "that none shall be distrained by the beasts of his plough or *his sheep, either by the king or any other, where there is another sufficient distress,") applies only to distresses for rents, amerciaments, &c., but not to particular distresses under statutes, which are rather in the nature of executions; not, therefore, to distresses for poor-rates, which are a parliamentary

remedy, unknown at the time of the statute, for a public duty. Then, if this statute, though declaratory of the common law, and though the king be named in it, will not extend to a distress for poor rates, *a fortiori*, such distress is not within the statute of Marlbridge. Besides, pleas in the county court must be determined by wager of law, unless a jury trial be authorized by prescription, or writ of justices; 52 Hen. 3, c. 22; 2 Inst. 142; Dalton's Sheriff, cap. 112; Finch's Law, 117; whereas by 43 Eliz. c. 2, s. 4, if an issue be joined in any action for taking a distress upon the pleadings there specified, such issue must be tried by a jury. This shows that replevin by plaint does not lie in the case of a poor-rate.

Lord TENTERDEN, C. J. I think there should be no rule in this case. Before the statute of Marlbridge, when a man's beasts or goods were distrained and impounded, the owner had no other remedy than a writ of replevin, and this was attended with considerable delay. That statute was intended to give a more expeditious mode of getting back goods illegally distrained. It is a remedial act, and ought to be liberally construed; and so construed, I think it may well embrace all cases to which replevin by writ was otherwise applicable. The statute 43 Eliz., c. 2, gives the power of levying poor-rates by distress and sale; and section 19, by implication, gives the power to replevy for goods unlawfully distrained; *for it enacts, that in an action brought for taking any distress for a poor-rate, the defendant may make avowry or cognizance. [444] The legislature must be understood, from that section, to have intended that the party whose goods were unlawfully taken might replevy by any mode then known to the law; for the remedy is not confined expressly to replevin by writ, and replevin by plaint is more simple and less expensive. But it is said, that the action of replevin, if commenced by plaint in the county court, must be determined by wager of law, and that the statute of 43 Eliz., c. 2, s. 19, requires that the issue joined in any action brought for taking of any unlawful distress for a poor-rate, shall be tried by verdict of twelve men, and not otherwise. I think the meaning of that provision is, that in whatever court such action may be brought, the issue joined in it must be tried by a jury: and that, if replevin by plaint, therefore, be brought in the county court, the issue must be tried by a jury, and not by a wager of law. Rule refused.

SAUNDERS v. DREW and Others, Executors of JAMES DREW. [445]
April 27.

By a charter-party of affreightment for a voyage from the port of London to Calcutta, and back, on the usual terms, it was further agreed, that the freighter, if he thought proper, might hire the vessel for an intermediate voyage, within certain limits, for not less than six months; that, in that event, the master should refit the vessel for such voyage, and the complement of men should be kept up, and all necessities provided: in consideration of which, the freighter agreed to pay the owner for such voyage at the rate of 1*l.* a ton per month on the ship's tonnage, and to pay four months of such hire in advance, and at the end of six months two further months' pay, and so in every succeeding two months; and the balance due at the termination of such hiring, in cash or approved bills.

It was further stipulated, that if the vessel should be lost or captured, the freight by time shall be payable up to the period when she should be so lost or captured, or last heard of.

Held, that under the former clauses of this agreement, the freighter could not claim a return of any part of the four months' advance, on the vessel being lost within that period; but that the advance, being in respect of freight, was absolute. And that the stipulation on this head was not qualified by the subsequent clause.

ASSUMPSIT on promises by the testator for money had and received, &c.; plea, the general issue. At the trial, before Lord Tenterden, C. J., at the sittings in London after Hilary term, 1831, a verdict was found for the plaintiff for 809*l.*, subject to the opinion of this court on the following case.

By a charter-party of affreightment between Drew, the testator, then owner of a ship in the river Thames called the John, of the one part, and the plaintiff, a merchant, of the other, the said Drew let, and the plaintiff hired, the said ship to take a cargo to Calcutta, and after delivering the same, to carry a cargo of grain to the Isle of France, and from thence to bring a cargo of sugar to the port of London on the usual terms. The charter-party contained a clause to the following effect :

It is likewise provided, &c., that if the said freighter shall be desirous of hiring the said ship for any voyage or voyages to the eastward of the Cape of Good Hope, he shall be at liberty to do so for any period not less than six nor exceeding eighteen months; and in such event, the master of the ship, or some
 *446] other proper person *in his place, shall repair and refit the vessel for her intended voyage or voyages, and shall load, unload, and reload such cargo or cargoes, carry and trade backwards and forwards to such parts or places to the eastward of the Cape of Good Hope, and within the limits of the East India Company's charter, as the freighter or his agents, &c., shall from time to time direct; and that during such voyage or voyages, the vessel's usual complement of men, as far as practicable, shall be kept up, and the vessel be kept tight, staunch, and strong, and sufficiently provided with boats, anchors, tackle, provisions, &c., and all other necessities proper for the service. "And in consideration of the premises, the said freighter doth agree to pay unto the said owner, at the rate of 1*l*. sterling per ton per calendar month for every ton of the said ship's register tonnage, to be computed from the day on which the forty running days allowed for loading and unloading at the port at which she may be so hired,(a) and cease on her being laden and finally despatched for the Isle of France, or from thence to the port of London; and that he, or his agents, &c., shall and will pay unto the said master, four months of such monthly hire in advance, and at the expiration of six months, two further months' pay, and so in every succeeding two months during the said monthly hire; and the balance that may be due at the termination of the period for which she may be so hired, either by cash at the port where she may be so discharged, or in approved bills on London at sixty days' sight; and at the expiration of the time for which she may be so hired, load her with a full cargo of sugar, in bags, for the port of London, as hereinbefore mentioned. And it is hereby
 *447] expressly *declared and agreed, that if the said vessel should be lost, or captured, or wrecked, the freight by time shall be due and payable up to the time she may be so lost, &c., or last heard of." It was further stipulated, that if by any accident the vessel should be obliged to go into dock, or undergo repairs, and should be detained more than ten days, the freight should cease from the expiration of such ten days, and recommence when ready for service again: and in case of the monthly freight before mentioned not occurring at Calcutta, the freighter agreed to advance 200*l*. there, if necessary, and other 200*l*. at the Isle of France, on account of the homeward freight, free of interest and commission. Then followed a stipulation in favour of the freighter, respecting the freight of invalids brought home from the Isle of France. And it was agreed that the freighter should bear all port and other charges during such time charter, but such freight to be in full for primage.

The ship made her voyage to Calcutta, and thence to the Isle of France, and all the terms of the charter-party were so far duly performed. At the Isle of France, the plaintiff, according to the above-mentioned proviso, hired the ship for a voyage to Calcutta, and paid the master 173*l*. for four months' hire, in advance. The vessel sailed, and was lost on her voyage, two months after the hiring. The question was, whether the plaintiff (who had paid all the port dues and other charges of the ship, as agreed, during the time of the last-mentioned hiring) was entitled to recover back any part of the money he had advanced. This case was now argued by

(a) So in the charter-party.

Rumball, for the plaintiff. The payment of four months' hire by the plaintiff to the owner, was not *absolute and unconditional, but dependent on the amount which should actually be earned: the plaintiff may therefore recover back so much as the ship did not in fact earn. This is merely a question on the intention of the parties, as disclosed by their agreement. It is not like *De Silvale v. Kendall*, 4 M. & S. 37: there the advance made by the plaintiff for the vessel's disbursements after her arrival at Maranham, and before she sailed on her return, was held not to be recoverable; but the agreement in that case was an ordinary covenant to carry goods on freight, and the stipulation for certain payments at Maranham was intended to diminish the risk, incident to such a covenant, of losing the whole freight if the goods were not delivered. But here no such risk was incurred: the hire, being at so much per month, became due at the end of each month, and did not depend on the ship's arrival at her port of destination; according to the doctrine laid down in *Malyne*, p. 101 (cited in *Abbott on Shipping*, p. 305, 5th edit.), and confirmed by *Havelock v. Geddes*, 10 East, 555. So that, for as long a time as the vessel continued in existence, the owner was sure of his hire; and therefore there was no reason to stipulate for the unconditional payment insisted upon by the defendants, as there might have been in the case of an ordinary contract for freight. The intention of this clause may be inferred from the following ones, which provide that in case of loss or capture, the freight by time shall be payable up to (that is, only up to) the period of such loss, &c.; and that if the vessel should be detained in dock, by reason of any accident, more than ten days, the freight shall cease: both of which clauses are evidently meant to limit the liability of the freighter. *It is also stipulated, that if the time voyage before provided for, shall not take place (in which case the vessel would have to return home upon the ordinary terms of a contract for freight), the freighter shall advance 200*l.* at Calcutta, and 200*l.* at the Isle of France. Now, it is not probable that the parties would agree for so small an advance as this, where the owner ran a risk of losing his whole freight, and at the same time covenant for an absolute advance of 1734*l.* upon the time voyage, where the freight was to accrue monthly, and the owner consequently ran little or no risk. *Manfield v. Maitland*, 4 B. & A. 582, shows, that where an advance of money by the freighter is to be considered as part of the freight, that intention ought to be expressed in unequivocal terms. [*449]

F. Pollock, contra. *De Silvale v. Kendal*, 4 M. & S. 37, clearly shows that an advance of freight eo nomine cannot be recovered back. The only question that could be raised here is upon the construction of the charter-party, taken altogether. But that is in favour of the defendants. The intermediate voyage to the east of the Isle of France is to be for a time not less than six months; the master is to refit the vessel for such voyage; and during the continuance of it the complement of men is to be maintained, and the ship kept tight and strong, and sufficiently provided with boats, anchors, tackle, and other necessities. In consideration of these things, the plaintiff stipulates to pay 1*l.* a ton per month, and it is specifically agreed that four months' hire shall be paid by way of advance; after which there are to be other payments at intervals of two months, whether by way of advance or *otherwise it is not material to ascertain. According to the argument on the other side, if the vessel had been refitted and provided with all things necessary for the intermediate voyage, and had sailed upon that voyage, and been lost immediately, the whole of the four months' advance must have been returned, notwithstanding the expense incurred by the owner. The clause for payment of the time-freight, in case of loss, down to the period when the vessel should be lost or last heard of, is not for the benefit of the freighter, but for better securing to the owner all that might be due to him at the time of such loss. The largeness of the sum stipulated for by way of advance upon the freight for the time voyage only shows that great additional expense was likely to be incurred in fitting out the vessel for such voyage. [*450]

LORD TENTERDEN, C. J. I am of the opinion that the defendants are entitled to judgment. The law is thus laid down by Saunders, C. J., in an Anonymous case, 2 Shower, 283 :—"Advance-money paid before, if in part of freight, and named so in the charter-party, although the ship be lost before it come to a delivering port, yet wages are due according to the proportion of the freight paid before; *for the freighters cannot have their money.*" This is the ground of the doctrine, which was acted upon in *De Silvale v. Kendall*, 4 M. & S. 37, that money paid in advance for freight cannot be recovered back. Here the money was advanced in payment of freight, and there is nothing in the terms of the contract to take it out of the established rule: on the contrary, *451] the stipulation that, if an intermediate voyage be made, the owner shall refit the vessel, shows that the four months' advance was intended to reimburse him, in any event that might happen, for the expense so incurred.

LITLEDALE, J. I am of the same opinion. If the clause in question had stood alone, there could have been no doubt that the owner was entitled to retain the advance-money, according to 2 Shower, 283, confirmed by *De Silvale v. Kendall*, 4 M. & S. 37. And the subsequent stipulation for the payment of freight until the vessel should be lost or captured, ought not to be considered as restrictive of the former clause, if the whole can be read together in a different sense. I think it may be so read. It cannot have been intended that, after the owner had been at the cost of refitting his vessel for the intermediate voyage, he should forego the advance made in consideration of that expense, if the vessel were lost immediately on commencing such new voyage.

PARKE, J. But for the latter clause of the charter-party, there could be no doubt on this case: and I think it is not essentially different from *De Silvale v. Kendall*, 4 M. & S. 37. It is stipulated that, if the ship be hired for a voyage to the east of the Cape of Good Hope, the owner shall put her into proper repair for that purpose. Some compensation, at all events, was due to him on this account, and it is given by the advance of four months' freight. It is contended, that there is a difference between this case and *De Silvale v. Kendall* because the owner ran less risk here. But still there was a risk to be *452] provided against; for, without the stipulation for an unconditional advance, the owner would have lost by the transaction if the vessel had not survived for a sufficient portion of the four months to reimburse him, by the monthly hire, for his outlay in repairs. The doubt on this case arises on the latter provisions of the charter-party, some portion of which is in favour of the freighter, but that which respects the advance of freight in case no intermediate voyage should be undertaken is for the protection of the owner. The principal question is, on the effect of the stipulation for payment of the time-freight down to the period when the vessel should be lost or captured: but I think, if it had been meant that, in case of a loss or capture within the first four months, a proportionate amount of the freight should be returned, that intention would have been expressed: and as it is not, I am of opinion that the plaintiff has no right to recover.

PATTESON, J. I am of the same opinion. It is clear that, without the latter clause which has been referred to, the plaintiff could have no claim to a return of any part of the money advanced. The stipulation for payment down to the time of loss or capture, appeared to me, at first, to be inserted for the benefit of the freighter; but I now think it is intended for that of the owner, to secure him from the loss of a fractional part of the hire, which might otherwise have ensued if the ship had been lost in the course of any month after the expiration of the first four. Judgment for the defendants.

*453] *DOE dem. JOHN ASHFORTH v. THOMAS BOWER. April 27.

Devise of "all my messuages situate at, in, or near a street called Snig Hill, in Sheffield,

which I lately purchased of the Duke of Norfolk's trustees." The testator had four houses in Sheffield, about twenty yards from Snig Hill, and two houses about 400 yards from it, in a place called Gibraltar Street, also in the town of Sheffield. He purchased all the houses by one conveyance, and redeemed the land-tax upon all by one contract. He had no other houses in Sheffield:

Held, that the terms "at, in, or near Snig Hill," did not apply to the houses in Gibraltar Street; and that, there being four houses which answered all the terms of the devise, it must be understood as meant to pass those, and not the two to which only part of the description applied.

EJECTMENT.—At the trial before Park, J., at the York Spring Assizes 1831, a verdict was taken for the plaintiff, subject to the opinion of this Court upon the following case. The action was brought to recover two dwelling-houses, of the value of 100*l.*, situate in Gibraltar Street, in Sheffield, which the lessor of the plaintiff claimed as heir-at-law and residuary legatee under the will of his father, Joseph Ashforth. By that will, executed in February 1810, the testator devised as follows:—

"I give unto my daughter Hannah, the wife of Thomas Bower, all and every my messuages, tenements, or dwelling-houses and buildings, situate and being at, in, or near a street commonly called Snig Hill, in Sheffield, which I lately purchased of and from his Grace Charles Duke of Norfolk, or his trustees, under and by virtue of an act of parliament made and passed, empowering his said Grace to sell certain lands; To hold unto my said daughter Hannah, her heirs and assigns for ever." He then devised to his son Thomas property of the value of 1000*l.* in the parish of Ecclesfield, in fee, subject to certain payments; to another son, premises of the like value in the same parish, in fee; and to two other married daughters, legacies of 600*l.* each, charged on the residue of his real estates in aid of the personalty. All the residue of his real and *personal estate he gave to his eldest son, John, the lessor of the plaintiff, his heirs, executors, &c., for ever. [*454]

The testator at the time of his death was seized in fee and in possession of four dwelling-houses of the value of 600*l.*, situate at the east end of a street called West Bar, within twenty yards from Snig Hill; and of the two houses in question, situate in Gibraltar Street, at the west end of West Bar Green. These last are from 390 to 399 yards distant from Snig Hill, and 370 yards from the other houses in West Bar. All are situate in a now populous part of Sheffield, the intermediate space being covered with houses, intersected by cross streets. There are no tenements between Snig Hill and the four dwelling-houses at the end of West Bar.

At the time of the conveyance next mentioned, the four houses were standing upon plots of ground containing 518 square yards, holden by the testator of the Duke of Norfolk, by lease; the two houses were standing on other ground containing eighty-one square yards, also holden by him of the Duke, at a small annual payment, but without lease. The testator afterwards bought both pieces of ground of the Duke of Norfolk's trustees, under an act of 42 Geo. 3, referred to in the will, by one contract, and for one sum of 91*l.* 10*s.*; and the trustees conveyed them to him in fee, by indentures of lease and release, in August 1805. The ground on which the four houses stood, was there described as situate in Newhall Street, Sheffield, and lying intermixed with ground held by another party: that on which the two houses stood, was stated to be situate in and fronting to "a certain other street in Sheffield aforesaid, called Gibraltar Street;" and bounded on other sides by a street and by ground sold to J. M. The *land-tax of both sets of premises was redeemed by the testator for one consideration, and by the same contract. [*455]

The testator died in May 1810, leaving the lessor of the plaintiff, and the said Hannah Bower, the wife of the defendant, surviving. The lessor of the plaintiff took real estates of considerable value under the will, and a large residue of personalty. Thomas Bower, the defendant, who survived Hannah his

wife, received the rents and profits of the premises now sought to be recovered, from the time of the testator's death till this action was brought. The testator had no other real estate in Sheffield than that purchased by him of the Duke of Norfolk's trustees, and did not buy any other property of them. This case was now argued by

Wightman, for the lessor of the plaintiff. The question for the opinion of the Court is, whether the two houses in Gibraltar Street passed to Hannah by the devise in her favour, or to the lessor of the plaintiff by the residuary clause. First, it may be inquired, what would have been the construction of the devise to Hannah, if the only words of description had been, "all my messuages, &c., situate at or near Snig Hill?" Now, it is true that words in a devise must be construed so as to answer the intention of the testator; but a forced interpretation is not to be put upon them, where an easier one will satisfy their meaning. Here it may be admitted that the houses in question would have passed, if there had been no others better answering the description "at or near Snig Hill." But there are others precisely within the description, being situate not indeed *at*, but within twenty yards of the place named. It is not necessary, *456] therefore, to suppose that other comparatively *remote houses were intended. This is according to the rule of construction laid down by Bayley, J., in *Doe d. Humphreys v. Roberts*, 5 B. & A. 407. Near is a relative term: in some situations, 400 yards may be considered near, in others distant: a place on Salisbury Plain would be spoken of as near Amesbury, if there were only a few hundred yards between; but if a testator devised premises "near Charing Cross," houses in the neighbourhood of Palace Yard could scarcely be said to come within that description; especially if the testator had other houses at the bottom of St. Martin's Lane. Then, do the other words, "which I lately purchased of the Duke of Norfolk, or his trustees," make any difference in favour of the defendant? All the houses were purchased of the trustees, but all are not "at or near Snig Hill;" and where there are lands which correspond in every particular with the description in a devise, such devise is not to be extended in construction to lands answering only a part of the description. *Doe d. Tyrrell v. Lyford*, 4 M. & S. 550; and Lord Bacon's *Maxims of the Law*, Comment on Reg. 13. *Doe d. Chichester v. Oxenden*, 3 Taunt. 147, shows, that where the words of a devise may be satisfied in every respect, by referring them to one estate, it cannot be proved by collateral evidence, that another, not falling within the express terms of the devise, was meant to pass. *Doe d. Dell v. Pigott*, 7 Taunt. 553, was a stronger case than the present, but is an additional authority to show that a forced construction ought not to be adopted where the words of devise may be satisfied by a more natural one. And it is a rule, that an heir-at-law is not to be disinherited except by express words.

*457] *Milner, contra*. If the houses in question pass to Sarah, it cannot be said that the words of devise are not satisfied. It is true that "near" is a relative term, but there is nothing to restrict its meaning to the degree contended for on the other side. Even according to the argument for the lessor of the plaintiff, this word might well imply a distance of 400 yards, in an unfinished quarter of a town, and where part of the interval consisted of plots of building ground, as may be inferred from the language of the conveyance by the Duke's trustees. Here the property was all purchased together, and transferred by the same indentures of lease and release; and the land-tax upon all was redeemed at the same time: it is, therefore, the more probable that all was considered as one in the devise. If the words had been only "my messuages which I purchased of the Duke of Norfolk's trustees," there could have been no doubt. And if the meaning of these words is clear, the previous ones, "at, in, or near Snig Hill," are not sufficient to control it. In *Doe d. Humphreys v. Roberts*, 5 B. & A. 410, Abbott, C. J., says, "Suppose a man having no house in the High Street, devised his house in the High Street, if he had a

house in this Bakehouse Lane" (which was a place leading out of the High Street), "would not that pass?" [LITLEDALE, J. Your difficulty here is, that in construing a devise of property, the first description is generally resorted to, to ascertain the meaning of the rest.] The whole is to be taken together. In *Doe d. Beach v. Lord Jersey*, 1 B. & A. 550, the testatrix devised all her Briton Ferry estate, which, for some time before, had been commonly understood to comprise lands in the counties of Brecknock and Glamorgan; and by a subsequent *clause of the will she made a distinct devise of "all my Penlline Castle estate, which, as well as my Briton Ferry estate, is situated in the county of Glamorgan;" and it was contended, that the latter devise showed the "Briton Ferry estate" to be limited, at least in the intention of the testatrix, to lands in Glamorganshire. But Lord Ellenborough said, that the words relied upon in this latter devise, if they were to be considered by the Court, were only words of suggestion or affirmation, and not to be construed with the same strictness as if they had been words of restriction or limitation; and, therefore, that they could not do away with that which before was a clear and perfect devise. In *Goodtitle d. Radford v. Southern*, 1 M. & S. 299, the testator devised "all my farm called Trogues Farm, now in the occupation of A. C.;" and it was contended that certain closes, which the testator had evidently considered as part of the farm, but which were not in the occupation of A. C., were therefore not included in the devise; but it was held, that parcel or no parcel was a question of evidence, and that in this case, it being clear that the testator meant to pass all that was called Trogues Farm, which was a plain and certain description, the defective description of the occupation would not alter the devise. [LITLEDALE, J. In both these cases, the first description was resorted to to ascertain the meaning.]

Lord TENTERDEN, C. J. I am of opinion that the plaintiff is entitled to judgment. The testator devises to the wife of the defendant "all my messuages situate at, in, or near Snig Hill, which I lately purchased of the Duke of Norfolk, or his trustees." There are four *houses answering every part of that description, and to which the defendant is clearly entitled by the will. But he also claims two houses which are at some distance; bought, indeed, of the Duke of Norfolk's trustees, like the four, but not at or near Snig Hill. They are situate at a place which was known by a different name at least five years before the will was made, for the conveyance of 1805 speaks of them as fronting to a street called Gibraltar Street. Taking this and the other facts together (for I do not ground my opinion merely on the distance from Snig Hill), I think the testator has not used such terms in his will as enable the Court to say that he meant the houses in question to pass to the wife of the defendant.

LITLEDALE, J. The first part of the description, "my messuages situate at, in, or near Snig Hill," applies to the four houses, and not to those now claimed. The further words, "which I purchased of the Duke of Norfolk, or his trustees," are merely additional description, and do not extend the effect of what precedes. Houses at or near Snig Hill would have passed by the former part of the clause, although some of them had not been bought of the Duke or his trustees, according to the rule, that where there is sufficient certainty in a description, a false reference added shall not destroy its effect. (a)

PARKE, J. One rule of construction is, that an heir at law shall not be disinherited except by express words. And another, as stated by Lord Bacon, is, that if there *be some land, wherein all the demonstrations in a grant are true, and some, wherein part are true and part false, the words of such grant shall be intended words of true limitation to pass only those lands wherein all the circumstances are true. Here all the circumstances are true of the four houses, but not so of the two; these last are not "at, in,

(a) Bacon's Maxims of the Law, Comments on Reg. 18 and Reg. 24. And see Powell on Devises, vol. ii., c. 11, 8d edit.

or near Snig Hill," and they are in a place bearing a different name. And if the testator had intended, by the devise in question, to pass all these houses, why should he not have described them as all his houses in Sheffield (for he had no other)? or all the houses which he bought of the Duke's trustees? I think, therefore, that the judgment must be for the plaintiff.

PATTESON, J. I am of the same opinion: and I think this case is the stronger, as the two houses are situate in a place which has a distinct name.
Judgment for the plaintiff.

The KING v. The Inhabitants of PIDDLEHINTON. April 28.

The master of an apprentice, having had the indenture in his possession, failed in business, and an attorney took the management of his affairs, and custody of his papers, which he inspected, but did not find the indenture:

Held, that this, after the master's death, was a sufficient case to let in secondary evidence of the indenture, though his widow was living, and no inquiry had been made of her respecting it.

A father, in consideration of natural affection, and of 24*l.* which he owed his son, made over to him premises in the parish of S., by verbal agreement only, and the son received the rents for three years, residing in S.:

Held, that the son was a purchaser for less than 80*l.* within 9 G. 1, c. 7, s. 5, and gained no settlement.

ON appeal against an order for the removal of John Northover from the parish of Piddlehinton, in the county of Dorset, to the parish of Charminster *461] in the *same county; the sessions quashed the order, subject to the opinion of this court on the following case:—

The respondents proved that the pauper, thirty years ago, was apprenticed to John Fowle of Charminster, by a deed of only one part, which, on being executed, was carried away by Fowle. The pauper served as apprentice to Fowle, in Charminster, about a year, when Fowle failed in business, gave up his premises, and passed the remaining years of his life in a lodging at Charminster, with his wife, supported by their friends. Upon the failure of Fowle, Mr. Sabine, an attorney of Dorchester, had the management of his affairs, and the custody of all his books and papers. He looked over the books and papers relating to Fowle's accounts shortly after his failure, and did not find any indenture. Fowle left no child. His widow quitted the neighbourhood of Charminster about 1821. A witness had called upon and seen her in London about a year before the trial of the appeal: and did not know that she was not still resident there. It was objected that this proof was not sufficient to let in secondary evidence of the indenture; but the sessions were of a different opinion, and parol testimony was then given that the pauper was duly bound apprentice to Fowle.

The appellants then gave the following evidence to show a subsequent settlement in Stratton. On the 13th of October, 1813, J. Brown and his wife, in consideration of 40*l.*, demised to William Northover, the pauper's father, a cottage in the parrysh of Stratton, Dorsetshire, for sixty years. The pauper, by a verbal agreement with his father, who owed him 24*l.*, was put into the possession of and received the rents of the cottage for three years, 3*l.* for the first year, and 5*l.* for the two next years; at the end of which term, by inden- *462] ture dated the 4th of *November, 1816, between the said William Northover of the first part, the pauper of the second part, and one Thomas Bowring of the third part, reciting the deed of October, 1813; and that the father, since the delivery and execution thereof, had, in consideration of his natural love and affection to his son (the pauper), and also in liquidation of a certain debt due to him, verbally, and without any assignment or conveyance, given to his son the said cottage, and put him in possession of the rents,

and that the pauper had contracted to sell the premises to the said T. Bowring; the father, by the direction, approbation, and consent of the pauper, in consideration of 25*l.*, assigned and conveyed the said cottage to Bowring, and the pauper ratified and confirmed the conveyance. The father and the pauper joined in the usual covenants to the purchaser. The pauper received the 25*l.* purchase-money from Bowring. During the three years above mentioned, the pauper resided in the parish of Stratton: and upon this evidence the sessions were of opinion that he had gained a settlement there.

Barstow, for the appellants, contended, first, that the parol evidence ought not to have been admitted, on which point he cited *Rex v. Castleton*, 6 T. R. 236, and distinguished this case from *Rex v. Morton*, 4 M. & S. 48, inasmuch as, there, inquiry had been made of the master's executrix respecting the indenture; whereas, here, no question had been put to the wife. [Lord TENTERDEN, C. J. She was not executrix. It was useless to inquire as to her possession of the indenture, after the evidence of Sabine, who had had, and looked into, the master's papers. PATTESON, J. In *Rex v. Castleton*, the person *of whom it was held that inquiry ought to have been made, was [*463 proved to have had possession of the indenture at one time.] Then as [*463 to the remaining point. *Rex v. Standon*, 2 M. & S. 461, and *Rex v. Long Bennington*, 6 M. & S. 403, will be cited on the other side; but this differs from the former case, because here the pauper was not in by mere license, but was an equitable mortgagee in possession; and in the latter case, the contract under which the pauper entered was incomplete. A conveyance from father to son, in consideration of a sum below 30*l.*, and of natural love and affection, is not a purchase by the son within 9 G. 1, c. 7, s. 5. *Rex v. Ufton*, 3 T. R. 251.

Per Curiam. (a) That is where there has been an actual conveyance. Here there was none; and the pauper could not ground an equitable interest on natural love and affection; such interest, if he had any, must have rested on the pecuniary consideration, and that was below 30*l.* Order of sessions quashed.

Gambier was to have argued for the respondents.

(a) Lord Tenterden, C. J., Littledale, Parke, and Patteson, Js.

The KING v. The Inhabitants of NORTH CERNEY. April 28.

A man marrying a woman, who after the passing of the 59 G. 3, c. 50, has become a yearly tenant of premises at a rent of less than 10*l.* per annum, gains a settlement by forty days' residence thereon.

UPON an appeal against an order of two justices, whereby John Lovesey and Elizabeth his wife were removed from the parish of Winchcomb, in the county of *Gloucester, to the parish of North Cerney, in the same county, as the place of settlement, by apprenticeship, of the pauper John Love- [*464 sey: the sessions confirmed the order, subject to the opinion of this Court on the following case:—

About five years ago (and after the expiration of the indentures under which the pauper had served in North Cerney) the pauper's wife Elizabeth, being at that time a widow, took a house and garden, situate in the parish of Winchcomb, of one Greening, from Michaelmas to Michaelmas, at the rent of 3*l.* per annum. She went into the house immediately after taking it, and continued to reside therein until the 23d of July, 1828, on which day she married the pauper John Lovesey, who immediately went to reside in the said house with his wife, and continued to live there from that time till the order of removal was made. Before the marriage, the rent was paid by the said Elizabeth, and after that time by the pauper. The question for the opinion of the Court was whether the pauper gained a settlement in the parish of Winchcomb by his residence on the tenement, which had been so taken by his wife before her marriage.

Justice and Talbot in support of the order of sessions. The wife of the pauper could not, after the 59 G. 3, c. 50, acquire a settlement by having hired the premises in question, at a rent below 10*l.*; and if that be so, she could not, by marrying the pauper, communicate to him a settlement which she could not acquire herself. It would be a fraud upon the act. In *Rex v. Ynyscynhanarn*, 7 B. & C. 233, which may be cited, the tenement was hired and occupied before *465] the passing of the *59 G. 3, c. 50. [PATTESON, J. In *Rex v. Ilmington*, Bur. S. C. 566, a woman before marriage purchased an estate for less than 30*l.*, and she could not, therefore, acquire a settlement by such purchase, yet it was held that that estate having vested in her husband by operation of law, he gained a settlement by forty days' residence on it.]

Greaves and Cripps, *contra*, were stopped by the Court.

Lord TENTERDEN, C. J. I am not able to distinguish this case in principle from *Rex v. Ilmington* and *Rex v. Ynyscynhanarn*. In the last-mentioned case it was expressly decided that a man by marrying a woman who was a yearly tenant of premises of less than the annual value of 10*l.*, gained a settlement. So here, upon the same principle, the pauper gained a settlement in the parish of Winchcomb, his wife having, before her marriage, become the yearly tenant of a house and garden at the rent of 3*l.*, and that interest having, on the marriage, vested in him by operation of law.

LITLEDALE, PARKE, and PATTESON, J*s.*, concurred.

Order of sessions quashed.

The KING v. The Inhabitants of DURSLEY. April 28.

The second section of the statute 1 W. 4, c. 18, by which it is provided, "that where the yearly rent shall not exceed 10*l.*, payment to the amount of 10*l.* shall be deemed sufficient for the purpose of gaining a settlement under the recited act" (6 G. 4, c. 57), is retrospective, and, therefore, where a pauper in 1829 hired a house at a yearly rent exceeding 10*l.*, occupied it more than a year, and paid not a whole year's rent but above 10*l.*, it was held, that he thereby gained a settlement.

UPON an appeal against an order of two justices, dated the 24th of December, 1830, whereby Thomas Merritt, his wife, and six children were removed *466] from *the parish of St. George, Hanover Square, to the parish of Dursley in the county of Gloucester, the sessions confirmed the order, subject to the opinion of this Court on the following case:—

In March, 1829, the pauper (being then settled in the parish of Dursley) took a house in the parish of St. George, Hanover Square, at a yearly rent of 36*l.* He resided in, and occupied that house from Lady-day, 1829, until August, 1830, and paid during such occupation several sums on account of rent, amounting in the whole to 29*l.* The question for the opinion of this Court was, whether the statute 1 W. 4, c. 18, s. 2, which passed on the 30th of March, 1831, applied to this case so as to enable the pauper to obtain a settlement in St. George, Hanover Square, by such renting, occupation and payment. If it did apply to this case, the order of sessions was to be quashed; if otherwise, to be confirmed.

Sir James Scarlett and Bodkin, in support of the order of sessions. The 1 W. 4, c. 18, is prospective and not retrospective, and consequently the pauper, not having paid a year's rent, did not gain any settlement in St. George, Hanover Square. The statute 6 G. 4, c. 57, which was in force from March, 1829, to August, 1830, required that the rent should be paid for one whole year. The 1 W. 4, c. 18, recites the former statute, and "that doubts have arisen with respect to the intentions of the legislature concerning the occupation of such house, &c., by the person hiring the same, and concerning the amount of the rent to be paid, and the person paying the same," and enacts, "that from and

after the passing of this act no person shall acquire a settlement by reason of such yearly hiring of a dwelling-house, &c., *unless such house, &c., [*467 shall be actually occupied under such yearly hiring by the person hiring the same for the term of one whole year at the least, and unless the rent for the same, to the amount of 10*l.* at the least, shall be paid by the person hiring the same." That clause is clearly prospective only. Sect. 2 proceeds: "Provided always, that where the yearly rent shall exceed 10*l.*, payment to the amount of 10*l.* shall deemed sufficient for the purpose of gaining a settlement under the said recited act." Now, if that clause had been incorporated in the first section, it would clearly have been prospective only; and though it be in a separate section, it operates as a proviso to the first, and cannot, therefore, be construed as extending its operation. The words "from and after the passing of this act" in the first clause override the whole. The expression "gaining a settlement *under the said recited act*" may be relied upon on the other side; but that can refer only to cases occurring after this act, which is professedly "to explain and amend" the former. The doubts recited are no proof that this act is retrospective, for they relate not only to the amount of rent, but other matters, the regulation of which is clearly prospective.

Campbell and Prendergast, contra. Section 2 is retrospective; it need not be contended that sect. 1, is so. The act 6 G. 4, c. 57, required the house, &c., to be occupied under a yearly hiring, and the rent, to the amount of 10*l.*, paid, *for one whole year at the least*; and it was decided by *Rex v. Ramsgate*, 6 B. & C. 712, that this required the whole year's rent to be paid, though amounting to 1000*l.* The 1 W. 4, c. 18, s. 2, was intended to remedy the inconvenience *resulting from that decision. The first section provides, that after the passing of the act, no settlement shall be gained by the [*468 yearly hiring of a dwelling-house, unless the same shall be occupied *by the party hiring*, and the rent, *to the amount of 10*l.* at the least*, shall be paid *by such party*. That is prospective, and will prevent the gaining of any settlement after the act by renting a tenement, unless upon the terms prescribed by this act. The second section, therefore, which provides for the gaining of settlements by renting, &c., *under the recited act*, must be retrospective, or it will have no operation whatever.

✓*LORD TENTERDEN, C. J.* I think we must understand the second section to be retrospective, because it would be useless unless it were so. The words that "payment to the amount of 10*l.* shall be *deemed* sufficient for the purpose of gaining a settlement *under the said recited act*" import that, as to the payment of rent, the statute is declaratory. If the words had been "it is hereby declared that payment, &c. shall be deemed sufficient," there could have been no doubt that the clause would be retrospective. Here the words are the same in effect.

LITTLEDALE, J. The act is not very clearly expressed; but taking the words in the first section, "the rent for the same to the amount of 10*l.* at the least," to be descriptive of the amount of rent to be actually paid, which I suppose is meant, then the effect of the first section is, that "after the passing of the act no settlement shall be gained unless rent to the amount of 10*l.* be paid;" and if that be so, then, unless the second section be retrospective, it adds nothing to the former.

**PARKE, J.* This act is to "*explain*" the former. Sect. 1 provides for settlement by renting for the future. Sect. 2, therefore, unless it [*469 be retrospective, is without object.

PATTESON, J. concurred.

Order of sessions quashed.

DOE dem. SEWELL v. PARRATT. May 1.

Testator devised all his real estates in Jamaica, and all the residue of his real estates, to trustees in fee, for the benefit, ultimately, of his heirs at law. By a codicil he bequeathed to another party 1200*l.* (the amount of a bond debt), and further devised as follows:—"I also bequeath to him my chambers in Albany, for which I paid 600 guineas, with all my furniture, except such articles as I may particularly except from this donation." The testator had bought the fee simple of these chambers (of which he died seised) for 600 guineas; and he had no other chambers in Albany: Held, that the devisee under the codicil took only a life estate.

EJECTMENT for chambers in Albany. At the trial before Lord Tenterden, C. J., at the sittings for Middlesex after last Trinity term, a verdict was taken for the plaintiff, subject to the opinion of this Court on the following case:—

Matthew Gregory Lewis, Esq., being seised in fee of the chambers in question, the fee-simple of which he had bought for 600 guineas, made his will, dated the 5th June, 1812, and thereby devised all his real estates in Jamaica (therein particularly described), and all the residue of his estate, real, personal, or mixed, to the lessor of the plaintiff, and to Robert Sewell and Cyril Jackson, D. D., their heirs, executors, &c., upon trust to pay an annuity to the testator's mother during her life, and to make certain other payments from part of the proceeds of such real estates to the two sisters and heiresses at law of the testator, during their respective lives; and after the death of each of them, to convey a full moiety of all the said real estates (subject *to the said
*470] annuity), to the use of all and every the child or children of such deceased sister, and of their respective heirs, such children to take as tenants in common. In January, 1813, he added this codicil: "I bequeath to the Honourable Thomas Stapleton, 1200*l.*, being the amount of Lord Le Despencer's bond to be paid by my executors into his own hands, for his sole and separate use, and also bequeath to him my chambers in Albany, for which I paid 600 guineas, with all my furniture, except such articles as I may particularly except from this donation." The testator died in 1818, seised in fee of the said chambers in Albany, and of no others there. The Hon. Thomas Stapleton, under whom the defendant claimed, and who was a stranger in blood to the testator, entered into possession of the chambers, and died in 1829. The lessor of the plaintiff was the only surviving trustee under the will. This case was now argued by

Tyrchitt for the lessor of the plaintiff. The question is, whether Mr. Stapleton took an estate in fee-simple, or only a life estate, in the chambers, under this codicil. Where no words of limitation are added to a devise, and there are no other words from which an intention to give an estate of inheritance can be collected, the devisee takes only a life estate. The present codicil has no words of limitation. The lessor of the plaintiff is trustee for the heiresses at law, and by the former part of the will, the testator devises his estates in Jamaica, and all the residue of his real and other estates, to him and his heirs, and upon trusts which of themselves imply a devise of the fee. It rests with the defendant to show (in the absence of such express words as are used in the body of
*471] the will as to other property), that the testator *intended to except the chambers out of this devise, and give them in fee-simple to him.

Jardine, contra, was here called upon by the Court. It can scarcely be questioned, upon reading this codicil, that the testator in fact meant to give the chambers to Mr. Stapleton absolutely, and not for life only. Where there are not express words of restriction, it is generally supposed that the testator meant to pass his whole interest; and courts will go far to support a testator's intention. Sir J. Mansfield, C. J., says in *Doe d. Wright v. Child*, 1 New Rep. 345; and see *Bailis v. Gale*, 2 Ves. 48, 49, "In almost all the cases where questions of this sort have arisen, it has been next to impossible, out of a court

of justice, to doubt of the testator's intention to give the thing absolutely to the devisee. When a man gives a house, he supposes that he gives it in the same manner as he gives a personal chattel." Here the testator probably thought that he gave the devisee his chambers as effectually as the furniture in them. Then, are the words used sufficiently certain to accomplish that intention? The devise is of "my chambers in Albany, for which I gave 600 guineas;" the testator had no other chambers in Albany; the latter words therefore were not necessary to distinguish the subject-matter of the devise; they cannot be rejected as nugatory; and if they have any object, it must be to denote the quantity of interest possessed by the testator, and which he intended to devise. He means, "all that for which I gave 600 guineas," namely, the fee-simple in the chambers. The devise in question comes between two bequests of other property, which are clearly absolute: it may therefore be inferred, that this was intended to be so too. A like argument from collocation was relied upon by Lord Ellenborough, *in *Roe d. Allport v. Bacon*, 4 M. & S. 366, where the word "estates" was held to pass not [472 merely particular lands, but the testator's whole interest in them. The term "estate," though followed by words of local description, has been held in modern cases to denote the quantity of interest, and to carry a fee; *Denn d. Richardson v. Hood*, 7 Taunt. 35, and the cases there referred to by Gibbs, C. J.: and though the word estate does not occur in this codicil, and the cases are not precisely in point, the principle of them applies, and they show how far the Courts will extend the import of words denoting the subject-matter of devise, in favour of the testator's intention.

LORD TENTERDEN, C. J. I am of opinion that the words which the testator has used in this codicil are not sufficient to take the fee-simple from the heirs at law.

LITLEDALE, J. I am of the same opinion. It is argued, that "my chambers in Albany, for which I gave 600 guineas," must mean all that interest for which the testator gave such a sum: but to put such a construction on these words would be introducing a new class of cases.

PARKE, J. Considering all the circumstances, I have little doubt what the intention of the testator really was, but it is not expressed with sufficient certainty. The judgment must therefore be for the plaintiff.

PATTESON, J. concurred.

Postea to the plaintiff. (a)

(a) See *Lushington v. Sewell*, 1 Sim. 485, where the same codicil was before the Vice-Chancellor, and he considered the devise of the chambers to be for life only, p. 470.

*DOE dem. NORRIS and Others v. JANE TUCKER. May 1. [473

Testator being seised in fee of the premises after mentioned, devised as follows:—"I give and bequeath to my wife my freehold estate called *Pouncetts*, during her natural life. I give to my son Richard, my heir, after the death of my wife, 10l. Item, all the above bequeathed lands, goods, and chattels, after the death of my wife, I give and devise to my son Richard, to my son Thomas, to my son Robert, and to every other of my children then in being, share and share alike, equally to be parted between them." Held, that under this devise the children only took life estates in their respective shares, after the death of the wife.

EJECTMENT for premises situate at the parish of Street in the county of Somerset. At the trial before Bosanquet, J., at the Spring assizes for Somersetshire, 1830, the jury found a verdict for the plaintiff, subject to the opinion of this Court on a special case, by which it appeared that Robert Maynard being seised in fee of certain premises, commonly known by the name of *Pouncetts*, of which the premises in question formed part, duly made and published his will, and thereby devised as follows:—

"First, I will that all my just debts be fully paid by my executrix, herein-after named, so soon as conveniently may be after my decease: Item, I give and bequeath unto my dearly beloved wife, Jane, my freehold estate called Pouncetts during her natural life: Item, I give and bequeath unto my dearly beloved wife, all my stock, goods, and chattels, of every denomination, during her natural life: Item, I give unto my son Richard, my heir, after the death of my wife, 10l.: Item, all the above bequeathed lands, goods, and chattels, after the death of my dearly beloved wife, I give and devise in manner following: unto my son Richard, unto my son Thomas, unto my son Robert, and unto every other of my children then in being, share and share alike, equally to be parted between them."

The testator died, leaving his said wife, Jane Maynard, the three sons above named, and five other children him surviving. They all survived the widow, who died in 1804. John Maynard, one of the eight, sold his *share to *474] Robert Tucker, in whose right the defendant claimed. On the death of John, in 1829, the lessors of the plaintiff laid claim to this property, in right of Richard, the heir at law of Robert Maynard, the testator, and by virtue of a devise by Richard of all such lands, &c., as he was entitled to in reversion expectant on the deaths of his brothers or sisters. The question was, what estate John Maynard took for his eighth part of the lands devised by his father. The case was now argued by

Follett, for the lessors of the plaintiff. John took only a life estate under his father's will, on the death of Jane the widow. The words "my freehold estate called Pouncetts," are only descriptive of the particular property, and not meant to denote quantity of interest. The devise of the testator's lands by shares among the children contains no words calculated to pass a fee, nor does the will show any such intention. (He was then stopped by the Court.)

Coleridge, contra. The intention to pass a fee is apparent from the whole of the will, and in *Roe d. Shell v. Pattison*, 16 East, 221, Lord Ellenborough said, "There are no words of such an inflexible nature as will not bend to the intention of a testator, when it can be collected from the context of his will." In that case it was held, that a devise of the testator's remainder in the four per cent. stocks, with his freehold property, passed a fee in the real estate. It is not necessary here, to rely solely on the words "my freehold estates called Pouncetts," in the devise to the widow for life. There are other circumstances. The testator makes separate devises to her of realty and of personality, *475] being evidently aware of the *distinctions between the different classes of property. He gives 10l. to the heir at law as a compensation for the loss he sustains by sharing equally with the rest of the children. He devises "all the above bequeathed lands, goods, and chattels" among his children, evidently intending (as was observed in *Roe d. Shell v. Pattison*, 16 East, 221), to give as absolute an estate in one as in the other. And he devises the property to be parted, "share and share alike;" whereas if he had meant the several children to take life estates only, he would probably have made them joint-tenants. The cases cited for the defendant in *Doe d. Sewell v. Parratt*, ante, p. 469 (just decided), though not precisely in point, are applicable in principle. The word "estate," when unaccompanied by any words restraining or limiting the general sense, has been held sufficient to carry a fee, and to describe not only the land, but the interest in the land, if such appeared to be the intention; but neither that, nor any other precise term, is essential, if the intent be sufficiently expressed. And where it is evidently meant that the interest, and not merely the particular land should pass, words of description added to the term "estate" will not restrain the sense; *Bailis v. Gale*, 2 Ves. 48. The rule of law has always been, that, in construing a devise, the intention of the testator was to be consulted, and that the whole question was, what constituted sufficient evidence of it: only in modern cases the courts have looked more to the general contents of the will than was formerly done. *Doe*

d. *Liversage v. Vaughan*, 5 B. & A. 464, and *Doe d. Ellam v. Westley*, 4 B. & C. 667, may be cited on the other side; but, in the first of these cases, the language used was more in favour of a life-estate than it is here, and in the *latter, the two clauses of the devise were separated by the words "and also," which prevented those expressions that might otherwise have [*476 conveyed a fee, from operating upon the real property.

LORD TENTERDEN, C. J. I am of opinion that John Maynard took only a life-estate under his father's will. There have been many cases where devises have been held to carry no more than a life-estate, although such a construction certainly did not effectuate the intention of the testator. A wish to avoid this, has led the Courts occasionally to lay hold of very trifling matters in the context of wills, for the purpose of carrying into effect what the testator really wished. But I think that, if we considered the present devise as passing an estate in fee, we should be introducing a latitude of construction which would operate very injuriously. The devise of all the testator's "above bequeathed lands, goods, and chattels" to his children, share and share alike, would of itself carry only a life-estate. Then the devise referred to by the words "above bequeathed," is this: "I give and bequeath unto my wife, Jane, my freehold estate called Pouncetts, during her natural life." The term "estate" may operate only as a description of the particular lands, or may mean, also, the quantity of testator's interest in them. Here, it appears to me that the words "my freehold estate called Pouncetts," are merely descriptive of the land, and not of the quantum of interest. In *Bailis v. Gale*, 2 Ves. 48, the words "*all that estate I bought of Mead*," might well import the whole interest in the estate, because the testator had in fact bought the fee-simple of Mead. The judgment must be for the plaintiff.

*LITLEDALE, J. I think the words "my freehold estate called Pouncetts," in this devise, only denote the local situation; and the sub- [*477 sequent words, "all the above bequeathed lands, goods, and chattels, after the death of my wife, I give and devise to my sons," would not of themselves carry a fee. In this latter clause the word "lands" is used instead of "estate," which occurs before; and this may probably have been to avoid the construction now attempted.

PARKE, J. I have no doubt as to the intention of the testator; but a will must have words sufficient to carry the intention into effect. The devise to the sons is of "all my above bequeathed lands, goods and chattels." I take it there is no case in which a fee has been held to pass by a mere devise of "lands;" and there is no other expression in this clause which of itself could carry such an estate. And looking to the context, I see nothing to give this devise the effect contended for.

PATTESON, J. I am of the same opinion. In *Roe d. Shell v. Pattison*, 16 East, 221, the devise was of the testator's "freehold *property*" (see *Nichols v. Butcher*, 18 Ves. 193), which is very different from the terms used here.

Postea to the plaintiff.

*CROWLEY and Others v. COHEN.

[*478]

Carriers on a canal effected an insurance for twelve months upon goods on board of thirty boats named, between London, Birmingham, &c., backwards and forwards, with leave to take in and discharge goods at all places on the line of navigation. The insurance was agreed to be 12,000*l.* on goods, as interest might appear thereafter; the claim on the policy warranted not to exceed 100*l.* per cent.: and 3000*l.* only were to be covered by the policy in any one boat on any one trip. The premium was 30*s.* per cent.:

Held, that an insurance "on goods" was sufficient to cover the interest of carriers in the property under their charge; for, in general, if the subject-matter of insurance be rightly described, the particular interest in it need not be specified:

Held, also, that the policy was not exhausted when once goods to the value of 12,000*l.* had been carried by all the boats, or by each of them, but that it continued, throughout the year, to protect all the goods afloat at any one time, up to the amount insured :

Held further, that upon the loss of goods on board one of the boats, the assured was entitled to recover that proportion of such loss which 12,000*l.* bore to the whole value of the goods afloat at the time ; and not the proportion of 12,000*l.* to the whole amount carried during the year.

ASSUMPSIT on a policy of insurance. Plea, the general issue. At the trial before Lord Tenterden, C. J., at the London sittings after Hilary term, 1831, a verdict was taken for the plaintiffs subject to the opinion of this Court upon the following case :—

The action was brought upon a policy effected by the plaintiffs, and subscribed by the defendant, for 1000*l.*, whereby the plaintiffs caused themselves to be insured for twelve calendar months, commencing on the 11th of April, 1828, “by canal navigation boats containing goods at work between London, Wolverhampton, Birmingham, &c., backwards and forwards, and in any rotation, upon goods and upon the body, tackle, &c., on thirty boats,” as per margin of the policy ; beginning the adventure upon the goods from the loading thereof on board, and continuing it till the same should be discharged and safely landed ; and the vessel was to have “leave to take in and discharge goods and merchandise at all places on the regular line of canal between the aforesaid places and London, without being deemed a deviation.” It was then stipulated as follows : “The said ship, &c., goods and merchandises, &c., for so much as concerns the assureds, by agreement between the assureds and assurers *in 179] this policy, are and shall be (a) twelve thousand pounds on goods as interest may appear hereafter, to pay average on each package or description as if separately insured, warranted free from damage or loss that may arise from wet occasioned by rain, snow or hail, or from any loss arising from plunderage, bartrary or pilferage, the claim on this policy warranted not to exceed 100*l.* per cent.” The premium was 30*s.* per cent. The following stipulation was written at the bottom of the policy :—“3000*l.* only to be covered by the policy in any one boat on any one trip.” The instrument bore a 30*l.* stamp.

One of the boats named in the margin of the policy, and of which the plaintiffs were owners, departed from London on the 17th of January, 1829, on the above-mentioned line of canal, with goods of several persons on board, to the value of 1700*l.*, which were in the care of the plaintiffs as carriers, to be carried on freight from London to Wolverhampton. On the 29th of January, the boat, with the goods on board, was accidentally sunk in the canal ; the goods were damaged, and the plaintiffs in consequence were obliged to make compensation to the owners, and were also put to other expenses. It was agreed that the damage sustained should be settled by a reference, and that the arbitrator should calculate them according to that which the Court should decide to be the legal construction of the policy. Between the 11th of April, 1828, and the 29th of January, 1829, the boat in question had gone thirty-one trips on the line of canal, and she was on her thirty-second at the time of the loss. *480] Between the two last-mentioned days, each of the *thirty boats mentioned in the policy had carried goods to the amount of 12,000*l.* and upwards.

The objections taken to the right of the plaintiffs to recover were five. 1. That this policy, which pursued the ordinary form, did not cover the interest of the plaintiffs, since it purported to protect goods against the usual risks to which the owners of goods are liable, whereas the loss alleged was one arising out of the plaintiffs' liability as carriers to risks to which carriers are liable.

(a) Here the printed words “valued at” were struck out. The instrument was the common printed form of policy on ship and goods, filled up so as to adapt it in a very inartificial manner to this insurance.

2. That the loss was not within the policy, the perils insured against being the ordinary perils in a sea policy, and the loss the consequence of a breach of special contract between the assured and those whose goods they carried. 3. That as soon as goods to the amount of 12,000*l.* had been carried by the boats the policy was exhausted, or at least as soon as goods to that amount had been carried by each boat. 4. That supposing the policy not to be so limited, the underwriters were liable only to that proportion of the loss which 12,000*l.*, the sum insured, bore to the whole amount of the goods carried by the boats in the twelve months; that is to the whole interest of the assured. 5. That according to the plaintiffs' construction of this policy the stamp was insufficient: but this objection was not persisted in. The case was argued by

Campbell, for the plaintiffs. With regard to the first objection, as between the plaintiffs and the underwriter, the claim in respect of this loss is for the damage to the goods. It is sufficient, as between them, that the policy is on the goods, and that they have been damaged on the voyage by a peril insured against. It is not necessary, in a policy of insurance, to state the precise *nature of the interest, and whether the property be absolute or special. A consignor, a consignee, a prize agent (as such) may all [*481 insure; but they are not bound to specify what the interest is (see *Carruthers v. Sheddon*, 6 Taunt. 14). And so as to the second objection: the contract between the assured and the other parties is nothing to the underwriter. He cannot pretend that this is a wagering policy; the plaintiffs only seek to recover the amount of damage which they have actually sustained by the injury to these goods. The third objection is answered by a reference to the nature and objects of the policy. It was to continue twelve months, and the intention evidently was, that the underwriters should be liable for damage to be sustained by the goods on board these boats during the whole time. The stipulations for leave to take in and discharge goods at all places on the line of canal, that no greater amount than 3000*l.* should be covered by the policy in any one boat on any one trip, and that the claim on the policy should not exceed 100*l.* per cent., all show that the limitation contended for is not according to the real sense of the contract. Then it is said, fourthly, if that limitation is not to prevail, the underwriter is still only liable for the proportion which 12,000*l.* bears to the whole amount of goods carried in all the boats during the twelve months. According to this argument, if no damage occurred till the last day, and on that day a loss of goods to the amount of 1000*l.* took place, then, although no other goods were afloat at the time, the underwriter would claim to pay, not 1000*l.*, but only a part of that sum in the proportion of 12,000*l.* to the value of all the goods before carried in all the boats; *by which mode of calculation, [*482 he might be liable to 1000*l.* at the beginning of the year, and only a farthing at the end of it for precisely the same amount of loss. The true measure of liability is the proportion of 12,000*l.* to the value of all the goods afloat at the time of the loss; and it does not appear from the case, that anything more was on the line of canal that day, than the goods valued at 1700*l.*, in the boat which was sunk.

Maule, contrâ. As to the first and second points: it may be admitted that this was an insurable interest, if the policy were rightly framed. But the interest here is not that described in the policy. The Courts have allowed much latitude in this respect, as where they held that a shipowner carrying his own goods on a voyage, might insure his interest in them under the name of freight. *Flint v. Flemyng*, 1 B. & Ad. 45. But there are many instances in which a greater strictness of construction is still adhered to. A party lending money on bottomry has a complete interest in the ship; yet he cannot insure as on the ship. In *Simonds v. Hodgson*, ante, 50, the interest insured was "on bottomry," and the decision turned wholly upon the question whether the instrument alluded to by that expression in the policy, was a bottomry bond or not, though it was clear that the plaintiff had, at all events, a security on the body of the ship, capable of being insured. It was decided in *Glover v. Black*,

3 Burr. 1394, that a lender of money on respondentia could not insure as upon the goods and merchandise; and in a subsequent case, *Gregory v. Christie*, Park *483] on Insurance, p. 14, where the insurance was on goods, specie, *and effects of the plaintiff (the captain) on board the ship, and he demanded, under that insurance, money expended by him during the voyage for the use of the ship, and for which he claimed respondentia interest, Lord Mansfield, though he held that the plaintiff might recover, was of opinion that he would not have been so entitled, but for an express usage proved by several witnesses. The insurance by the present plaintiffs is precisely in the form which would be used by owners of goods sending them in other persons' barges. No other kind of interest is pointed out by the terms used. Yet the interest in this case is, in fact, one of a very special nature. It is that of a carrier, which consists of the gain to be made by freight, and the loss to be guarded against from damage or destruction of the goods. Now it will scarcely be said that this policy covers the gain,—the freight; and if the general words are not of a nature to protect this, how is it shown that they apply to the loss risked by the plaintiffs as carriers? Yet if their interest as carriers generally were covered by this policy, why should not it extend both to the expectation of freight and the risk of loss? It has been said that the policy, being on goods, covers any interest in them, absolute or special. It may be admitted that the assured need not be an absolute owner; but the interests to be protected must all be such as are carved out of one and the same entire right; and an interest arising merely from a liability, like that of a carrier, is not within this description. Suppose the goods here had been lost by the act of God or the king's enemies. Carriers are not answerable for these risks; yet the underwriter would have been liable to the assured upon the present policy. Another proof that this *484] contract of insurance does not truly show the nature of the interest to be protected is, that the policy is an open one. The inference from that form of policy is, that the interest is of such a nature that it may be appreciated when the loss happens, without the aid of any previous convention between the parties, or estimate by which they have agreed to be bound. Thus an absolute interest in goods may be valued by reference to the invoice price; and an estimate may be taken by similar means, as to ship or freight. But it is not so with the interest of a carrier; that must be appreciated by some rule of calculation, which should be agreed upon beforehand. The present contract is in the nature of a re-assurance; for a carrier is an insurer: the risk provided against by such contract, if it could be previously estimated, would probably be calculated on the average quantity of losses which the parties effecting the re-assurance have to pay. This kind of contract is always considered as totally distinct from an original insurance,^(a) and ought not to be described in the same general terms. As to the third point; if the policy was not exhausted when goods to the value of 12,000*l.* had been carried by all, or at least by each of the boats, this contract was most improvident on the part of the underwriter; for, on the plaintiffs' construction, goods to the amount of 360,000*l.* had, at the time of the loss, been protected by this policy; and the same proportion might have been carried during the remaining two months of the year. The premium of 180*l.* for such a risk is so far below the ordinary rate, that the underwriter, at least, cannot be supposed to have understood the contract in the *sense now contended for. Lastly, the underwriter is liable only *485] for that proportion of the loss which 12,000*l.* bears to the whole value of the goods carried during the year. This is the rule in case of an open policy; the indemnity recoverable is to the loss as the sum insured to the whole interest protected by such policy. It is argued this would lead to an unjust result; and that in the present case it would be hard, if the plaintiffs carried 360,000*l.* worth of goods during the year, that they should only recover in the

(a) Park on Insurance, 419, and the authorities there cited.

proportion of one-thirtieth for any subsequent loss. But this is the consequence of insuring a carrier's interest in a form applicable only to a policy on the party's own goods. The indemnity may be inadequate to the loss, but the premium was not a sufficient consideration for a perfect indemnity.

Campbell, in reply. A policy must state correctly *what* is insured; but there is no authority for saying, that the reason why the party insures should also be expressed. *Glover v. Black*, 3 Burr. 1394, was decided on the ground of an established practice; and the court expressly guarded against any application of the judgment there given to other cases than those of respondentia and bottomry.

LORD TENTERDEN, C. J. I am of opinion that the plaintiffs are entitled to recover. It is objected that this policy is not framed so as to cover the interest in respect of which they claim. But I agree in the proposition laid down in the argument on their side, that although the subject-matter of the insurance must be properly described, the nature of the interest may in general be *left at large. Here the subject-matter is very sufficiently described, [*486 and the policy shows that the sum to be received in case of loss was to be for further consideration, "as interest might appear thereafter. The instrument is not artificially framed; it would have been better if it had expressly shown that the object was to indemnify the plaintiffs as carriers; still I think it is sufficient. Then it is contended, that after goods to the value of 12,000*l.* had been carried by all, or at least by each of the boats, the policy was exhausted. But this is inconsistent with the evident object of the contract, and with the limit which the parties have fixed by warranting that the claim on the policy shall not exceed 100*l.* per cent. Then as to the mode of calculating the indemnity, the defendant insists that this is to be done by ascertaining the proportion which 12,000*l.* bears to the whole value of goods carried during the year, and allowing the assured such a proportion of the amount of loss. But the rule of calculation relied on by the defendant is never adopted in cases of policy on goods with liberty to change the cargoes. Here the whole value of the goods afloat at the time of the loss must be taken, and the plaintiffs will recover such a proportion of their loss as 12,000*l.* bears to the value of all the property on board all the boats at the time of the accident, if that value exceed 12,000*l.*; if not, they will be entitled to the whole amount lost.

LITLEDAL, J. I am of the same opinion; and I think it was not necessary that the interest of the plaintiffs should be more specially described. Goods in the custody of carriers are constantly described as their goods in indictments and declarations in trespass. *The plaintiffs here were liable, in particular cases, for the loss of the goods they carried, and had a [*487 special property in them on that account. The goods were, for the present purpose, their goods. As to the argument that this policy was exhausted when goods had been carried in all, or in each of the boats, to the amount of 12,000*l.*, I think that cannot have been the intention, where a policy was effected upon thirty boats continually going on this canal, and each of which might convey goods to that amount in a time far short of a year. It appears to me that the contract was, in effect, equivalent to a fresh insurance taking place at the time when each vessel started, and governing all that were then afloat; only instead of a renewed insurance, the object was obtained by a continuing policy. As to the amount the plaintiffs are to recover, I agree in the rule of calculation which my Lord has laid down.

PARKE, J. It is admitted here that the plaintiffs had some interest which they might insure. It was that, in fact, which carriers ordinarily have. The only question is, whether the interest, such as it was, was sufficiently described in the policy. Now the particular nature of the interest is a matter which only bears on the amount of damages; it is never specially set out in a policy. The instrument in question, I think, does all in this respect that ever is done. Then as to the suggestion, that when goods to the value of 12,000*l.* had been

carried, the policy was at an end; if that was so, the insurance was not for a year, but upon the first 12,000*l.* worth of goods that should be carried. But I think it was clearly meant to be an indemnity, applicable to the successive *488] cargoes. I am also of opinion, that the *compensation is not to be calculated in the manner proposed by the defendant. If it were to be (as contended on that side) in the proportion of 12,000*l.* to the whole value of goods carried during the year, the result would be, that the underwriter's liability would have gone on diminishing through the year, and become less in proportion as more goods were carried. But I think the intention clearly was, that 12,000*l.* should be insured upon each successive number of cargoes; and, therefore, that the whole value of the goods afloat at the time of the loss, compared with 12,000*l.* will afford the true measure of the defendant's liability.

PATTESON, J. It is only necessary, in such a policy as this, to state accurately the subject-matter insured, not the particular interest which the assured has in it. This is an answer to the objection, that a policy like the present would cover the interest of a party sending his goods by another's vessel: it is not the less a policy upon goods. So, too, when it is said that this contract is in the nature of a re-assurance; the answer is, that it is still only an insurance upon goods in which the assured has a special interest. The suggestion that this policy had become exhausted is at variance with the contract itself: for the proviso, that only 3000*l.* should be covered in any one boat on any one trip, shows that at least more than one voyage was contemplated, in which each boat might take as much as 3000*l.* worth of goods; and this is quite inconsistent with the supposition that an insurance of only 12,000*l.* was contemplated upon all or each of the boats.

Postea to the plaintiffs: the damage to be calculated on the principle above stated.

*489] *ADAMS v. OSBALDESTON, Esquire. *May 2.*

A sheriff, to whom a bailable latitat not containing a non omittas clause was directed, is not bound for the purpose of arresting the party named in it to enter a franchise, within which the lord has the return and execution of writs.

CASE against the late sheriff of Yorkshire. The first count was for an escape. The second count alleged, that one Firth was indebted to the plaintiff in the sum of 36*l.*, and the Plaintiff, for the recovery thereof, sued out a latitat, directed to the sheriff of Yorkshire, commanding the said sheriff to take Firth, if he should be found in his bailiwick; which said writ was afterwards duly endorsed for bail for 36*l.*, and delivered to the defendant, who then, and until and at the time of the default after-mentioned, was sheriff of Yorkshire, to be executed: that Firth, at the time of the delivery of the writ to the defendant, and from thence until the return of the writ, was within the sheriff's bailiwick, and the sheriff might at any time during that period have arrested him by virtue of the writ; but that he did not, at any time before the return of the writ, take, or cause to be taken, the said Firth, as by the writ he was commanded. At the trial before Parke, J., at the Yorkshire Summer assizes, 1831, it appeared that in January, 1830, a bailable latitat, not having a non-omittas clause, issued against Firth at the plaintiff's suit for a debt of 36*l.*, on which the sheriff's warrant, directed to Foster, a bailiff, was delivered by the plaintiff to one Pennington. Foster being at Snaith, Pennington went from thence to Stubbs Walden, about eight miles distant, where Firth lived, to induce Firth to come to Snaith; and Foster desired his assistant Haigh to accompany Pennington, in order that he might become acquainted with Firth's *490] *person. At Stubbs Walden, Pennington and Haigh met Firth, and Haigh (who had not the warrant with him) took Firth; but before they

left Stubbs Walden, he escaped. Both Snaith and Stubbs Walden are within the liberty and Franchise of the honour of Pontefract, the bailiff of which has the execution and return of writs.(a) Upon this evidence it was admitted, that as Haigh had no authority to arrest Firth, and Foster, the officer, was not present, or in any way acting at the time when Firth was taken,(b) there was no lawful arrest, and consequently the plaintiff must fail on the first count; and the defendant's counsel contended, that the plaintiff could not recover on the second count, because there was not any non-omittas clause in the latitat, and, therefore, it was the duty of the sheriff to arrest within his bailiwick only, and not within the liberty of Pontefract. The learned Judge directed a verdict for the plaintiff on the second count, reserving liberty to the defendant to move to enter a nonsuit. A rule nisi having been obtained for this purpose,

F. Pollock and Hoggins now showed cause. The sheriff, or his officer, was guilty of negligence in not arresting Firth. If the officer himself had gone to Stubbs Walden on the Thursday, the arrest would have been good. The privilege of a particular liberty is not the privilege of the sheriff, or of any individual but the lord of the franchise.

Holt and Blackburne, contra. The first act of negligence was on the part of the plaintiff, who knew that *Firth resided within the liberty, and yet did [*491 not cause a non-omittas clause to be inserted in the writ. The sheriff was not guilty of negligence, by omitting to do that which was not authorized by the writ. It is averred in the declaration that Firth, from the time of the delivery of the writ to the defendant till the return, was within the sheriff's bailiwick. Now the proof was that he was residing within the honour of Pontefract, which is not within the sheriff's bailiwick: and the sheriff, if he had arrested Firth there, would, though the arrest would have been good, have subjected himself to an action at the suit of the lord, *Fitzpatrick v. Kelly*, cited in *Rex v. Stobbs*, 3 T. R. 740; *Piggott v. Wilkes*, 3 B. & A. 502. And in *Rex v. Mead*, 2 Stark, N. P. C. 205, it was held that the killing of a bailiff in resisting the execution of mesne process in a civil action does not amount to murder, if the bailiff attempt to execute a writ without a non-omittas clause in an exclusive liberty.

LORD TENTERDEN, C. J. The rule for entering a nonsuit must be made absolute. It is quite clear that the plaintiff was not entitled to recover upon the first count, because the party was not arrested. Neither is he entitled to recover on the second count, because a most material allegation in the declaration was not proved. That allegation is, that Firth, at the time of the delivery of the writ to the defendant, and from thence until the return of the writ, was within the sheriff's bailiwick. The evidence was that Firth was within the liberty of the honour of Pontefract, and the sheriff clearly had no authority to enter that liberty by *virtue of the writ sued out by the plaintiff. If [*492 it had contained a non-omittas clause, he might have executed it within the liberty. The sheriff was bound by the writ to take Firth in any part of the county where he has a general authority by virtue of his office to execute process; but he had no authority, nor was he bound, to take him within any liberty where the lord or bailiff had the execution of process.

PARKE, J. I am of the same opinion. The action is not maintainable on the first count, because there was no arrest, and therefore no escape; and in respect to the second count, the proof was not that the defendant was in the sheriff's bailiwick, but that he was in the liberty of the honour of Pontefract. Independently of that, I think no action could be maintained in this case against the sheriff for negligence, by reason of his not having entered the liberty of Pontefract, and arrested the party there; for the writ only authorized him to take the person named in it within the sheriff's bailiwick, that is, in that part of the county where, by virtue of his office, he had the execution of process. It gave him no authority to enter any liberty or particular district, where, by

(a) See, as to this liberty, *Carrett v. Smallpage*, 9 East, 383.

(b) See *Blatch v. Archer*, Cowp. 68.

grant or prescription, any individual had the execution and return of writs. A non-omittas clause was necessary to give him such authority. The sheriff therefore, would have been liable to an action at the suit of the lord of the liberty of Pontefract, if he had entered it to execute this writ, although, if he had made the arrest within the liberty, it would have been good. *Rex v. Mead*, 2 Stark.

*493] N. P. C. 205, and the *other cases cited, show that there can be no obligation upon the sheriff to enter a franchise and execute a writ upon his own responsibility, though if he do so, such execution is not invalid. See *Sparkes v. Spink*, 7 Taunt. 311, and *Bell v. Jacobs*, 4 Bingh. 523.

PATTESON, J. A most material averment in the declaration has not been proved, for it does not appear that Firth was actually within the sheriff's bailiwick. Then, was he constructively so? If there had been a non-omittas clause, the liberty would have been thereby made, *pro hac vice*, parcel of the sheriff's bailiwick, and he would have been bound to execute it there. But there being no such clause, it was neither actually nor constructively within the bailiwick. See 2 Inst. 453, and 19 Vin. Ab., Return, 206.

Rule absolute.

In the Matter of Arbitration between GILLON and Others, and the MERSEY and CLYDE Navigation Company. *May 3.*

An agreement of reference stated, that disputes had arisen between G. and a navigation company, respecting certain goods shipped by G. on board the company's vessels, and which G. complained had not been delivered; that G. had commenced an action in Scotland against the company for the recovery of the goods or their value, of the damage sustained by the non-delivery, and of the costs incurred in the action; and that the parties agreed to refer the said differences to arbitrators, the costs of the reference and award, and also of the action, to be in their discretion. The arbitrators awarded that 238*l.* were due from the company to G.; that the said sum, with 30*l.*, the costs of the reference and award, should be paid by the company on a certain day; and that the company should keep the goods, which were then in their possession:

Held, (*Parke, J.*, *dubitante*) that this was a sufficient adjudication upon all the matters referred: Held also, that the award of the goods to the company was not void as an excess of authority.

By an award made in the above matter, certain articles of agreement were set out, whereby, after reciting that disputes had arisen and were still existing *494] *between Gillon, Rule, and Thomas and John Black on the one part, and the company on the other, respecting two cases of goods shipped by Gillon, &c., on board one of the company's vessels, and which Gillon, &c., alleged had never been delivered as directed, but the company asserted the contrary; and after reciting that they had commenced an action in Scotland against the company for the recovery of the goods or their value, and of the loss and damage sustained by Gillon, &c., in consequence of the non-delivery, and the costs and expenses incurred by them relative thereto, and in the said action, which was then depending; and reciting also, that for finally settling the said differences and disputes, the parties had agreed to leave the same to the award and decision of the arbitrators after named; it was agreed that the said parties should and would abide by the award of H. G. and J. D., arbitrators named on behalf of each of the parties to the said agreement, to award, &c., of and concerning the matters thereby referred, so as the said award should be made on or before, &c.; and that the costs of the agreement, of the reference and award, and also the costs incurred previous to and in commencing, prosecuting, and defending the said action, should be in the discretion of the arbitrators. The arbitrators then went on to award "of and concerning the matters referred," as follows:—
"We do award, &c., that there is now due and owing from the said Mersey and

Clyde Steam Navigation Company unto the said John Gillon, &c., the sum of 238*l*. And we do further award, &c., that the said sum, together with the sum of 30*l*., being the costs of the said reference and all matters relative thereto, and of this our award, amounting together to 268*l*., shall be paid by the said company unto Messrs. J. and G. C., *solicitors, at, &c., on, &c." They [*495 further awarded that the costs of making the agreement of reference or the award, a rule of court, if necessary, should be borne by the company. They then proceeded: "And we do lastly award, &c., that the said company shall and may keep and retain to their own use the said two cases of goods alluded to in the said agreement, and which are now in the possession of the said company, or their warehousekeeper or agent." A rule nisi was obtained for setting aside this award, on the grounds—1. That the award did not pursue the submission, in not making any adjudication respecting the damage sustained by non-delivery of the goods. 2. That the award was not made upon all the matters submitted, as it said nothing of the costs of the Scotch cause. 3. That the award exceeded the submission, in directing that the company should keep the goods. It appeared on affidavit, that the arbitrators had had evidence before them both of the damage occasioned by the non-delivery, and of the costs in the Scotch suit. A rule nisi having been obtained for an attachment against the company for not performing the award, both rules now came on together.

Cresswell, on behalf of the company. As to the last objection, if the arbitrators have exceeded their power, the award is only bad pro tanto. With respect to the rest, the award professes to be "of and concerning the matters referred," and it is not pretended on the other side that any matter referred was not brought before the arbitrators. The points in question before them were, whether there had been a delivery of the goods; whether any and what damage had ensued from the *non-delivery; and what had been the [*496 plaintiff's costs in the Scotch cause. The arbitrators award a sum generally. This will be intended to apply to all the questions. The award is conclusive against every claim which the parties might have advanced at the reference, *Dunn v. Murray*, 9 B. & C. 780.

Coulting, contra. The award does not determine all the matters submitted; at all events not the costs of the Scotch suit. The general sum awarded may be for these, or for the damage by non-delivery of the goods, or for both. In the last case the award is bad, on the ground that where distinct matters are referred, the arbitrators must award specifically as to each. *Randall v. Randall*, 7 East, 81; *Thornton v. Hornby*, 8 Bingh. 13. In *Dunn v. Murray*, 9 B. & C. 780, the reference was not of distinct things, but of all matters in difference in the cause. There is nothing here to show that the arbitrators came to any separate conclusion as to the costs of the action in Scotland, though other matters are specifically noticed in the award. The direction as to the goods is an excess of authority, because it was not submitted whether or not the company should keep them: and this affects the whole award; for if the arbitrators had not thought themselves at liberty to adjudicate as to this, the other terms prescribed would have been different.

Lord TENTERDEN, C. J. The award is inartificial, but enough appears to sustain it. The arbitrators have awarded a certain sum as due to the plaintiffs in the Scotch *cause, and it must be understood that they meant to include the costs as well as the other matters of that cause. *Dunn* [*497 *v. Murray* is a strong authority in favour of the award. It is said that the arbitrators have not made a distinct adjudication on any of the matters referred, but it does not appear that they have excluded any. In *Randall v. Randall*, 7 East, 81, the award was so framed, that one distinct subject of the reference could not by possibility have been included. The same objection was taken in *Thornton v. Hornby*, 8 Bingh. 13; that case also was different from this. The adjudication here, that the parties who were ordered to pay the money should

keep the goods, imposes what, perhaps, could not have been enforced at law, but it was just, and, I think, sufficiently correct on an arbitration.

LITTLEDALE, J. I am of opinion that this award may be supported. It would have been better if it had distinctly specified the matters in respect of which the payment was adjudged; but upon this agreement of reference, I am not aware that there was any positive objection to awarding one sum in respect of the whole.

PARKE, J. I have some doubt whether this award is final, for I do not see how the sum of money adjudged to be paid is made applicable to the Scotch cause. However, I do not feel so strong an opinion on the subject, as to say that the award cannot be supported.

PATTERSON, J. I think it is clear the arbitrators must have meant to include *498] the costs of the Scotch cause in the sum of 238*l.* first awarded. The costs of the reference and award, amounting to 30*l.*, are given separately, and I think the former sum must apply to the remaining matters in dispute.

Rule absolute for an attachment.

MARTINDALE and Another v. F. BOOTH, W. S. COPELAND, and J. WILSON. *May 4.*

A. being indebted to B. in the sum of 10*l.* for goods applied for a further supply upon credit, and for a loan, B. refused to grant either without security; and it was then agreed that A. should give a bill of sale of his household furniture and fixtures, and that B. should give him credit for 200*l.* on that security. Before the bill of sale was executed, B., upon the faith of such agreement, advanced to A. 90*l.* in money and goods, and afterwards, on the 8th of May 1828, A. executed a bill of sale, whereby, in consideration of the debt of 100*l.* he bargained and sold to B. all his (A.'s) household goods and furniture, &c., with a proviso, that if A. should pay the 100*l.* by instalments, the first of which was to be due on the 7th of June, the deed should be void; but in default of payment of any of the instalments at the times appointed, it should be lawful, although no advantage should have been taken of any previous default, for B. to enter upon the premises and take possession, and sell off the goods. There was a further proviso, that until such default, it should be lawful for A. to keep possession of them. In 1828, A. had given a warrant of attorney to C. and D., as security for a debt of 1100*l.*, and they, in November 1828, entered up judgment and sued out a *f. fa.*, under which the sheriff seized the goods:

Held, in trespass brought by B. against the sheriff, that under these circumstances the bill of sale was not fraudulent by reason of A.'s having continued in possession.

Seemle, that after a conveyance of goods and chattels, want of possession does not constitute fraud, as against creditors, but is only evidence of it.

TRESPASS for taking away and converting furniture, goods, and chattels of the plaintiffs. Plea, not guilty. At the trial before Lord Tenterden, C. J., at the Middlesex sittings after Trinity term 1829, the jury found a verdict for the plaintiffs for 93*l.* 16*s.*, subject to the opinion of this Court on the following case:—

Before the 8th of May 1828, one W. G. Priest, who kept the Peacock Tavern in Maiden Lane, Middlesex, was indebted to the plaintiffs, wine and spirit merchants, in 10*l.* for wine and spirits. Priest having applied to them for a further supply of wine upon credit, and for a loan of money, the plaintiffs refused to *499] give him any further credit, or to lend him any money unless he would give them satisfactory security. Priest then proposed to execute a bill of sale to them of the furniture and fixtures in the Peacock Tavern as such security, and the plaintiffs agreed to give him credit thereupon to the extent of 200*l.* After Priest and the plaintiffs had agreed to give and accept such security, but before the bill of sale was actually executed, the plaintiffs, upon the faith of such agreement, advanced to Priest 30*l.* in money and to the amount of 60*l.* in wine and spirits, and in two days afterwards, viz. the 8th of May 1828, in pursuance of the agreement, Priest executed and delivered to the

plaintiffs a bill of sale, reciting that he, Priest, was indebted to the plaintiffs in the sum of 100*l.* for money advanced and goods sold and delivered, and stating that, in consideration thereof, he granted, bargained, sold, and assigned unto the plaintiffs all the household goods, furniture, &c., in and about the premises called the Peacock Tavern, to hold to the proper use and behoof of the plaintiffs for ever, subject to the condition thereafter contained: proviso, that if Priest should pay the said sum of 100*l.* with lawful interest thereon by instalments, that is to say, 25*l.* on the 7th of June then next, 25*l.* on the 7th of May next, and 50*l.*, the residue thereof, on the 7th of November 1829, the deed should be void; but in default of payment of all or any of the said sums at the times appointed, then it should be lawful, although no advantage should have been taken of any previous default, for the plaintiffs forthwith to enter upon the premises, and take possession of the goods, furniture, &c., and absolutely sell and dispose of the same. There was a power reserved to the plaintiffs, during the continuance of the deed, to enter upon the premises and take an inventory; and also *at any time after default as aforesaid to take and retain possession of the goods until they should deem it expedient to sell. [*500 Then followed a proviso, "that until default should be made in payment of all or any of the said sums, it should be lawful for Priest to retain and keep quiet possession of all and singular the said household goods," &c.

Before Priest commenced dealing with the plaintiffs, he had married the widow of one Higman, who formerly kept the Peacock Tavern, and who, at the time of his death, was indebted to Combe, Delafield, and Co. in the sum of 1100*l.* His widow being executrix of his will, on her marriage with Priest they both became possessed of Higman's effects; and Priest, by way of security for the said 1100*l.*, executed a warrant of attorney to Combe, Delafield, and Co., for that amount in November 1823. On the 1st of November 1828, Messrs. Combe, Delafield, and Co., caused judgment to be entered up on the warrant of attorney, and sued out a writ of *fi. fa.* directed to the defendants Booth and Copeland, then sheriff of Middlesex, who thereupon issued their warrant to Wilson, the other defendant, their officer, and he seized and took in execution the goods in question, being the furniture and effects in the Peacock Tavern. While the sheriff remained in possession, the plaintiffs came upon the premises, gave the defendants notice of the bill of sale, and required them to relinquish possession, which was refused, and the sheriff sold the goods. This case was now argued by

Archbold, for the plaintiffs. This is not a question between two creditors, but between a creditor of Priest and a party who was owner of the goods which once *belonged to Priest. It appears that a debt being due to Combe and Co., before November 1823, from the former husband of Priest's [*501 wife, Priest, in November 1823, gave them a warrant of attorney, upon which they did nothing until November 1828, after the plaintiffs had advanced money on the goods. If they had entered up judgment on the warrant of attorney, the plaintiffs would not have advanced that money. The property of the goods was vested in the plaintiffs absolutely, the moment the bill of sale was executed, subject to a right of redemption by Priest. But for the bankrupt act of 21 Jac. 1, c. 19, which vested in the commissioners any goods of which the bankrupt was reputed owner, in case even of the bankruptcy of Priest, his assignees could not have taken the goods. They would have had no right, but such as the bankrupt would have had, viz. to a kind of equity of redemption; and it is the same here, the bill of sale having been given for a debt contracted at the time. If the possession of the goods had induced Combe and Co., to give credit to Priest, it might have been said that it operated as a fraud on them, but their debt had accrued five years before the bill of sale. *Edwards v. Harben*, 2 T. R. 587, will be relied upon by the defendants, but there the bill of sale was given as a security for an old debt; and the case is of questionable authority. Buller, J., there distinguishes between bills of sale which are to take place

immediately, and those which are conditioned to take place at some future time; in which latter case, "the possession continuing in the vendor till that future time, is consistent with the deed, and comes within the rule as *accompanying and following the deed." Here it is to be observed, that Priest's continuing in possession was perfectly consistent with the terms of the bill of sale. [PARKE, J. The question is, whether the deed is absolutely void, because there was no possession of the goods; or, whether the want of possession is only evidence of fraud to go to the jury.] Want of possession is evidence of, but does not of itself conclusively show fraud; *Steward v. Lombe*, 1 Brod. & B. 511, 512. In *Twyne's case*, 3 Rep. 80, the donor's continuance in possession, and using the goods as his own, are said to be the *signs and marks of fraud*. In *Eastwood v. Brown*, R. & M. 312, Lord Tenterden was of opinion that continued possession was not in itself conclusive of fraud; and in *Kidd v. Rawlinson*, 2 Bos. & Pul. 59, though possession did not accompany and follow the deed, Lord Eldon did not treat the deed as absolutely void, but left it to the jury to judge, from all the circumstances taken together, whether fraud could be properly imputed to the plaintiff or not; and he there observed, that if Kidd had lent money to A. to buy goods, and had then taken a conveyance of the goods as a security for his debt thus arising out of the mere act of lending the money, leaving A. in possession of the goods, that would not have been a fraudulent act; in support of which he cited Bull. N. P. 258. So here, the plaintiffs advanced money to Priest, and took the bill of sale as a security, leaving him in possession of the goods. (a)

*503] **Comyn, contrâ*. It is not necessary to contend that every bill of sale is void, where the vendor continues in possession; but this was void under the particular circumstances. This is a question, between a creditor under a bill of sale and a creditor under an execution, whether the latter is to be defeated of the fruit of a judgment by a secret bill of sale, unaccompanied by possession. It was given partly to secure a previous debt, and partly a future advance of money. The possession was not consistent with the deed, for the vendor continued in possession after default was made in payment of the first instalment. At common law, where personal chattels are assigned, delivery is essential to the validity of the deed. There must be *something equivalent to a livery of seisin in case of land. Movable chattels, being capable of specific delivery, and being ordinarily used and enjoyed by being possessed, possession is generally looked to as the criterion of ownership. The judgment of Buller, J., in *Edwards v. Harben*, 2 T. R. 587, has never

(a) The test of fraud given by Buller, J., in *Edwards v. Harben*, 2 T. R. 587., viz., whether or not the continued possession of the vendor be consistent with the conveyance, is also laid down in *Stone v. Grubham*, 2 Bulst. 225. The expressions in both cases are very general, but it is not said in either, that such a test is conclusive under all circumstances whatever; nor did either case require such a decision. In *Edwards v. Harben* an absolute bill of sale had been given, but the vendor was left in possession by a verbal agreement, which was relied upon as disproving fraud; and to the question raised, whether or not such a possession was maintainable, the answer was, that *possession must accompany and follow the deed*, otherwise it is fraudulent. See the judgment of Buller, J., in *Haselinton v. Gill*, 3 T. R. 620, note (a). In *Lady Arundel v. Phipps and Taunton*, 10 Ves. jun. 146, Lord Eldon, referring to his decision in *Kidd v. Rawlinson* (cited above in the argument), says, "The mere circumstance of possession of chattels, however familiar it may be to say that it proves fraud, amounts to no more than that it is *prima facie* evidence of property in the man possessing, until a title, not fraudulent, is shown, under which the possession has followed. Every case, from *Twyne's case*, 3 Rep. 80, downwards, supports that: and there was no occasion otherwise for the statute of the 21 Jac. 1; c. 19, s. 11." See also *Dewey v. Bayntun*, 6 East, 257. In *Latimer v. Batson*, 4 B. & C. 654, Lord Tenterden said that "possession is to be much regarded; but that is with a view to ascertain the good or bad faith of the transaction;" and although there had been an absolute sale, and continued possession afterwards by the original owner, it was held that the whole matter had been properly left to the jury as a question of good or bad faith. It was agreed by the Court in *Stone v. Grubham*, that secrecy is a great badge of fraud, but no concluding proof.

been overruled, and is supported by the ruling of Lord Ellenborough, in *Worrell v. Smith*, 1 Camp. 332. Besides, here there is no schedule to the deed, but only a general description of the household goods. Where property is conveyed by such deed, especially if there is no delivery, it ought to be shown that the goods, or some of them at least, are the same (see *Jarman v. Woolloton*, 3 T. R. 618.) [PARKE, J. Here it is found that the goods are the same.] The transaction is against the policy of the law. [PATTESON, J. Your argument would apply equally whether possession was consistent with the terms of the deed or not.]

LORD TENTERDEN, C. J. I am of opinion that the deed of sale was not absolutely void. Much has been said as to the secrecy attending that transfer, but the observation applies with equal force to the warrant of attorney, which was unknown to the plaintiffs, and which Combe and Co. forbore to act upon for so long a time. The consideration for the bill of sale was not only an antecedent debt, but a sum of money to be advanced by the plaintiffs to enable Priest to carry on his trade. The omission of the plaintiffs to take possession of the goods was perfectly consistent with the deed; for it was stipulated that Priest should continue in possession until default made in payment of all or any of the instalments, *and that on such default it should be lawful, although no advantage should have been taken of any previous default, [*505 for the plaintiffs to enter and take possession of the household goods and furniture. The possession by Priest, therefore, being consistent with the deed, and it having been given in consideration of money advanced to enable Priest to carry on his trade, I cannot say that it was absolutely void.

LITTTLEDALE, J. I am of the same opinion. The cases show that continuance in possession of goods and chattels by a vendor, after the execution of a bill of sale, is a badge and evidence of fraud; but I think that, under the circumstances of this case, a jury would have negatived fraud. In *Jezeph v. Ingram*, 1 B. Moore, 189, Dallas, J., denies that *Edwards v. Harben*, 2 T. R. 587, lays down a general rule, that in transferring chattels, the possession must accompany and follow the deed. There was in *Jezeph v. Ingram*, a mixed possession; for the vendee superintended the management of the farm, and was occasionally present. That case, however, shows the opinion of the Court of Common Pleas to have been, that a change of possession is not in all instances necessary.

PARKE, J. I am of the same opinion. I think that the want of delivery of possession does not make a deed of sale of chattels absolutely void. The dictum of Buller, J., in *Edwards v. Harben*, 2 T. R. 587, has not been generally considered, in subsequent cases, to have that import. The want of delivery is only evidence that the transfer was colourable. In *Benton v. Thornhill*, 2 Marshall, 427, it *was said in argument, that want of possession was not only evidence of fraud, but constituted it; but Gibbs, C. J., dissented; and [*506 although the vendor there, after executing a bill of sale, was allowed to remain in possession, Gibbs, C. J., at the trial, left it to the jury to say, whether, under all the circumstances, the bill of sale were fraudulent or not. It is laid down in *Sheppard's Touchstone*, 224 (7th ed.), "that a bargain and sale may be made of goods and chattels, without any delivery of any part of the things sold;" and, afterwards, in page 227, it is said, "that the word *gift* is often applied to movable things, as trees, cattle, household stuff, &c., the property whereof may be altered as well by gift and delivery as by sale and grant, and this is, or may be, either by word or writing;" and in a note to this passage by the editor, it is said, "that, by the civil law, a gift of goods is not good without delivery, yet in our law it is otherwise, when there is a deed: also in a *donatio mortis causa*, there must be a delivery." Then it is evident that the bill of sale, in this case, without delivery, conveyed the property in the household goods and chattels to the plaintiffs. It may be a question for a jury, whether, under the circumstances, a bill of sale of goods and chattels be fraudulent or not; and if there were any grounds for thinking that a jury would find fraud here, we

might, this being a special case, infer it; but there is no ground whatever for saying that this bill of sale was fraudulent. It was given for a good consideration, for money advanced to Priest, to enable him to carry on his trade, and his continuance in possession was in terms provided for.

*507] *PATTERSON, J. There is no sufficient authority for saying that the want of delivery of possession absolutely makes void a bill of sale of goods and chattels. It was held in *Martin v. Podger*, 2 Sir W. Bl. 701, that want of possession was a badge of fraud which ought to be left to the jury. Then, if it be a badge of fraud only, in order to ascertain whether a deed be fraudulent or not, all the circumstances must be taken into consideration. Here the possession was consistent with the deed, for the reason already given. The continuance of possession by the vendor is provided for by the deed, and the purchaser was not bound to enter for the first or the subsequent defaults in paying the instalments. That being so, the possession does not show fraud. The judgment of the Court must be for the plaintiffs. Judgment for the plaintiffs.

GOWAN v. ANTHONY FORSTER. May 4.

A. and B. being joint owners of a ship, and indebted to C. for repairs, B. gave two bills to C., which were dishonoured, and afterwards sold his interest, and became bankrupt. A. proved under B.'s commission for 3000*l.*, and in 1822 drew on his assignee a bill of exchange payable to C., which the assignee accepted, and which A. then delivered to C. on account of the sum due to him for the repairs and on the bills. It was agreed that payment of this latter bill should not be demanded of the acceptor until he should have funds on account of dividends of B.'s estate. The bill was paid in March, 1827. In 1830, C. brought an action against A. for the sum remaining due on account of repairs, and A. pleaded the statute of limitations:

Held, that the drawing of the bill (supposing it to be evidence of a fresh promise on the original demand), was only evidence of a promise at the time when it was drawn, and not when it was paid, and, therefore, did not take the case out of the statute.

ASSUMPSIT for repairs done by the plaintiff, in the year 1818, to the ship *Lively*. Pleas,—first, the general issue; secondly, the statute of limitations; *508] thirdly, set-off. A verdict having been found for the plaintiff, *with 1000*l.* damages, subject to the award of an arbitrator, who was to raise upon his award, for the opinion of the Court, any point of law which either of the parties might desire, he directed the verdict to be vacated, and that it should be entered for the plaintiff on the first and third issues, and on the second issue for the defendant, subject to the opinion of the Court on the following facts:

The defendant and George Forster, his brother, were joint owners of the ship *Lively*, during the time that the repairs were done by the plaintiff, and so continued till the sale by George of his interest in March, 1819. The plaintiff, in the progress of the repairs, received payment from time to time by bills drawn by him upon and accepted by George Forster, with the privity of the defendant, and paid at maturity out of the funds of George Forster and the defendant as partner in the vessel. The plaintiff in 1818 and 1819, drew two bills on George Forster for 250*l.* and 200*l.* at three months each, on account of repairs done to the vessel during the joint ownership; which bills were accepted. The plaintiff discounted both bills at the Berwick bank, and had eventually to take them up, as George Forster was unable to meet them when due, and was declared bankrupt in July, 1819. The defendant's name did not appear on the bills, and no notice of dishonour was given to him. The defendant proved on George's estate for upwards of 3000*l.*, and the holders of the two dishonoured bills also proved in respect of them.

In February, 1822, the above bills remaining dishonoured, the defendant drew a bill at two months for 200*l.* on Wilson, the assignee of George Forster, *509] payable to the order of the plaintiff, and delivered the bill to the plaintiff, on account of the sums due to him for the repairs of the vessel, and

on the dishonoured bills. Wilson, the assignee, accepted the bill, but at the time of acceptance it was agreed between the parties to the bill, and there was a written minute of the agreement, that payment should not be demanded of the acceptor until he should have funds in hand, on account of dividends due to the defendant, sufficient to meet the acceptance; and there being sufficient funds for this purpose on the 31st of March, 1827, Wilson then paid the plaintiff the sum due on the bill without interest. This action was brought in Trinity term, 1830, to recover the sum alleged to be due to the plaintiff on account of the repairs of the Lively, after giving the defendant credit for payments on account before the bankruptcy of George Forster, for dividends received from his estate on account of the two dishonoured bills (which dividends were paid to the holders of the bills in 1827), and for the 200*l.* paid by Mr. Wilson on the bill drawn by the defendant. If the Court should be of opinion that the plea of the statute of limitations was avoided, the arbitrator directed that the verdict should be likewise entered for the plaintiff on the second issue, and that the damages should be reduced from 1,000*l.* to 345*l.* 15*s.* 6*d.*, the amount agreed to be due in that case from the defendant to the plaintiff in respect of the plaintiff's demand in this action, after giving credit to the defendant for the amount of his set-off; otherwise the plaintiff to pay 14*s.* 9*d.* to the defendant. A rule nisi having been obtained to set aside the award, the Court directed the case to be set down in the special paper.

**Cresswell* now showed cause. This action was brought eleven or twelve years after the debt was contracted, and as there was not any written promise within six years to pay the debt, the plaintiff cannot succeed unless he shows a part payment within that time. The only payment was by the bill of exchange in 1822; for the payment must be considered as made when that bill was given, and if so, it does not assist the plaintiff. But even admitting that the payment is to be considered as made in 1827, when the bill was actually paid, it merely proves that the bill was due at that time, but not that anything was due on account of the original cause of action. A payment to take the case out of the statute must be made on account of the debt sought to be recovered, otherwise it does not get rid of the presumption, that the debt may have been paid, and the vouchers lost. Where a sum of money is paid into court on general counts, that does not operate as an admission that anything beyond that sum is due, *Long v. Greville*, 3 B. & C. 10. So here the mere payment of the bill cannot be an admission that anything else was due. It is observable that in all the instances in the books where a part payment has been held to take a case out of the statute, the original debt was founded on a written instrument, so that there could be no doubt as to the demand which was recognised by such payment. The necessity of making out that the payment is made on account of some specific demand, is illustrated by two very recent cases. In *Dickinson v. Hatfield*, 2 M. & M. 141, which was an action against the acceptor of a bill of exchange, a promise in writing to pay the balance due, was held sufficient under the statute 9 G. 4, c. 14, to take a case out of the statute of limitations, although the writing did not express the amount of the balance; but the whole evidence being proof of the writing, and of the original cause of action, the plaintiff recovered nominal damages only. And in *Kennett v. Milbank*, 8 Bingh. 38, the plaintiff produced a composition deed, by which, after reciting that the defendant was indebted to the plaintiff and others, the defendant assigned his property to the plaintiff in trust to pay all such creditors as should sign the schedule of debts annexed, provided that if all did not sign, the deed should be void, and the plaintiff never signed, nor was the amount of his debt stated; it was held that the recital in the deed was not a sufficient acknowledgment to take the plaintiff's debt out of the statute of limitations, although it was admitted orally that he had but one debt. [PARKE, J. The reason why a part payment takes a case out of the statute is, that it is evidence of a fresh promise. Here the promise must be considered as having been made when the bill was given, and not when it was paid.]

Archbold, contra. When the bill was paid, it was payment by the agent of the defendant on account of the original demand for which the bill was given and this action brought. It is the same as if the defendant himself had paid it. Then the arbitrator has found, that the defendant and George Forster were partners in the ship; and it was agreed that the bill of 1822 should be paid as soon as Wilson had funds. This, therefore, is the same as if the defendant *512] had given an order to the assignee, as his agent, to pay as soon as *he had funds, which he had on the 31st of March, 1827. If the defendant had paid it himself, it would clearly have taken the case out of the statute, and it makes no difference that the payment was by an agent. He authorized the agent to make a new promise for him in 1827. An authority given to an agent to pay on a particular day, implies a promise by the principal on that day. An actual promise is never supposed in such a case. The late statute was not intended to lessen the effect of any payment by an agent, and payment by an agent has been held sufficient. In *Jackson v. Fairbank*, 2 H. Bl. 340, one of two makers of a joint and several promissory note became bankrupt, and the payee received several dividends under the commission on account of the note, and an action having been brought (within six years after the receipt of the last dividend), against the other maker for the remainder of the money due on the note, it was adjudged that the payment of the dividends was such an acknowledgment of the debt as took the case out of the statute. That case proceeds on the principle, that a part payment, by one of the makers of a joint promissory note, operates as an admission by all the joint promisors that the note was unsatisfied, and, therefore, as a promise by all to pay the residue. That case was not overruled in *Brandram v. Wharton*, 1 B. & A. 463, and is supported by *Burleigh v. Stott*, 8 B. & C. 36.

Lord TENTERDEN, C. J. Suppose the drawing of the bill, taken by itself, to be evidence of an acknowledgment of a debt due on account of the original *513] demand for which the bill was given and the action brought, *which may be very questionable; still, under the circumstances of this case, the drawing of the bill was equivalent to transferring to the plaintiff the right to receive such a portion of the dividends as the defendant might be entitled to out of his brother's estate: such a transfer would take effect immediately, and must be evidence of a promise at the time when the bill was given, and not at a subsequent one.

LITTLEDALE, J. The promise is to be implied at the time when the bill was given. The bill might be an authority to the agent to pay at another time, but no promise by the principal at such time. I think, therefore, that the case is not taken out of the statute.

PARKE, J., concurred.

PATTESON, J. I am of the same opinion, and I think the giving of the bill was not evidence to support the original demand. Rule discharged.

*514]

PITTEGREW *v.* PRINGLE. May 4.

Plaintiff effected an insurance on freight, &c., by a ship, subject to certain regulations, which provided that vessels should *not sail from ports in Ireland after the 1st of September*; and that the time of clearing at the custom-house should be deemed the time of sailing, *provided the ship were then ready for sea*. The plaintiff's ship being in the port of Sligo, dropped down the river before the 1st of September, in readiness for sea, except that she had not her full quantity of ballast, there being a bar at the mouth of the river, which the ship could not have crossed with that quantity on board. Boats were in waiting on the outside, on the 1st of September, to ship the remainder of the ballast, and the vessel crossed the bar on that day, but stuck in doing so, and the master, to ascertain what damage she had received, put into an adjacent port without taking the rest of his ballast, which was not done till the 4th, and the vessel proceeded upon her voyage on the 8th:

Held, that the ship's dropping down the river, and crossing the bar, without her full ballast, was not a *sailing*; and that until the ballast was completed she was not *ready for sea* within the rule referred to by the policy.

ASSUMPSIT on a policy of insurance. The plaintiff claimed as on a total loss of freight and outfit. Plea, the general issue. At the trial before Littledale, J., at the Spring assizes for Newcastle-upon-Tyne, 1831, a verdict was found for the plaintiff, subject to the opinion of this court upon the following case :

The plaintiff was the owner of the ship *Perseverance*. The defendant was member of an association called the Hope Cargo and Freight Association at North Shields, and in consideration of a certain premium, had subscribed the policy on which this action was brought, on cargo or freight from the 20th of February, 1828, at noon, to the 20th of February, 1829, at noon, subject to the regulation, amongst others, "that the rules and regulations as to the periods of sailing and limits of navigation, which govern the principal insurances of North Shields, do also govern this association." There were six other insurance associations in North Shields, governed by printed rules, to which either party was at liberty to refer in arguing this case. By the warranties and rules of the General Premium Association (one of the above societies), which were referred to in the course of argument, it was provided (in rule 6), that vessels should not sail for certain parts of British North America, from *ports [515 on the west coast of Great Britain, ports in the British Channel, or Ireland, or ports in Europe westward of the Downs, *after the 1st of September*. And in rule 9, of the same association, it was provided as follows: "The time of clearing at the custom-house to be deemed the time of sailing, *provided the ship is then ready for sea*; but ships allowed to proceed to any port for the purpose of clearing outward, provided such port and time of sailing be within the limits of the warranties."

On the 29th of August, 1828, the plaintiff's vessel was lying in the Ballyshannon River, on the west coast of Ireland, under charter to proceed to Miramichi (a place within the restriction of rule 6), to take a cargo there on freight. On that day the vessel was cleared at the custom-house of the port of Sligo, within the limits of which port the vessel was lying, and had then on board a crew of eight men (the ship's complement being as after stated), and stores and provisions for the voyage, together with from ten to fifteen tons of ballast. On the 30th of August the vessel dropped down the river, and brought up within the harbour at a mile's distance from the bar of the river. On the 31st she remained at her moorings, the wind being foul; and on the morning of the 1st of September the wind changing, she took a pilot and dropped down, but struck twice in crossing the bar, between eight and nine o'clock. To ascertain what damage the ship had received, the master crossed Donegal Bay to the port of Kellybegs, a distance of seven miles, at which port the vessel brought up between one and two P.M. The water on the bar of Ballyshannon is so shallow that a vessel of the burthen of the plaintiff's could not safely attempt to cross with *more than from ten to fifteen tons of ballast shipped, which was [516 the quantity the plaintiff's vessel had at this time; but she required fifty tons in all to enable her to cross the Atlantic with safety. Before the 1st of September boats had been engaged to complete the ballasting of the ship; they were in attendance on the morning of the 1st, and if the vessel had not struck in going over the bar, they were to have crossed it and shipped the ballast outside; in which case the ballasting might have been completed that afternoon, and the vessel might have proceeded to sea before dark.

The ship, on arriving at Kellybegs, was found not to be injured, and the ballasting was completed there. It was finished on the 4th of September, but the vessel was then detained by accidental circumstances till the 8th, when she sailed on her voyage. In the course of that voyage she was totally lost by perils of the sea. The ship's proper complement of men was nine; she left the Ballyshannon River with only eight, the ninth, a carpenter, who had been

hired, not appearing when the ship sailed. Another carpenter was hired at Kellybegs, and sailed with the ship. Others of the crew who had already been on board the vessel, signed their articles during her stay at Kellybegs. The case then set out some facts which were intended to raise the question, whether the ship was seaworthy in respect of her crew when she left the Ballyshannon River, but it is unnecessary to state them, as the Court held that this was a question on which the opinion of the jury should have been taken, and that it did not appear on the case in a form in which the Court could decide upon it.

*517] There was also a question as to the plaintiff's right *to recover for outfit, upon which no decision was given. The case was argued on this and a former day of the term.

Ingham, for the plaintiff. The conditions of the policy had been fulfilled at the time of the loss, and the plaintiff is entitled to recover. Construing the policy according to the rules of the General Premium Association, the vessel had sailed as early as the 29th of August, for, by the ninth of those rules, the time of clearing out, if the ship be then ready for sea, is to be deemed the time of sailing. At all events she actually did sail on the 1st of September, having then everything requisite for the voyage, and there being no intention but that of proceeding on it immediately, and going direct to the place of destination. In *Moir v. The Royal Exchange Assurance Company*, 3 M. & S. 461, 6 Taunt. 241, a ship insured at and from Memel, warranted to *depart* on or before the 15th of September, cleared out and broke ground, and was under weigh on the 9th; but the wind changing, she was obliged to anchor within the mouth of the harbour till after the 15th. A distinction was there taken by the Courts both of King's Bench and Common Pleas between the words to "depart" and to "sail," and it was held in both Courts that if the warranty had been merely to *sail*, it would have been sufficiently complied with. In *Bond v. Nutt*, Cowp. 607, Lord Mansfield said, "This also is clear; if the ship had broken ground, and been fairly under sail upon her voyage for England on the 1st of August" (when she was warranted to have sailed), "though she had gone ever *518] so little a way, and had afterwards put *back from the stress of weather, or apprehension from an enemy in sight, or had then been put under an embargo and been detained till September, it would still have been a beginning to sail, and the stoppage would have come too late." Here there had evidently been a beginning to sail. It is true, the ship had to take in ballast after she passed the bar; but it was only necessary, when she sailed from the river, that she should have everything on board that was requisite for the inception of the voyage. If she had had more ballast she could not have passed the bar. This is not like *Forshaw v. Chabert*, 3 B. & B. 158, where the ship, after her first sailing, had to call at a place out of the regular course of the voyage in order to make up her crew. Here the voyage might be said to divide itself into two parts, one of them being that within the bar, which must have been performed with the lesser quantity of ballast. Taking in the remainder on the outside of the bar, was like the ordinary case of a vessel from the port of London receiving part of her water or provisions at the Downs. The clause stating what shall be deemed the time of sailing, is framed for the purpose of indulgence, and must be taken to mean that something short of *sailing* in the strictest sense, shall save the warranty. The construction should be liberal, and beneficial to the assured.

Archbold, contra. The ship did not sail on the 1st of September, according to the rules referred to by this policy. There could not be a sailing, in that sense, unless she had been perfectly fitted out in every particular that renders *519] a vessel seaworthy. According to *the ninth rule of the General Premium Association, which is that selected on the other side, the time of clearing out is to be considered the time of sailing, only "provided the ship is then ready for sea." This vessel was not ready for sea on the 1st of September, for she had not her whole ballast. In *Ridsdale v. Newnham*, 3 M. &

S. 456, freight and goods were insured by a ship at and from Portneuf to London, warranted to sail on or before the 28th of October. She dropped down the St. Lawrence from Portneuf before the 28th, with a crew sufficient for the river navigation, but not for the sea voyage, and completed her crew at Quebec, which place she left after the 28th; and this was held not to have been a sailing from Portneuf according to the warranty. Lord Ellenborough said there, that "warranted to sail" must mean to sail on her voyage; "that is, when the ship could get her clearances, and sail equipped for the voyage." Here the vessel was not equipped for her voyage when she left the bar. Her going to Kellybegs was only preparatory to her going to sea. The articles of some of the crew were not signed till she put into that place. In *Lang v. Anderdon*, 3 B. & C. 495, a vessel warranted to sail from Demerara on or before the 1st of August, had cleared out and gone from the Demerara River on that day, but anchored within side of a shoal lying just beyond the mouth of the river, till the 3d, and it was proved, that larger vessels used to complete their cargoes on the outside of the shoal: the question was whether this vessel had "sailed from Demerara," according to the warranty, when she came to anchor; and the Court held, that if she had had to take in a part of her cargo at the outside of the shoal, she could not have been considered as having sailed on the 1st. *Forshaw v. Chabert*, 3 B. & B. 158, is like the pre- [*520 sent case, and is also an authority for the defendant.

Ingham, in reply. In *Ridsdale v. Newnham*, 3 M. & S. 456, the vessel had not obtained her clearance, on the day when she was warranted to sail. In *Lang v. Anderdon*, 3 B. & C. 495, it was said that large vessels, which completed their cargoes on the outside of the shoal, and obtained their clearances there, must for that reason (and on account of the custom) be considered as "sailing from Demerara," when they left the other side of the shoal, where the lading was completed; but a distinction was taken as to smaller vessels, which had their cargoes complete, and their clearances, when they dropped down the river; and this comes nearest to the case of the ship now in question. In *Forshaw v. Chabert*, 3 B. & B. 158, the question raised by the Court, as to the condition of the ship, was whether she was seaworthy at the inception of the voyage. Here the ship was so; she had every requisite on board for the first stage of the voyage, although something was wanted (namely the additional ballast) to continue that seaworthiness afterwards. If the whole loading of ballast was necessary to render her fit for sailing, she never could have left the river in a seaworthy state.

Lord TENTERDEN, C. J. The general principle of the decisions is this; that if a ship quits her moorings and removes though only to a short distance, being perfectly ready to proceed upon her voyage, and is by some subsequent occurrence detained, that is nevertheless a *sailing; but it is otherwise if, [*521 at the time when she quits her moorings and hoists her sails, she is not in a condition for completing her sea voyage. In the present case, by the regulations which have been referred to, the last day for a vessel's sailing from any port in Ireland, was the first of September; and the objection taken on behalf of the defendant, and which prevails with me is, that she was not in a condition to sail during the first, because she had not on that day the proper quantity of ballast to enable her to cross the Atlantic. It is answered that she could not take in her whole ballast before she crossed the bar; but that everything was prepared for loading the remainder afterwards: the vessel stuck on the bar in passing, and the master thought it best to put into another port before he completed his ballast. Now if the ship had taken in her whole ballast on the first of September, I think it might have been said that she sailed that day according to the regulations; but as unfortunately she was not able to load the whole ballast for her voyage on the first, she was not, on that day, in a condition to go on her voyage; and consequently I am of opinion that the plaintiff cannot recover on this policy, and a nonsuit must be entered.

LITTLEDALE, J. To entitle the plaintiff to recover, it should have appeared that the ship broke ground on the first of September, ready to go to sea. She required fifty tons of ballast to cross the Atlantic, and she had not that quantity on board till the fourth of September. It is said that when she broke ground she had as much ballast as she could take within the bar; but this is no excuse; it was the plaintiff's business to put himself in such a situation as to be sure of *522] completing his ballast *in the proper time. Having left it till the last moment he must be liable for the consequence. In *Lang v. Anderdon*, 3 B. & C. 499, the vessel was on her voyage in the regular course for ships of that size, on the day warranted.

PARKE, J. I am of the same opinion, and agree in the rule for the construction of this kind of warranty, which has been laid down by my Lord, and which is also stated by the Court in somewhat different terms but to the same effect, in *Lang v. Anderdon*, 3 B. & C. 499. Now here the vessel certainly had not, according to the language used in that case, "everything ready for the performance of her voyage," on the first of September, nor could it be said when she got under sail, that "nothing remained to be done afterwards:" for she had to take on board what was material for the prosecution of the voyage, a larger portion of ballast, and no distinction can be drawn between the necessity of taking in more ballast, and that of receiving part of the cargo. And if the policy be read, as it must, with reference to the rules, one of which states that the time of clearing at the custom-house is to be deemed the time of sailing, provided "the ship is then ready for sea," the ship in this case was not ready for sea; for she could not be so, from the particular nature of this port, till she had crossed the bar.

PATTESON, J. Putting this case upon the construction of the ninth rule of the General Premium Association (which is taking it in the manner most favourable to the plaintiff), was the vessel ready for sea, when she broke ground *523] to leave the river? The plaintiff was obliged to *contend that she was ready for sea, because she was ready to cross the bar; but to support that construction the word "sea" must be taken to signify merely the outside of the bar.

Nonsuit to be entered.

SCAIFE and Others v. Sir JOHN TOBIN, Knight. May 4.

A consignee (not the owner) of goods, receiving them in pursuance of a bill of lading, whereby the ship owner agrees to deliver them to the consignee, by name, he paying freight, is not liable for general average, although he has had notice, before he received the goods, that they have become subject to that charge. Semble, that he would be so liable if the consignor had, by the bill of lading, made the payment of general average a condition precedent to the delivery of the goods.

THIS was an action by the plaintiffs as surviving owners of the brig *Solon*, against the defendant as consignee at Liverpool of goods shipped on board the *Solon* at Demerara, upon a voyage from that place to Liverpool, for average loss. At the trial before Bayley, J., at the Summer assizes for Cumberland, 1830, the jury found a verdict for the plaintiffs, subject to the opinion of this Court on the following case:—

The brig *Solon* sailed from Demerara on a voyage to Liverpool, on the 6th of January, 1829, having on board goods shipped by one Cramer on his own account, and other goods shipped by J. J. Starkey on his own account, and on the several accounts of two other parties. They were consigned to the defendant by four several bills of lading, each expressing that the goods mentioned in it were to be delivered to the defendant or to his assigns, paying freight for the same with *primage and average accustomed*. The goods were so consigned at the risk of the consignors. The course of dealing between the consignors and the defendant was, that the former, upon making shipments, drew bills

upon the defendant, who sold the consignment *on their account, carried the proceeds of the sale to their credit, and debited them with the amount paid by him upon their bills, charging a commission upon the sales. Accounts of these were rendered from time to time as they occurred, and accounts current were usually rendered half yearly to January and July. The defendant sometimes paid charges for general average upon the goods so consigned, and debited the consignors with the amount. Whilst the Solon was proceeding on her voyage, the masts were cut away in a storm for the preservation of the ship and cargo, and the loss which gave rise to the present claim for average was thereby occasioned. The vessel put into Holyhead on the 25th of February, and remained there till the 28th, and she then sailed for Liverpool, where she arrived on the 3d of March. Whilst she was at Holyhead, the master wrote a letter to the defendant and the other consignees of the goods on board the vessel, informing them of the damage sustained, and requesting instructions. This letter was received by the defendant before the Solon arrived at Liverpool, but no answer was sent. The defendant had also received bills of lading and invoices of the goods consigned to him, on the 25th of February. On the 9th of June he was called upon to pay the average in question. The goods consigned to the defendant were delivered to him after the arrival of the ship, and were sold by him on account of the consignors, and an account of the sale of Mr. Cramer's goods was rendered to him on the 13th of April, 1829, but no accounts of the sale of the goods of the other consignors were rendered to them until after the 9th of June, when the claim for average was made upon the defendant. The Solon was chartered *by Mr. Starkey at Demerara, and the defendant gave no orders for the consignment of the goods to him, nor did he know that any goods were consigned to him by the Solon, till he received the bills of lading and the invoices. [*524]

Campbell, for the plaintiff. The defendant having received the goods with full knowledge that they were subject to a charge of general average, is liable to pay it. General average is a contribution paid by the owners of the different goods for the preservation of which the sacrifice has been made. It must be taken here that the defendant had such a special property in the goods consigned to him as entitled him to pay, and to reimburse himself for, all charges to which they were liable. He was liable to pay freight upon the ground that he received the goods knowing them to be subject to that charge, and that the acceptance of goods, under such circumstances, is evidence of an implied promise to pay the charges. In *Cock v. Taylor*, 13 East, 399, the demanding and taking of goods from the master by a purchaser and assignee of the bill of lading without the freight having been paid, was held to be evidence of a new contract or promise on his part to pay the freight. Now it is perfectly immaterial whether the defendant had notice by the bill of lading or otherwise. In *Abbott on Shipping*, 286, after stating the case of *Cock v. Taylor*, it is laid down "that if a person accepts anything which he knows to be subject to a duty or charge, it is rational to conclude that he means to take the duty or charge upon himself, and the law may very well imply a promise to *perform what he so takes upon himself." Therefore, if the consignee to whom a bill of lading is made out absolutely accepts the goods after notice of a claim of average, the master or owner has a right to presume that the property is in such consignee, and the law will imply that he has made a new contract to satisfy that claim. [PARKE, J. A consignee who receives goods by virtue of a bill of lading, is liable to pay freight, not merely because he has notice that the goods are subject to freight, but because by accepting them he adopts as his contract the stipulation in the bill of lading, whereby the payment of freight by him is made a condition precedent to delivery of the goods by the master. LITLEDAL, J. Upon that principle a consignee has been held liable to demurrage, where that is expressly mentioned in the bill of lading, *Jesson v. Solly*, 4 Taunt. 52. PARKE, J. Is there any case in which the consignee has [*525]

been held liable to pay freight, except on the ground that it was mentioned in the bill of lading? Lord TENTERDEN, C. J. That ground was very much relied upon in *Dougal v. Kemble*, 3 Bingh. 383.] In such cases the bill of lading is notice to the consignee, that the goods are subject to the charge. Here the consignee has notice by other means. [PARKE, J. The bill of lading is more than notice: it implies not merely that the consignee has information that the goods are subject to freight, but a good deal besides, viz., that the consignee who accepts the goods by virtue of the bill of lading, agrees to pay that freight which the shipper made it a condition should be paid before delivery.] Besides the master and owners had a lien on the goods for general average, and *527] were not bound to part with them until their claim in that respect *was satisfied, *Abbott on Shipping*, 361, 362; 1 *Beawes's Lex Mercatoria*, 243, ed. 1813; *Stevens on Average*, 50, 51; 2 *Brown's Law of Admiralty*, 201. Then here, the consignee receiving the goods from the master, with full knowledge that they were subject to the lien, and the master parting with his lien, this is evidence of a new contract between them, that the consignee shall pay the general average; and those circumstances were relied upon by *Le Blanc and Bayley, J.*, in *Cock v. Taylor*, 13 East, 399. There may be a distinction in this respect between demurrage and general average, because there is no lien for demurrage, *Phillips v. Rodie*, 15 East, 547. [LITTLEDALE, J. You admit that the consignee is not liable for general average unless he has notice. Suppose a general average to have accrued by three distinct events, and that he has notice of one, would he be liable for that one only? That would be a very inconvenient rule.] It would be his duty to acquaint himself with the history of the voyage before taking the goods. Besides here the defendant, though not absolute owner, had a special property in the goods, and was owner so far as to be responsible for these charges. He was not a mere agent of the shipper. [PARKE, J. Then the plaintiff was bound to show that the defendant was an owner at the time when the general average accrued; but, in fact, he had not any special property in the goods, until he received notice of the consignment.] He became liable as an owner, when he received the goods with knowledge that a general average had accrued. Again, as a loss by general average is to be calculated between the owner of the ship and the owner of goods according to *528] the law of *the port of discharge; the consignee must be the person to pay it, *Simonds v. White*, 2 B. & C. 805. It would be most inconvenient if the ship-owner were obliged in all cases to have recourse to the consignor; on the other hand, the consignee, if obliged to pay, has the means of reimbursing himself. Besides here an implied promise to pay general average may be inferred from the previous dealings, *Wilson v. Keymer*, 1 M. & S. 157; for it is found that the defendant sometimes paid such a charge upon goods consigned to him.

Follett, contra, was stopped by the court.

Lord TENTERDEN, C. J. There can be no doubt that if a person receives goods in pursuance of a bill of lading, in which it is expressed that the goods are to be delivered to him, he paying freight, he by implication engages to pay freight, and so he would to pay general average, if that were mentioned in the bill of lading. But here general average is not so mentioned. It may, perhaps, be prudent in future to introduce into a bill of lading, an express stipulation that the party receiving the goods shall pay general average; but if we were to hold the defendant liable for it in the present instance, we should be going one step further than we are warranted in doing by any decided case. It is true that the master has a lien on the goods for general average, and if he had exercised that right, and informed the defendant that if he took the goods he must pay the general average, and the defendant after such notice had taken the goods, there would then have been an implied, if not express contract on *529] his part to pay it. It is said, that as the defendant had *notice that the goods were subject to this charge before he received them, he is

therefore liable to pay it. But I think the law will not imply a contract from the mere fact of knowledge that the goods were subject to a charge, unless it were accompanied with notice from the shipowner that he would insist on his right of lien. If there had been any established usage that a consignee should pay general average, that would have been evidence of an agreement on the part of the defendant to pay it in this case; but no such general usage is found. Then as to the course of dealing; it is found that the defendant sometimes paid general average; but that expression is too general to raise by implication a promise to pay in the present instance. Another argument is, that the defendant had funds in his hands, out of which he might have paid this charge; but the facts stated do not satisfactorily lead to that conclusion. We do not know whether he had or had not such funds, without seeing the accounts. A consignee, who is the absolute owner of the goods, is liable to pay general average, because the law throws upon him that liability. There is no other person to pay it. But a mere consignee, who is not the owner, is not liable, unless before he receives them he is informed by the shipowner, or the master, that if he takes them he must pay it. The judgment of the court must be for the defendant.

LITLEDALE, J. There is no doubt that an absolute owner of goods is liable to pay general average. But a mere consignee, who has a special property in the goods, is not so chargeable. He could not even pledge the goods before the late act of parliament. The question of liability here depends entirely on the maritime law. It is said that general average bears an analogy to [*530 freight, and that if goods be delivered to a consignee, he is liable to pay freight. There is no doubt that a consignee, not the owner of goods, who receives them in pursuance of a bill of lading, in which it is expressed that they are to be delivered to him, he paying freight or demurrage, is liable to those charges; but then he is so liable by reason of a special contract implied by law from the fact of his having accepted goods which were to be delivered to him only on condition of his paying freight and demurrage. In *Jesson v. Solly*, 4 Taunt. 52, it was said by the court that the consignee by taking the goods adopted the contract, that is, the contract in the bill of lading, whereby the master agreed with the shipper to deliver the goods to the consignee, he paying demurrage and freight. Here if it had been stated in the bill of lading that the goods were to be delivered to the defendant or his assigns, he or they paying freight and general average, he, by receiving the goods, would have adopted this as his contract, and would be presumed to have contracted to pay to the shipowner those charges, the payment of which was made a condition precedent to the delivery; but, here, general average is not mentioned. The argument that it would be for the convenience of commerce, that a mere consignee, not the owner, should be liable to general average, applies equally to demurrage; but neither the law of England nor the general law of the world makes him so liable. It is said that the defendant is liable because he had notice, before he received the goods, that they were subject to this charge. But the law will not imply a contract to pay general average merely [*531 because the defendant, before he received the goods, knew that they were subject to it. As, then, there was no contract, express or implied, to pay general average, the plaintiff cannot recover.

PARKE, J. To render the defendant liable there must be a contract, either expressed or implied, between him and the plaintiff for payment of general average. Express contract there was none, and the only question is, whether one is to be implied from the facts of this case. It is said there will be no hardship in holding the defendant liable, because he had notice of the loss which gave rise to the general average, before he received the goods. That may be true, but it is not a sufficient ground for implying a contract to pay it. Neither is it a sufficient ground that general convenience may require that a mere consignee should be liable. The ship-owner is not without his remedy

in such a case; for, to prevent the inconvenience of resorting to the consignor, he may insert in the bill of lading an express clause that the goods shall be delivered to the consignee, he paying general average; or he may insist on his right of lien, and refuse to deliver unless the consignee pays or agrees to pay it. Then on what ground is a contract to be implied? The ship-owner's parting with his lien on the goods may be a good consideration for an express promise by the consignee to pay general average, but does not raise any implied contract to pay it, even though the consignee has notice that a general average has been incurred. The cases in which a mere consignee, not the owner of goods, has been held liable to freight or demurrage, proceed on the ground that his acceptance of the goods in pursuance of a bill of lading, whereby the ship-
 *532] per *has expressly made the payment of freight or demurrage a condition precedent to their delivery, is evidence of the contract by the consignee to pay such demand. In *Roberts v. Holt*, 2 Show. 432, the earliest case on the subject, it was held to be a good custom, that if a merchant in Ireland consign goods to a merchant in London and the master sign a bill of lading, the merchant here shall be liable for freight. In such case the merchant here would receive the goods in pursuance of the bill of lading no doubt in the usual form, and would therefore be liable to the freight. I am clearly of opinion, therefore, that the defendant is not liable in this case, by his contract, express or implied, to this general average, which, in the absence of such a contract, is by the general law a charge on the owner of the goods. But, it is then said, the defendant has a special property in these goods, and is therefore liable as owner; the case, however, does not show that he has accepted bills on the security of the bills of lading, and even if he had, he would not have acquired any special property until after the general average accrued, and it was incumbent on the plaintiff to show that he was owner at the time of the loss.

PATTON, J., having been counsel in the cause, gave no opinion.

Judgment for the defendant.

*533] The KING v. The Undertakers of the AIRE and CALDER Navigation. May 5.

(Case of the Hunslet Mills.)

The owners of mills in the township of H., in compensation for the loss of water occasioned to them within the township by an adjoining navigation, were allowed, by act of parliament, to take certain tolls at a lock situate on the line of navigation, but in a different township.

Held, that they were not rateable at their mills in H. in respect of the tolls so taken.

On appeal against a rate for the relief of the poor of the township of Hunslet, in the borough of Leeds, in the county of York, whereby the defendants and one James Atkinson were jointly assessed in the sum of 27*l.* 12*s.* 4*d.*, on a valuation of 110*l.* 9*s.* 6*d.*, the defendants' proportion being 6*l.* 18*s.* 1*d.*, the sessions confirmed the rate subject to the opinion of this Court on the following case:

The rate was on "Fulling mill, scribbling mill, and corn mill, and tolls receivable in respect of them." The appellants are the owners of one-fourth part, and Mr. Atkinson the owner of three-fourths of the mills, which are mentioned in the statute hereinafter recited as the Hunslet Mills, and are situate in the township of Hunslet. At the time of making this rate they were, and still are, untenanted.

By the 14 G. 3, c. 96, s. 77, after citing that; to the end that a full compensation may be made to the several owners, proprietors, and occupiers of the several mills called Nether Mills, Hunslet Mills, &c., now standing and being

upon the river Aire, for all the loss and damage which may be occasioned by making, deepening, or altering any cuts, dams, locks, or other works of navigation, and the passing of boats and vessels by such mills, it is enacted, that it shall be lawful for the owner, farmer, or occupier of every of the said mills respectively for the *time being, to demand and take for his own proper use of the master, owner, or person entrusted with the care of every [*534 boat, barge, &c., passing up or down the said river with any goods on board, for which any tonnage rates or duties shall be payable by virtue hereof, the sum of 1s. as a passage toll for passing the lock or locks next adjoining to the pond or head of water belonging to every such mill, for the loss of water to every such mill or pond respectively, and upon non-payment thereof to take out of the boat or other vessel of the party making such default, a reasonable distress of any of the goods on board, not exceeding 20s. in value, and to sell the same, tendering to the owner, &c., of such boat or vessel, upon demand, the overplus after deducting the said passage toll and the charges of sale.

The appellants and Mr. Atkinson were at the time of making the rate, and still are, in receipt of the passage tolls given in the above section to the owners, farmers or occupiers of the Hunslet Mills. The lock where the tolls have for many years been collected, being the lock next adjoining the pond or head of water belonging to the said mills, is situate in the township of Leeds and has been rated in that township as part of the Aire and Calder navigation, but not in respect of these tolls. In the course of the navigation adjoining to the said pond or head of water, vessels after passing along part of the river which there forms the boundary of the two townships of Hunslet and Leeds, go along a cut or canal called the Knowstrop Cut, which, as well as its towing-path, is wholly in the township of Leeds. The towing-path for the river navigation, as far as it extends, is in the township of Hunslet, but many vessels navigate the river without using the towing-path, and pass on *the Leeds side of the river. [*535 The questions for the opinion of this Court were, first, whether such tolls were rateable; and if so, secondly, whether they were rateable in the township of Hunslet. This case was argued on a former day of the term by

Campbell and Blackburne, in support of the rate. If the tolls are rateable at all, they are so in Hunslet. They are given as a compensation for the loss of water at the mills, which compensation is, by the act of parliament, to be collected at the nearest lock; not indeed within Hunslet township, but that makes no difference. It is their connexion with corporeal property that renders tolls rateable. Here the mills, if they had retained their full flow of water, would have been rateable in Hunslet for their value, derived in part from the entire body of water. Now the quantity of water has been diminished, but the profits, by the statutory compensation, continue the same. It would be hard then if the township were to receive a less rate. It has been long established, that tolls, when connected with property in a parish, are rateable there, *Rex v. Cardington*, Cowp. 581; *Rex v. Sir A. Macdonald*, 12 East, 324; *Rex v. The Oxford Canal Company*, 4 B. & C. 74; and it is immaterial where the tolls are collected, *Rex v. Barnes*, 1 B. & Ad. 113. The question is, not where they are received, but where the cause of the receipt lies. It may be said, this is in its nature a passage toll; but, as regards these mills, it is only a compensation for the water. It is only made a passage toll for the purpose of ascertaining the persons who are to pay that compensation. [PATTESON, J. The mills are untenanted.] It is found that the appellants are in the *receipt of the tolls given to the owners and occupiers; the mills are occupied pro [*536 tanto.

Sir James Scarlett, F. Pollock, Wightman, Dundas, and Heywood, contra. In all the cases which have been cited, the profit arose from something immediately occupied in the parish for which the rate was made. This is fully pointed out in the judgments of Bayley, J., and Littledale, J., in *Rex v. Coke*, 5 B. & C. 804, 812. Here nothing that is occupied in Hunslet acquires any

increased value by the tolls. Suppose the compensation settled, by agreement, or by act of parliament, had been an annuity to the owner of the mills; there is no essential distinction between that case and the present, and there can be no doubt that such annuity might have been severed from the mills; the owner might have kept one and sold the other; or he might have granted the mills to a tenant at a reduced rent, and then it is clear that the occupier would not have been rateable in respect of the compensation. Nor is he so here. It might as well be said, that if damages were recovered, or a stipulated remuneration paid, for interference with an easement (as by darkening an ancient light), a rate might be laid in respect of them; for it makes no difference whether the compensation be fixed or casual, or settled by contract, or by statute, which is in effect a parliamentary agreement. The vessels which pay this toll need not pass through any part of Hunslet township, and the tolls are not paid there. There is no necessary connexion between this compensation and the land from which the easement (the use of a larger body of water) was taken away. An

*537] easement is only the *subject of rate when it causes a greater profit to be yielded by the land with which it is connected; when the profit is no longer yielded by the land, the cause of rating ceases. The effect of this act of parliament has been to transform a part of the profit of these mills into a toll; and it has long been settled that a toll is not rateable per se, but as a profit from land occupied. The appellants here do not even occupy the mills; they are owners merely. But the question is, what the mills are worth to an occupier. And if they were let, still the occupier could not on that account claim the tolls, unless they were specifically granted to him by the owners. That is the effect of the statute, which gives the tolls to the "owner, farmer or occupier of every of the said mills." [PARKE, J. By the word occupier, there, the legislature may probably have referred to some occupier under an interest existing at the time, but have intended that for the future the tolls should vest in the owners.] There is nothing to oblige the owners to keep up these mills. [Lord TENTERDEN, C. J. The passage along the navigation might become so frequent that it would not be worth while to work them at all.] Then if the mills cease working on that account, can it be said that the compensation is to cease also? for, if they are inseparable from each other, that must be the argument. This is a compensation for the taking away of an easement attached to a particular spot. The act did not assume that the subject-matter to which the easement was attached would never cease to exist, or to be possessed by the parties who then had it as occupiers: but it was not intended that the compensation should therefore cease.

Cur. adv. vult.

*538] *Lord TENTERDEN, C. J., now delivered the judgment of the Court. Having stated the facts, his Lordship continued as follows: We are of opinion that this rate cannot be supported. The toll itself is clearly not a subject of rate; and if it were, it does not arise in Hunslet. Then can the owners of these mills be rated in respect of the toll as a compensation paid to them for their loss of water? They might have let the mills, reserving the toll to themselves; and if they had done so, could they have been rated on account of the toll? It appears to us that they cannot, in respect of this compensation, be considered as occupiers of any property in Hunslet, producing a profit there. Suppose that instead of the toll, an annual rent had been given, or a sum in gross from which they derived an income? Could they have been rated in respect of that, as profit arising from their property in Hunslet? The rule for quashing the order of sessions must be made absolute.

Rule absolute.

The KING v. The Inhabitants of PENKRIDGE. May 5.

An order was made on the 21st of May, 1825, for the removal of a pauper to parish A., and suspended on the same day on account of the infirmity of the pauper. That

parish had no notice of the order till the 12th of August, 1826, when it was served. Another order, dated the 24th of January, 1831, directed that the order of removal should be executed, and 80*l.* paid to the removing parish by parish A., and this order was served on, and the pauper removed to, parish A., on the 16th of February, 1831. A. appealed to the then next sessions, and the sessions found that the original order of removal was not served within a reasonable time :
 Held, that it was not, therefore, void, but voidable only by appeal, and that parish A. ought to have appealed to the next practicable sessions after it had notice of the original order.

AN order was made by two justices of the county of Stafford, dated the 21st of May, 1825, for the removal of William Cooper to the parish of *Leamington Priors, in the county of Warwick, the execution of which order [*539 was (by another order of the said two justices endorsed on the order of removal, and made on the same day), suspended on account of the infirmity of the pauper, which rendered him unable to travel. No notice of this suspended order was given to the parish of Leamington Priors until the 12th of August, 1826, when that parish was served with a copy of the order of removal, and the order for suspending the same. Against this order the parish of Leamington Priors did not appeal until the removal of the pauper hereinafter mentioned. By another order made by two justices, dated the 24th of January, 1831, and also endorsed upon the said order of removal, reciting that it appeared to the last-mentioned justices that the said order of removal might be executed without danger, and further stating that it had been duly proved to them on oath, that the expense of 80*l.* 12*s.* 4*d.* had been incurred by the suspension of the order of removal, the two last-mentioned justices directed that order to be forthwith put into execution, and the churchwardens and overseers of the said parish of Leamington Priors to pay to W. S. therein mentioned, on demand, the said sum of 80*l.* 12*s.* 4*d.* This last-mentioned order, and the order of removal, and the order for suspending the same, were served on the parish officers of Leamington Priors on the 16th of February, 1831; the pauper was at the same time delivered to them, and payment was demanded of the above-mentioned sum. The parish of Leamington Priors appealed against the suspended order of removal and the order of the 24th of January, 1831, at the Easter sessions for the county of Stafford, in the year 1831, being the first sessions after the removal of *the pauper and demand of the expenses. Upon the hearing of the appeal, the counsel for the appellants objected that the original order of [*540 removal had not been served within a reasonable time after it had been made. The court of quarter sessions were of that opinion, and quashed both the orders appealed against, subject to the opinion of this Court on the above facts. The case was argued on a former day in this term by

Whately and *Whitcombe* in support of the order of sessions. The suspended order of removal, not having been served for fifteen months after it was made, was null and void; and the appeal, therefore, to the sessions next after the actual removal of the pauper was in good time. In *Rex v. Lampeter*, 3 B. & C. 454, the order had been suspended for three years, and no notice of the original order, or of the order for the suspension of it, had been given during that period. The sessions held the order to be null and void, and this Court affirmed their decision. It is true the pauper there had died before the service of the order, but the decision proceeded on the ground that it was not served within a reasonable time. In the marginal note to *Rex v. Llanwinio*, 4 T. R. 473, it is stated that an order of removal may be executed a year after it is signed, provided the circumstances of the pauper be not altered in the interval. But that is not decided in the case. Lord Kenyon merely said, that the delay in executing the order might have had weight if the pauper's circumstances had altered. It will be said that the 49 G. 3, c. 124, s. 2, requires when any execution of an order of removal shall be suspended, that the time of appealing *shall be computed from the time of serving the order, and not from the [*541 time of making the removal. That must mean the legitimate time of

service, *Rex v. Alnwick*, 5 B. & A. 184. Here it was incumbent on the respondents at the trial of the appeal, for the purpose of supporting the order, to show that it was served in proper time, and that they could not do. It is true the appellants in this case do not show any actual injury sustained by the delay; but the lapse of time was in itself unreasonable, and has been found so by the sessions, who were the proper judges of that question.

Shutt, contrd. The order was not void but voidable by appeal. The order itself was good though the service was irregular. The question of reasonable time is a mixed question of law and fact, and could only be determined by the justices upon appeal. *Rex v. Alnwick*, 5 B. & A. 184, does not apply, because in that case there was no service of the original order of removal. If Leamington Priors had applied to the sessions next after the service, the removing parish might have obtained a fresh order. This is analogous to a case of process, where, if there is an irregularity in the service, the process is not void, though it is a good ground for applying to the Court to set aside the proceedings for irregularity. In *Rex v. Llanwinio*, 4 T. R. 473, an objection was taken that there was an interval of a year between the signing of the order by the justices and the execution of it by the parish officers; but though Lord Kenyon there answered that there might have been some weight in the objection if the circumstances of the pauper had been altered in the *interval, he did not *542] say that in such a case the order would have been absolutely void. [Lord TENTERDEN, C. J. If the service was void for irregularity, the removing parish could not use the order.] In *Rex v. Alnwick*, 5 B. & A. 184, if the order had been actually void by reason of the irregularity in the service, the appeal ought not to have been permitted to proceed. Here the circumstances of the parties have not been altered between the time of making and serving the order.

Cur. adv. vult.

Lord TENTERDEN, C. J., now delivered the judgment of the Court. This was a suspended order, of which no notice was given to the parish of Leamington Priors till fifteen months after it was made, the pauper having been, during that period, in such a state that it was improper to remove him. The order of January, 1831, in fact only took off the suspension. The suspended order was by two justices, who were to inquire and adjudicate as to the propriety of removing the pauper. The other order was by justices who were only to direct the execution of the first order, and the payment of the charges attending it. The removal, therefore, was under the first order, and there was an appeal against it, on the ground that, as it was not served for so long a period after it was made, it was a mere nullity; and it was argued that this being so, the appeal to the sessions next after the actual removal of the pauper was in good time. If the first order had, by reason of the death of the pauper, become inoperative, it would have become a nullity of course; but the objection here *543] taken was, that it was not served *within a reasonable time: the sessions have so found, and of that they are the proper judges. It is, however, a question for us, whether the order was, for that reason, absolutely null and void, or voidable only. In our opinion it was voidable only, and ought to have been avoided by appeal to the next practicable sessions after it was served. By the omission to appeal to that sessions, the parish to which the removal was to be made lost its opportunity of making that objection to the order. In *Rex v. Lampeter*, 3 B. & C. 454, the appeal was to the sessions next after the service of the order. Besides, that was a case where the order was not served till after the death of the pauper, and it had therefore become a nullity, as there could be no removal. Here, the pauper was living at the time when the order was served, and there might, therefore, have been an appeal to the then next sessions.

Rule absolute for quashing the order of sessions.

The KING v. The Inhabitants of NACTON. May 5.

A., a certificated man, was hired by a farmer residing in parish B., as his shepherd, to go into his service at Midsummer. It was agreed between them, that A. should have a cottage in B. rent free, and the going of 105 sheep with his master's flock. The term "going" in the county where the contract was made, meant that the sheep should be pasture-fed, and the feeding on pasture in B. was worth 10*l.* per annum. At the same Midsummer A. hired C. to serve him for a year as shepherd's page, and he did so serve in parish B. till the following Midsummer: Held, upon a special case stating these facts as found by the sessions, first, that it was to be inferred from the case, that the feeding of the cattle was to be in parish B., and, therefore, that there was a taking of a tenement of 10*l.* per annum in that parish by A. Secondly, that C. gained a settlement by hiring and service with A., because the latter never resided in parish B. by virtue of the certificate; for having come there to settle on a tenement of 10*l.* per annum, he was irremovable as soon as he came into the parish, although he could not gain any settlement there until he had resided forty days.

UPON appeal against an order of two justices for the removal of Mary Gibson, widow, and her children from the parish of Nacton, Suffolk, to the *parish of Croxton, Norfolk, the sessions quashed the order, subject to the [*544 opinion of this Court on the following case:—

The paupers were removed to the parish of Croxton, as the last place of legal settlement of John Gibson, the deceased husband of the said Mary. The settlement of the deceased was in Croxton till Midsummer, 1804: he then went under a yearly hiring into the service of R. Stubbings, at Barnham, as shepherd's page, where he lived one whole year. Stubbings had been hired by J. Chambers, a farmer at Barnham, as his shepherd, to go into his service at that same Midsummer, and brought with him to Barnham a certificate, dated 1st of June, 1804, acknowledging him, his wife and children, to belong to St. Peter, Thetford, without which certificate Chambers would not hire him. Stubbings's agreement with Chambers was, that he should have a cottage in Barnham, to live in rent free, the going of 105 sheep with his master's flock, ten coombs of barley, ten coombs of rye, and firing, in lieu of wages. The occupation of the cottage was necessary for the due performance of the shepherd's service, and out of his allowance he had to lodge and maintain his pages. The appellants contended that this "going" was a tenement sufficient to determine the certificate. The sessions found that the term "going" meant, in the county where the contract was made, that the sheep should be pasture-fed, but that in bad weather the sheep were to be fed on turnips or hay with the master's; and that the actual feeding of the sheep in pasture in Barnham was worth more than 10*l.* a year. The question for the opinion of this Court was stated as follows, Whether there was a sufficient coming to settle by Stubbings *on a tenement of 10*l.* [*545 a year, and if the living in the cottage, and the going of the sheep, constituted a sufficient tenement? If the Court hold in the affirmative, the decision of the sessions is right, but otherwise the paupers were properly removed to the parish of Croxton. This case was argued on a former day by

Biggs Andrews in support of the order of sessions. The going of 105 sheep with the master's flock is found to mean that the sheep should be pasture-fed; there was, therefore, an express contract between Chambers and Stubbings that they should be so fed; and the feeding on pasture being the value of 10*l.*, Stubbings gained a settlement by coming to settle on a tenement of the value of 10*l.* a year, *Rex v. Benneworth*, 2 B. & C. 775. *Rex v. Thornham*, 6 B. & C. 733, is not applicable, because the sessions there did not find what was the meaning of the term "going."

Prendergast and Austin, contra. First, there was no coming to settle on a tenement by Stubbings in Barnham. If the sessions were justified in finding that the term "going" implied that the sheep were to be pasture-fed (which might be questioned, according to *Rex v. Bardwell*, 2 B. & C. 161, and *Rex v. Thornham*, 6 B. & C. 733), still the going of 105 sheep was to be with

his master's flock; they were to be fed wherever the master chose to feed his own flock, and that might be out of the parish. Now a tenement must be in some certain place, Co. Litt. 20 a. Lord Ellenborough in *Rex v. Minster*, 3 M. & S. 278. [PATTESON, J. In *Rex v. Darley Abbey*, 14 East, 281, it was noticed in argument that no particular land was assigned for the feeding of the *cattle.] The occupation of the cottage as servant and not as tenant, *546] will not give a settlement, *Rex v. Seacroft*, 2 M. & S. 472, *Rex v. Cheshunt*, 1 B. & A. 473. But, secondly, the husband of the pauper did not gain a settlement in Barnham by serving Stubbings while he resided there by virtue of the certificate. The statute 9 & 10 W. 3, c. 11, enacts, that no person who shall come into any parish by certificate shall be adjudged by any act whatsoever to have procured a legal settlement in such parish, unless he shall really and bona fide take a lease of a tenement of the value of 10l.; and the statute 12 Anne, c. 18, s. 2, prevents the hired servant of such certificated person from gaining a settlement by that hiring and service. Now although the terms of the 9 & 10 W. 3, c. 11, are more precise than those of the 13 & 14 Car. 2, c. 12, yet the two statutes are to be construed together, being in pari materia, and no distinction is to be made as to the nature of the tenement or the taking thereof, *Rex v. Croft*, 3 B. & A. 171. The renting of a tenement of 10l. a year and forty days' residence would undoubtedly avoid a certificate, *Rex v. Findern*, 2 Bott, pl. 740, 6th ed., but not until the forty days' residence was completed. Then here Stubbings's certificate was not discharged until he had resided in Barnham parish forty days. During those forty days, the pauper's husband was serving a certificated person, and he did not perform a year's service after the certificate was discharged. [Lord TENTERDEN, C. J. When the residence is complete, is not it the same as if there had never been a certificate?]

Lord TENTERDEN, C. J. It is now too late to contend that if the remuneration of a person hired to serve *in husbandry be by the pasture of cattle *547] on his master's land, that this is not the taking of a tenement sufficient to confer a settlement, if it be of the value of 10l. Here the sessions have found that the term *going* meant, in the county where the contract was made, pasture-feeding; and that although in bad weather the sheep were to be fed on hay or turnips, the actual feeding on pasture in Barnham was worth more than 10l. a year. It is said that this *going* does not constitute a tenement, because there is no locality. There is none certainly expressed in the words of the contract between Stubbings and Chambers; but it may be abundantly collected, from the other parts of the case, that the feeding of the sheep was to be in Barnham; for, first, Stubbings was to have a cottage in Barnham, the occupation of which was necessary to the performance of his duty as shepherd, and the "actual feeding of the sheep in pasture in Barnham" is found to be worth more than 10l. a year. The only doubt on my mind is as to the effect of the certificate. Upon that point we will take time to consider.

LITLEDAL, J. It is perfectly well established, that if a party takes a tenement of 10l. a year value, whether he pays for it by money or services, he gains a settlement. Here the sessions have found that Stubbings was to have the going of 105 sheep with his master's flock, but it is not to be inferred from thence that the sheep were to be fed out of the parish. The meaning of the term *going* is, that they should be pasture-fed. I think, from the facts found in this case, it may be inferred that the feeding of the sheep was to be in Barnham; and that being so, then, according to *Rex v. Benneworth*, 2 B. & C. 775, the *548] husband of the pauper would gain a *settlement in Barnham, unless he was prevented by the certificate. That question deserves further consideration.

PARKE, J. I am of opinion that in this case there was a taking of a tenement within the statute 13 & 14 Car. 2, c. 12, and that Stubbings, by having made an agreement with his master for the *going* of the 105 sheep, and residing in the parish forty days, gained a settlement. It is too late now to question

the propriety of the rules, that the perception of the profits of land by the mouths of cattle, is a tenement within the statute 13 & 14 Car. 2, c. 12, and that the occupation of a tenement of the value of 10*l.* will give a settlement, whether the rent be paid in money or in labour. The law upon that subject was finally settled in *Rex v. Benneworth*, 2 B. & C. 775. That being so, the question is, then, whether it sufficiently appears that the pasture-feeding was to be in Barnham; and the case resolves itself into the question, what was the meaning of the contract between the parties. I take it to be clear that the feeding on pasture was to be in the parish of Barnham, for the cottage which was necessary for the due performance of Stubbings's duty as shepherd was in that parish, and the actual feeding of the sheep on pasture in Barnham is found to be worth more than 10*l.* a year. The pauper's husband, therefore, came to settle on a tenement of 10*l.* per annum in Barnham. On the other question, as to the effect of the certificate, I agree that it should be further considered.

PATTESON, J. I think that, in this case, there was a taking of a tenement by Stubbings; the only difficulty is as to its locality. *Rex v. Darley Abbey*, 14 East, 281, shows, that *the meaning of the parties as to the place where cattle are to be pasture-fed, may be collected from the subject. [*549 matter of the contract and the other circumstances of the case. That being so, I infer from the facts found by the sessions, that the going was to be in the parish of Barnham, for the cottage was in that parish, and the value of the pasture-feeding there is found to be of the value of 10*l.* As to the question on the certificate, that may admit of some doubt. *Cur. adv. vult.*

Lord TENTERDEN, C. J., now delivered the judgment of the Court.

We have already decided that the agreement between Chambers and Stubbings, that the latter should have the going of 105 sheep with his master's flock, was a taking of a tenement in Barnham parish within the meaning of the statute 13 & 14 Car. 2, c. 12. The point reserved for consideration was, whether Stubbings was to be looked upon as having resided in that parish under a certificate, so as to prevent the husband of the pauper from gaining a settlement by hiring and service with him. It was urged, that as Stubbings could not acquire a settlement by the taking of a tenement until he had resided forty days in the parish, he must, at all events, be considered as having resided for those forty days under the certificate, and, consequently, that the pauper had not served him for a year after the certificate was discharged. It appears to us, however, that Stubbings is not to be considered as having resided in Barnham under the certificate during any part of the year; for he came to settle on a tenement of the value of 10*l.*, and was therefore irremovable as soon as he came into the parish. He never resided there under the certificate. The [*550 *pauper's husband, therefore, was not serving a person residing under a certificate. If there had been no certificate whatever, the case would have been just the same. Stubbings was irremovable as soon as he came to settle on the tenement, and gained a settlement when he had resided forty days.

Order of sessions confirmed.

LOWE v. The Inhabitants of the Hundred of BROXTOWE. May 5.

The servant or servants who in the absence of a master have the general care and superintendence of property, and who represent him in his absence, and not all who have the special care under them of particular parts of the property contained in a dwelling-house or manufactory, are the servant or servants who, by the 7 & 8 G. 4, c. 81, s. 3, are required, before any action be brought against the hundred for damage by rioters, to go before a justice, and state upon oath the names of the offenders, and submit to examination touching the circumstances of the offence.

The swearing before a justice to a deposition previously prepared, is a sufficient submission to examination, within the meaning of the act, if the justice require nothing further.

Declaration, after stating the felonious demolition of premises, alleged that the person who went before the justice, submitted himself to examination, and became bound to prosecute the offenders when apprehended, *such offenders being then and there unknown* to the plaintiff, or to the party bound: Held, after verdict, that, assuming any allegation on this point to be necessary under the present statute, this was sufficient, as it could only be sustained by proof that *all* the offenders were unknown.

THIS was an action against the hundred of Broxtowe, in the county of Nottingham, on the statute of 7 & 8 G. 4, c. 31, to recover damages for injury done to a mill, steam engine, movable machinery, furniture, goods, and fixtures, which had been feloniously damaged or destroyed by persons riotously and tumultuously assembled together. The declaration stated the felonious destruction of the premises, and that the plaintiff being the party damaged in that behalf, and one George Turton the younger, being the servant who had the care of the property so damaged and destroyed as aforesaid, did, within seven days after the commission of the offence, to wit, on the 15th of October, *551] 1831, go before H. Cope, a justice of peace residing near and *having jurisdiction over the place where such offence had been committed, and the said George Turton the younger submitted to the examination of such justice, touching the circumstances of the offence, and became bound by recognisance before the said justice to prosecute the said offenders when apprehended, *such offenders being then and there unknown to the plaintiff, or to the said* George Turton the younger, according to the form of the statute; and the said plaintiff offered to submit to the examination of the justice, and to become bound by recognisance to prosecute the offenders when apprehended; but the said justice declined to examine him, or to take such recognisance. Plea, the general issue. At the trial before Parke, J., at the last Spring assizes for the county of Nottingham, it appeared that the plaintiff was the owner of a mill and premises at Beeston, in the hundred of Broxtowe, in the county of Nottingham; and that on the 11th of October, 1831, they had been feloniously destroyed or damaged by rioters. Two points were made; first, that G. Turton, the plaintiff's servant who went before the magistrate, had not satisfied the statute by submitting himself to examination; secondly, that he was not the only person who, under the circumstances of the case, ought to have been examined. The facts as to those points were as follows:—G. Turton, who resided in a house adjoining the mill, had the general care and superintendence of it, and in the absence of the plaintiff was sole master. There were 160 persons employed on the premises; they had left the premises on the 11th of October at five minutes past twelve, and G. Turton remained there after they were gone, and between twelve and one o'clock of that day, during their absence, *552] the premises were attacked by a mob. The plaintiff had *not been on the premises on that day; he lived at Nottingham, which was four miles distant. George Turton the elder had the care of the steam-engine; his duty was to look after the fire, keep the steam up, and to work the machinery: but all orders either for stopping or setting the engine to work, or for repairing it when necessary, were given by G. Turton the younger. Turton the elder was in a coal-yard very near the mill, when the mob came. The steam-engine was stopped. William Turton, a person employed to watch the building during the night (but having nothing to do there in the day-time), watched in the mill all the night of the 10th, and went to bed about ten in the morning: he lodged in a dwelling-house belonging to the plaintiff; he was his own master during the day-time. Half an hour before the people went to their dinner on the 11th, he was called up by a person in the house, and was on the premises when the mob came. George Platt, a millman in the plaintiff's employ on the 11th of October, was, at the time when the mob came, dining at two or three hundred yards from the mill. G. Turton the younger, within seven days after the transaction, went before a magistrate to depose as to the damage done. The facts spoken to by him were previously taken down in writing by the magis-

trate's clerk, and reduced to the form of a deposition. It was then read over to him by the magistrate, and he was sworn as to its truth. The plaintiff also offered himself to the magistrate to be examined, but the latter declined to examine, on the ground that he had no knowledge of the transaction. Upon these facts, it was objected by Goulburn, Serjt., that the statute 7 & 8 G. 4, c. 31, s. 3, which requires the servant or servants who had the care of the property damaged, to go before the justice, had not *been satisfied, inas- [*553] much as G. Turton the younger, who went before the justice to be examined, was one only of several servants (William Turton, the night-watchman, and others) who had the care of such property, and should also have gone before the justice; and that at all events Turton the elder, who had the care of the steam-engine, ought to have been examined, to entitle the plaintiff to recover any damages for its destruction. Secondly, assuming that Turton the younger was to be considered the servant who had the general care of all the property damaged, still his swearing to a deposition prepared by another person, was not a submitting to the examination of the justice within the meaning of the statute. The learned Judge directed a verdict for the plaintiff, but reserved liberty to the defendant to move to enter a nonsuit, or to reduce the damages.

Goulburn, Serjt., in this term moved to enter a nonsuit, or to reduce the damages, or to arrest the judgment. The 7 & 8 G. 4, c. 31, s. 3, requires either that the person damaged or the servant or servants who had the care of the property damaged, shall, within seven days after the commission of the offence, go before some justice of the peace, and state upon oath the names of the offenders if known, and shall submit to the examination of such justice touching the circumstances of the offence, &c. Here G. Turton the younger did not submit to the examination of the justice, but merely swore to an affidavit drawn up for him by the clerk. That would not have been a sufficient compliance with the 9 G. 1, c. 22, s. 8, which required the party to give in his examination on oath. The statute 52 G. 3, c. 130, s. 4, also required that the party damaged should give in his examination on oath before a justice, &c., yet Abbott, J., *commenting on those words in *Nesham v. Armstrong*, [*554] 1 B. & A. 146, says, "the words in the statute are, examination upon oath, and not on affidavit; the statute points at an inquiry before justices, not a mere affidavit." The object of the statute was that the justice should, by an examination of the party, make inquiry into the circumstances of the offence. But, secondly, the present statute requires that the party damaged, or the servant or servants who had the care of the property, shall submit to the examination. Now G. Turton the younger, who was examined, was not the servant having the care of the property within the meaning of the act. The property was under the care of *several* persons; they ought all to have been examined as to their knowledge of the transaction, or it ought to have been shown that they had no means of knowledge, *Duke of Somerset v. Mere*, 4 B. & C. 171, and the judgment of Bayley, J., in that case was, that persons who had the care of part of the premises delegated to them by a steward, ought to have been examined. So here, Turton the elder, who had the care of the steam-engine, and W. Turton the watchman, ought to have been examined. [PARKE, J. In that case the steward and under-steward lived at a distance from the premises. W. Turton the watchman had not the care of the premises at the time when they were attacked by the mob. He was his own master in the day-time, and his duty ended with the night watch.] Turton the elder had the exclusive care of the steam-engine, and to entitle the plaintiff to recover damages for its destruction, he ought at all events to have been examined. *Rolfe v. The Hundred of Elthorne*, 1 M. & M. 185, shows that all the servants who "had the care" of the premises must be examined. The object of the statute is, that the public should have the *information of all the per- [*555] sons who are likely to have any knowledge of the transaction.

Then the judgment must be arrested. The declaration states that G. Turton the younger went before the justice and submitted to his examination, and became bound by recognisance to prosecute the offenders when apprehended, such offenders being then unknown to him or the plaintiff. It does not allege, as it ought, that Turton and the plaintiff did not know *any* of the offenders. In *Thurtell v. The Hundred of Mutford, 3 East, 400*, an affidavit stating that the person who made it did not know the person or persons committing the offence, without adding that he did not know any of them, was held to be insufficient. *Le Blanc, J.*, there said, "The statute, at all events, meant that the party should go before the magistrate, to be examined whether he know or do not know the persons who committed the fact, or any of them." *Trimmer v. The Hundred of Mutford, 6 D. & R. 10*, decides the same point. The title of the plaintiff to recover damages depends on the fact of his not knowing any of the offenders; that being so, the declaration should have negatived his knowledge of any of them.

Cur. adv. vult.

SAME v. SAME.

THIS was an action brought by the same plaintiff to recover damages for the destruction of a quantity of silk which was in soak when the premises were attacked by the mob. It had been put in soak in the wash-house by George Turton the elder, about ten o'clock; he was the person employed to wash it, *556] and it usually remained in soak six or eight hours; he had locked the *door of the wash-house, and hung the key up by the side of the boiler of the steam-engine. It was contended, in this case, that he was the servant who had the care of the silk, the property damaged, within the meaning of the statute; and, therefore, ought to have been examined. The learned Judge reserved the point, and *Goulburn, Serjt.*, in this term, moved to enter a non-suit, or to arrest the judgment on the objection taken in the former case.

Cur. adv. vult.

MUSTERS v. The Inhabitants of The Hundred of THURGARTON.

THIS was an action for damages, in consequence of a felonious beginning to demolish the plaintiff's dwelling-house, and destruction of his furniture. The declaration stated that one James Lowsby was a servant of the plaintiff, who at the time of committing the said offences had the care, charge, and custody of the said dwelling-house, and fixtures and property therein, and having knowledge of the circumstances of the said offences, within seven days, to wit, on the 13th of October, went before T. B., a justice, to be examined on his oath touching the circumstances, and on his oath declared that he did not know the said offenders, or any or either of them, and became bound by recognisance to prosecute the offenders, being then and there unknown to J. L., &c. Plea, general issue. At the trial before Parke, J., at the last assizes for the county of Leicester, it was made a question whether the said James Lowsby was a servant having the care of the property within the meaning of the statute. It appeared that the plaintiff, Mr. Musters, the owner of the house, had been *557] absent from home about a fortnight at the time when the offence *was committed. During his absence Lowsby was usually left in charge of the house. If anything was wanted for the family, or any repairs required to be done to the house, Lowsby, and not the other servants, gave orders to the tradesmen in Nottingham. He had the key of the wine cellar during his master's absence. If beer was wanted, he bought the malt and ordered the beer to be brewed. There were other servants in the house at the time of the

riot. Lowsby was not then in the house, but standing on the road near to the house and stables. He was bailiff on the 10th of October. The under-butler had the care of the plate to clean it, and slept in the pantry, in which the plate-chest was kept. It was objected that the other servants, and particularly the under-butler, ought to have been examined. The jury found specially that Lowsby had the general care and superintendence of the whole establishment, house, furniture, and fixtures, in the absence of his master. *Goulburn* now moved upon the same grounds as in the last case. *Cur. adv. vult.*

BEMROSE v. The High Constable of the Borough of DERBY.

THE declaration in this case stated, the plaintiff went before the justice and submitted to be examined, and entered into recognisance to prosecute the offenders when apprehended, they being unknown. Plea, not guilty. At the trial before Bayley, B., at the last assizes for the county of Derby, it appeared that the plaintiff was one of two colessees of the premises for the damaging of which the action was brought; but he was the sole occupier. It was objected, first, that the action ought *to have been brought by the two lessees; secondly, that they ought both to have gone before the justice. The [*558 learned Judge overruled the objections, but reserved liberty to the defendant to move to enter a nonsuit. A verdict having been found for the plaintiff,

Balguy, on a former day, moved to arrest the judgment upon the objection taken in *Lowe v. The Hundred of Broxtowe*, and for a nonsuit upon the points reserved.

Per Curiam. Supposing even that the other party, who was a mere lessee, and not an occupier, was a person damnified within the act, still the plaintiff might maintain an action for the injury done to the premises, and recover damages in proportion to his interest therein. The act only requires the persons damnified, or such of them as shall have knowledge of the circumstances of the offence, to go before the justice. Here the plaintiff was the only person damnified who could have such knowledge, for he was the sole occupier of the premises. As to the other point, *Cur. adv. vult.*

Lord TENTERDEN, C. J., now delivered the judgment of the Court.

These were actions brought on the second section of the statute 7 & 8 G. 4, c. 81, to recover damages for the destruction of property by riotous assemblies of persons committing offences within the description of the first part of that section. Some minor points were disposed of by the Court in the course of the arguments. The points reserved for our consideration depend upon the construction of the third section of the statute. These relate,

*First, to the character of the person who went before the justice.

Secondly, to the course pursued on the appearance before the justice. [*559

Thirdly, to the sufficiency of the declaration in the averment regarding those proceedings.

The first two points were argued as grounds for nonsuit (they having been reserved at the trials), and the last as a ground for arresting the judgment.

The third section of the statute is this: that no action or summary proceeding as thereinafter mentioned shall be maintainable by virtue of that act, for the damage caused by any of the said offences, "unless the person or persons damnified, or such of them as shall have knowledge of the circumstances of the offence, or the servant or servants who had the care of the property damaged, shall, within seven days after the commission of the offence, go before some justice of the peace residing near and having jurisdiction over the place where the offence shall have been committed, and shall state upon oath before such justice the names of the offenders, if known, and shall submit to the examination of such justice touching the circumstances of the offence, and become

bound by recognisance before him to prosecute the offenders when apprehended.”(a)

*560] *The object of the second section of this statute is to make it the interest of all the inhabitants of a district to exert themselves in the timely suppression of riotous *assemblies, and in the prevention of the serious
 *561] loss that such assemblies may cause to the particular individuals who are the first victims of their lawless outrage, and not to stand quietly by, either through fear or indifference, while the property of a neighbour is destroyed, and the rioters acquire that increase of strength which always accompanies unrestrained violence, until the evil extends itself, and in the end falls upon the heads of those by whose forbearance the strength and power of mischief were permitted to increase.

(a) Before the stat. 7 & 8 G. 4, c. 27, which repealed parts of the stat. 1 G. 1, sess. 2, c. 5 (commonly called the Riot Act), the inhabitants of the hundred were liable for damage done by a riotous mob to the full extent, and could not relieve themselves from such liability by convicting the offenders; nor was it necessary for the party injured to go before a magistrate or give any notice before bringing this action. Since the repeal of that part of the riot act, the present stat. 7 & 8 G. 4, c. 81, has been passed, also giving a remedy against the hundred for damage done by a riotous mob to the full extent, and there is still no clause by which the hundred are relieved by convicting the offenders. The legislature, however, has thought proper to introduce the provisions in s. 3, as stated in the judgment.

What the precise object was in adding such a clause to the present act, it is difficult to say. The inhabitants of the hundred seem to have no peculiar interest in immediately knowing the circumstances of the case or the names of the offenders; they are not bound to prosecute, nor are they relieved if they do; and there is no probability of collusion between the parties damaged and the mob. The clause appears to have been taken from sect. 8 of the 9 G. 1, c. 22, commonly called the Black Act, which is also repealed, an act of a very different description, making the hundred liable for damage (not exceeding 200*l.*) done by wilful fire, or maiming cattle, or cutting trees, offences frequently committed in secret, and as to which collusion with the party professing to be damaged is very possible. That clause enacts, that no person shall recover any damages by virtue of the act, unless he or they by themselves or their servants, within two days after such damage done, shall give notice of such offence committed unto some of the inhabitants of some town, &c., near to the place where any such fact shall be committed, and shall within four days after such notice give in his or their examination upon oath, or that of his or their servant or servants that had the care of his or their houses, outhouses, &c. &c., before any justice of the peace of the county, &c., where such fact shall be committed, whether he or they do know the person or persons that committed such fact, or any of them; and if upon such examination it be confessed that he or they do know the person or persons committing the said fact, or any of them, that then he or they shall be bound by recognisance to prosecute such offender, &c. The statute 27 Eliz. c. 13, *limiting the liability of the hundred in case of robberies*, contained a similar clause, s. 11. By sect. 9 of the Black Act, if any one of the offenders be convicted within six months the hundred shall not be liable. And so the statute of Elizabeth discharged the hundred if any one of the offenders were apprehended by hue and cry. (See the conclusion of 18 Ed. 1, st. 2, c. 2, and of 28 Ed. 3, c. 11.) In these cases information from the parties as to the facts, and their knowledge of the offenders, was most important to the hundred, in order that by due diligence in finding out and prosecuting the offenders they might relieve themselves from the burthen of making good the damage. A clause in the same words as the eighth section of the Black Act was indeed introduced into a subsequent statute, 52 G. 3, c. 130, which was passed to extend the Riot Act and Black Act to buildings, erections, and engines used in trade; and, singularly enough, gives a remedy against the hundred for riotous demolition, but none for wilful burning, yet it takes the clause in question from the Black Act and applies it to the case of riotous demolition. By this act, too, no advantage is given to the hundred in case of a conviction. The motives assigned by two of the Judges in *Nesham v. Armstrong*, 1 B. & A. 146, for the introduction of this enactment in 52 G. 3, c. 130, seem rather applicable to the Black Act. The 56 G. 3, c. 125, which extends the remedy against the hundred, &c., to collieries and mines, contains a similar clause to that in question, and here, too, a conviction of the offenders does not discharge the hundred. The 57 G. 3, c. 19, s. 38, seems to extend the remedy against the hundred to damage done by riotous mobs to houses or other buildings where there is no beginning to demolish, yet it refers only to 1 G. 1, sess. 2, c. 5, and does not require any examination before a magistrate.

The object of the third section is to furnish the means of bringing the offenders to trial and to punishment: and this for the sake of example, not of vengeance. In the ordinary form of indictments, the offence is alleged to be the evil example of all others; and I well remember to have heard a most learned, eloquent, and humane Judge of the Court of Admiralty, in passing sentence upon a convict, conclude his judgment with these words, viz., "that by the example of your sufferings, others may be deterred from following the example of your crime."

*That this is the only object of the third section appears by the view of the subsequent parts of the statute, in which there is no provision [562 that the district shall be relieved from compensating the damage by the conviction of the offenders, as was done in some particular cases under some of the former and now repealed acts.

This object must be kept in view in the consideration and construction of the third section. The persons who are to go before the justice are to enter into a recognisance to prosecute the offenders when apprehended. In the absence of the master, the servant or servants who had the care of the property damaged are to go before the justice. Who, then, are the persons answering this description? We are all clearly of opinion that the person or persons, whether one or more than one, who have the general care and superintendence of the property, who represent the master in his absence, are the persons answering this description, and not all who have the special care under them of particular parts of the property contained in a dwelling-house or manufactory. In the two actions against the hundred of Broxtowe, George Turton the younger appears by the evidence very clearly to have had the general care and superintendence of the manufactory; and in the action against the hundred of Thurgarton, James Lowsby was the person answering this description, and found by the jury to be so, upon a question put to them on that point.

If the persons having the general care and superintendence are not the persons intended by the statute, it will be necessary in many cases, that a very great number of individuals should go before the justice, and enter into the recognisance. In the case of a manufactory, there will be several persons having, in one sense of the *words, the care of particular parts of the property: one person of one engine or part of the machinery, another [563 of another, one of the raw material to be delivered out for manufacture, another of the article after it has passed one stage or process, another when it is to undergo a subsequent process, another when the whole process shall be completed, and many others who are employed upon it in its different stages. So in a dwelling-house occupied by a large family, one servant will have the especial care of the linen, another of the plate, another of the knives and forks, several others probably of the furniture of particular rooms or apartments, and the result will be that the inferior workmen or inferior servants, men and women, adults and non-adults, must all go before the justice and enter into the recognisance, lest all or at least some part of the property should be excluded from the compensation, and all this without, in any degree, furthering the object of the act. If it should happen that any person of this description have any knowledge that may lead to the discovery or apprehension of a particular offender, they may be expected, as is their duty, to give their information at a more convenient time, and in a more effectual manner; and this even before the person having the general care goes before the justice, and who may then represent such an offender as being known, for there is nothing that confines that person to speak only of his own personal knowledge, and if he speaks upon the knowledge or information of others, the justice may and ought to require the attendance of such others before him. The question only is, what is sufficient in the first instance.

The second point regards the course pursued on the appearance before the justice.

*564] *In one of the cases, the person who went before the justice had submitted to him a deposition previously prepared; the justice read the deposition, the person made oath to it before him, and nothing more took place. It was urged that this was not a submission to the examination of the justice within the meaning of the act. But we all think that it was; the person was there present before the justice; the justice might have asked any questions that he thought proper, and the person must have answered them in the best way he could: he could not be examined unless the justice chose to examine him; by his very presence he submitted himself to examination; and his deposition might furnish materials for an examination, which the justice might not otherwise have. In Buller's *Law of Nisi Prius*, part 8, ch. 1, it appears that in several of the cases there mentioned on the statute of Hue and Cry, an affidavit was made and no objection taken on that ground. (a)

The last point is on the form of the declaration: and the objections are made after verdict and not on demurrer. The allegation in the declaration is, that the person who went before the justice submitted himself to examination, and became bound to prosecute the offenders when apprehended, *such offenders being then and there unknown*, as was alleged in the first two cases, to the plaintiff or George Turton, in the third, to James Lowsby, and in the last, generally without naming the person who had gone before the justice. The objection was, that it was not alleged that the offenders were, and every one of them was, unknown, or that no one of them was known.

It is not necessary to decide, whether any allegation of this kind be essential *565] in an action on this statute; *because we are all of opinion that the allegation is sufficient. If, in fact, any one of the offenders was known, it would not be true that the offenders were unknown in the proper sense of those words. If any of them were known at the time, the proof of that fact would have falsified the assertion.

The cases cited in moving for the rules, are all clearly distinguishable from this.

In *The Duke of Somerset v. Mere*, 4 B. & C. 167 (which was a case on the 9 G. 1, c. 22), the steward who gave in his examination before a magistrate, did not reside on the spot. In the case of *Nesham v. Armstrong*, 1 B. & A. 146, the question arose on the fourth section of the 52 G. 3, c. 130, which provides that no person or persons shall recover unless he, she, or *they* give his, her, or *their* examination on oath, and of several partners, plaintiffs, one only was examined. The other two cases, *Thurtell v. Hundred of Mutford*, 3 East, 400, and *Trimmer v. Hundred of Mutford*, 6 D. & R. 10, were upon the statute 9 G. 1, c. 22, which requires that the person injured shall give in his examination upon oath (or that of his servant, &c.), "whether he *knew* the persons that committed the offence or *any of them*," and the plaintiff in each of those cases had omitted to comply with that express condition. But this act of parliament does not impose as a condition, that an oath in this particular form shall be taken.

For the reasons given, we think there should be no rule granted in either of these four cases. Rules refused.

(a) And see Lord Ellenborough's judgment in *Thurtell v. The Hundred of Mutford*, 3 East, 405.

*566] *The KING v. The Inhabitants of HATFIELD BROAD OAK.
May 5.

A. being in possession of a copyhold estate of inheritance, offered to give it up to his son and heir, if he would pay off 15*l.* which he, A., had borrowed on the estate, and would permit A. and his wife to reside on it rent free during their lives. The son paid off the 15*l.*, and was admitted to the copyhold estate upon the surrender of his

father. The admittance recited the verbal agreement between A. and his son, and the payment of the 15*l*. A. and his wife continued afterwards to reside on the estate with their son :

Held, that from the terms of the conveyance, and the state of the family, natural love and affection must be taken to have formed an ingredient in the consideration, and, therefore, this was not the purchase of an estate or interest whereof the consideration did not amount to 80*l*., within the 9 G. 1, c. 7, s. 5.

UPON an appeal against an order of two justices, whereby John Greygoose, his wife and children, were removed from the parish of Takeley, in the county of Essex, to the parish of Hatfield Broad Oak, in the same county, the sessions confirmed the order, subject to the opinion of this Court in the following case :—

The pauper had gained a settlement by hiring and service in Hatfield Broad Oak, but he afterwards returned to and lived with his father, who was then in possession of a copyhold estate and premises of inheritance in the respondent parish Takeley, to which estate he had been admitted on the death of his father, as heir at law, in 1757. After the pauper's return, and about twenty-four years ago, the pauper's father told the pauper that he would give up the estate and premises to him, as they would be his afterwards by heirship, if he would pay off a debt of 15*l*. which he (the father) had borrowed upon them, and if he would permit him (the father) and his wife (the pauper's mother) to reside upon them rent free during the rest of their lives. The pauper paid off the sum of 15*l*. for the purpose of relieving his father from that debt, and was duly admitted to the estate and premises upon surrender of his father. The father and mother continued to reside upon the premises; the father till his death, the mother till the *time of the removal; and the pauper did so for [*567 eighteen years after his admittance, and gained no subsequent settle- ment. The admittance of the pauper on the surrender of his father (in 1807), contained no statement of any consideration except the verbal agreement between the pauper and his father, and the payment of the 15*l*. by the pauper. The sessions, in confirming the order, stated their opinion to be, that this was a purchase of an estate for less than 80*l*., the only apparent consideration being the payment of the 15*l*. by the pauper on his father's account, which payment originated in the want of the father; and therefore no settlement was gained under the 9 G. 1, c. 7.

Mirehouse and Ryland, in support of the order of sessions. The only question is, whether this was a purchase of an estate for less than 80*l*. within the statute 9 G. 1. The sessions have found that it was. The only apparent consideration is the payment of 15*l*. by the pauper. *Rex v. Martley*, 5 East, 40, may be cited on the other side, but there the pauper was residing on his estate when the order of removal was made. Here he had ceased to reside.

Knox and Bullock, *contrâ*. The question of purchase is not excluded by the finding of the sessions, for the case is stated for the express purpose of taking the opinion of the Court whether or not the transaction is a purchase within the statute. The conveyance here must be considered under all the circumstances, as having been made, not for the sole consideration of 15*l*., but for *another consideration mixed with that, and which, looking to the parties and what passed between them at the time, could only be natural [*568 love and affection; and this would prevent the operation of the statute, however small a part of the consideration it might form, *Rex v. Ufton*, 3 T. R. 251.

LORD TENTERDEN, C. J. I think the sessions have not come to the right conclusion. From the terms of the conveyance and the state of the family at the time, I think that natural love and affection must certainly be taken to have formed an ingredient in the consideration; and if so, this was not a pecuniary purchase for less than 80*l*. within the meaning of the statute.

LITTTLEDALE, J. The 15*l*., the debt charged on the estate, was not the only consideration for this conveyance. This is clear from the agreement that the

pauper should allow his father and mother to reside upon the premises rent free during the rest of their lives.

PARKE, J. This was a conveyance of the property, in consideration of natural love and affection, and subject to a certain burthen. I think the sessions came to a wrong conclusion.

PATTESON, J., concurred.

Order of sessions quashed.(a)

(a) See *Tetley v. Tetley*, 4 Bing. 214.

*569] *The KING v. The Inhabitants of AYLESBURY. May 5.

A pauper was bound apprentice by the trustees of a public charity. The master covenanted to find him meat, drink, apparel, washing, &c. Before the execution of the indenture, the father of the pauper, who was not a party to it, agreed with the master to find the pauper clothing and washing during the term; and he did so. It did not appear that the trustees were privy to this engagement.

Held, that the indenture did not require to be stamped, because either the agreement by the father to provide clothes was not a thing secured to be given to or for the benefit of the master, within the 55 G. 3, c. 184, sched. part 1, tit. Apprenticeship, or, assuming that it was, then it was void as being a fraud on the trustees, who had bound out the apprentice on the faith that the master was to provide clothes.

On appeal against an order of removal from Aylesbury to Leighton Buzzard, in the county of Bedford, the sessions quashed the order, subject to the opinion of this Court on the following case:

The pauper, on the 4th of November, 1823, was bound apprentice by the trustees of a public charity to William Fryer for seven years. The master covenanted to find the pauper meat, drink, apparel, washing, lodging, and all other things needful during the apprenticeship. Before the indenture was executed, the father of the pauper, who was no party to it, agreed with the master to find the pauper clothing and washing during the term, and he accordingly did so during great part of the time; and the clothes and washing so supplied might amount to 10*l.* in value. The master said he would not have taken the pauper unless the father had made such agreement. There was no evidence that the trustees of the charity were privy to this arrangement. The indenture was not stamped, and it was objected by the appellants, that the apprentice had not been bound by, or at the sole charge of a public charity; and, therefore, that the want of a stamp rendered the indenture invalid; and the sessions allowed the objection. The question for the opinion of this Court

*570] *was, whether the indenture ought to have been stamped under the statute 55 G. 3, c. 184.(a)

Maltby, in support of the order of sessions. The clothing and washing agreed to be found by the father during the apprenticeship were a matter or thing secured to be given for the use and benefit of the master, with and in respect of the apprentice, within the meaning of the 55 G. 3, c. 184, sched. part 1, tit. *Apprenticeship*, and the indenture consequently ought to have had a *li.* stamp. [Lord TENTERDEN, C. J. Is not the case of *Rex v. Leighton*, 4 T. R. 732, conclusive on this point? There the father of an apprentice covenanted in the indenture to find and provide for his son meat, drink, and lodging on every *Sunday* in the year during the term, and also to provide him with apparel and washing; and it was held that such agreement by the father was not a benefit to the master for which a duty was required by the stat. 8 Anne, c. 9, s. 45, which enacted, that where anything, not being money, should be given, contracted for, or secured to or for the use or benefit of the master, the duty should be

(a) By the 55 G. 3, c. 184, sched. part 1, tit. *Apprenticeship*, it is enacted, that if the sum of money, or the value of any other matter or thing which shall be paid, given, assigned, or conveyed to or for the use or benefit of the master or mistress, with or in respect of such apprentice, &c., or both the money and value of such other matter or thing, shall not amount to 30*l.*, a duty of *li.* shall be paid.

paid for the full value of such thing.] There the covenant was in the indenture itself. Here the father's agreement was contrary to the master's covenant. In *Rex v. Mattishall*, 8 B. & C. 733, before the execution of an indenture, the master having said that the apprentice should have better clothes, the parish officers *agreed, on the execution of the indenture, to give him 2*l.* for the purpose of buying clothes, which they did accordingly, and it was [*571 held that the money so paid by them was an expense incurred by reason of an indenture of apprenticeship within the 56 G. 3, c. 139, s. 11, and therefore that the indenture required the assent of two justices.

LORD TENTERDEN, C. J. I cannot distinguish this case from *Rex v. Leighton*, 4 T. R. 732, where this point seems to have been very fully considered. That case turned upon the 8 Anne, c. 9, s. 45, the words of which are very similar to those of the 55 G. 3, c. 184, sched. part 1, tit. *Apprenticeship*, and the decision proceeded on the ground that there was no obligation on the part of the master, in the absence of express stipulation, to provide clothes or sustenance for an apprentice, and therefore that the agreement so to do by the father could not be considered a benefit to the master; and the concluding words of Lord Kenyon's judgment apply to the present case: "The clear meaning of the statute of Anne is, that where money or money's worth is given to the master by the friends of the apprentice by way of premium, a duty ought to be paid for it; but that where meat, clothes, &c., are to be provided for the apprentice, no duty is payable, because there is not *anything given to the master*." It is urged that that case is distinguishable, because there the father covenanted in the indenture to provide clothes, &c., but that here the benefit is given to the master by the father's agreement independent of the indenture. But that agreement being prior to the indenture, if it was made without the *knowledge of [*572 the trustees of the charity, it was a fraud upon them, and therefore void, even if the providing clothes could be considered as anything given to or for the benefit of the master; but I think that the agreement by the father to provide clothes cannot be considered as having that effect.

LITLEDAL, J. I think this case falls within *Rex v. Leighton*, 4 T. R. 732.

PARKE, J. It is said that there is a benefit conferred on the master by the agreement of the father to provide clothes, and that that is equivalent to a sum of money. Assuming it to be so, the agreement was then a fraud on the trustees of the charity, for it is clear from the covenant in the indenture that they bound out the pauper on the faith that the master was to find apparel, &c.; see *Rex v. The Inhabitants of Baildon*, ante, 427; and the latter could not have sued the father for not providing clothes, for there was no binding engagement on him so to do.

PATTESON, J., concurred.

Campbell and *Monro* were to have argued against the order of sessions.

Order of sessions quashed.

*The KING v. The Inhabitants of the Parish of ST. GILES, in the City of YORK. May 5. [*573

Lands purchased by voluntary contribution were conveyed to trustees, for the purpose of erecting thereon a Lunatic Asylum, and for such other purposes relative thereto as should be determined by the subscribers. The asylum was originally designed for parish paupers or other indigent persons, but the funds being insufficient, a limited number of affluent persons were afterwards admitted at certain rates of payment in proportion to their abilities. From this and other sources of revenue the trustees, after paying all the expenses of the establishment, had accumulated, in five years, profits to the amount of 2000*l.*, part of which had been laid out in buildings and purchases for the institution, and part continued to accumulate. All benefactors of 20*l.* or upwards were governors, and they exercised the entire control over the asylum and its funds. The trustees derived no personal benefit from the institution:

Held, that as the building produced a profit, it was rateable, and that the trustees, who were the owners, and in actual receipt of the profits, were the persons liable to be rated.

UPON an appeal by the trustees of the York Lunatic Asylum against a rate made for the relief of the poor of the parish of St. Giles, in the city of York, whereby the trustees were rated for and in respect of the said asylum; the sessions quashed the rate, subject to the opinion of this Court on the following case:—

In 1774, a number of voluntary subscribers raised a fund for purchasing certain premises within the respondent parish, containing four acres two roods twelve perches, and by the conveyance thereof it was declared that the premises were so purchased "for the purpose of erecting thereon a convenient house for the reception of lunatics, to be denominated 'The Lunatic Asylum,'" and for such other intents and purposes relative to the said charitable undertaking as should be thought proper by the subscribers, or the major part of them. The purchase-money amounted to 828*l*. The conveyance of the property was taken in the names of seven trustees, which trustees and the survivors or survivor of them, and the heirs of such survivor were to stand and be seised of and in the same for the purpose of erecting thereon a house (as above stated), and any *574] officers or other buildings commodious for the same, and for any* other intent and purpose relative thereto, which should be ordered from time to time by the subscribers or the major part of them at a general meeting, or by any committee of such subscribers to be duly appointed at such meeting. The asylum was originally designed for lunatics being either parish paupers or members of indigent families; but the finances of the institution being inadequate to the maintenance of that description of persons only, a limited number of affluent patients were afterwards admitted at rates of payment in proportion to their abilities, with a view of providing a surplus from the payments by this class towards the support of the most necessitous. The asylum is now a large and flourishing establishment, having seventy-nine male, and sixty-eight female patients; and in respect of these, the trustees receive yearly payments varying from 100*l*. to 20*l*., or weekly payments varying from three guineas to 6*s*. Of the patients, sixty-two pay only 6*s*. per week. Nearly the whole of these last are parish paupers.

Belonging to the institution is a fund founded in 1789 by the executor of Mr. T. Lupton, and thence called "Lupton's Fund," subject to the sole control and disposition of the Archbishop of York for the time being. This fund, which has been considerably augmented by subsequent donations, now consists of 12,180*l*. stock in the 3 per cent. consolidated bank annuities, and the dividends thereof are directed by the founder to be exclusively appropriated to the maintenance of lunatic parish paupers and other indigent lunatics within the city, county of the city, and county of York. Three hundred pounds per *575] annum are directed by the archbishop to be paid out of this fund to the *asylum, the remainder being still suffered to accumulate at interest.

From 1825 to 1830 inclusive, the donations amounted only to 249*l*. The balance in the hands of the trustees in 1825 was 1579*l*., and in 1830 it had increased to 2572*l*. The institution had also made purchases and erected buildings out of the moneys accumulated in their hands during this period, to the amount of 1000*l*.; so that the accumulation during the five years was about 2000*l*.

All benefactors to this institution of 20*l*. or upwards at one time, as well as certain public functionaries for the time being, are governors, who exercise the entire control over the asylum and its funds. A committee of governors is appointed every quarter at a general meeting, and to them is delegated the power of auditing the accounts, contracting with tradesmen for provisions, hiring and discharging servants, determining what sums are to be paid by

patients, and what persons are to be admitted, discharging patients, and otherwise giving such orders and directions as they think requisite.

The paid officers of the institution receive salaries amounting altogether to 986*l.* a year. The apothecary resides in the asylum, and has two furnished rooms appropriated to his own separate use, in addition to his salary; which would be greater without the occupation of these rooms. The house servant and matron likewise live in the house, but have no exclusive apartments except bed-rooms. The various attendants and domestic servants, and the lunatics, are the only other inmates of the house. The last conveyance from the old to new trustees bears date in 1808, and by it the legal estate in the asylum, and the grounds belonging to it, are vested *in them "upon trust for the said charitable institution, or to be from time to time subservient and sub- [576] ject to such intents and purposes relative to the same which shall be ordered by the subscribers, or the major part of them, at some general meeting." Of the seven new trustees two only now survive, and they are also governors. The surviving trustees do not derive any personal benefit from the institution. The asylum is situate in the respondent parish, and several persons in consequence of being employed about it have gained settlements in, and become chargeable to, the said parish. The rate was in these terms:—

"100*l.* The trustees of the Lunatic Asylum, 8*l.* 15*s.*" The trustees appealed on two grounds; first, that the asylum was not rateable by law; and, secondly, that if it were rateable, the trustees were not persons liable to be assessed.

The case was argued on a former day in this term by

Cresswell, in support of the order of sessions. As to the first point, the general rule is, that a building erected and used for charitable purposes is not rateable if no profit whatever be derived from it by any person. Now here, although the governors exercise a control over the funds, neither they nor the trustees derive any benefit from them. There are no persons, therefore, who receive a profit from the use of the building, and consequently it is not rateable. But, secondly, these trustees are not persons liable to be rated, none of them deriving any profit from the institution; and as a poor-rate is a tax on the person in respect of property, not on the property itself, there can be no rate unless some persons be liable to be rated, *Rex v. The Salters' Load Sluice Navigation*, 4 T. R. 730; *Rex v. Sculcoates*, 12 East. 40; *Rex v. Liverpool*, 7 B. & C. 61, and *Rex v. Trustees of the River Weaver Navigation*, 7 B. & C. 70, note (c). In *Rex v. Woodward*, 5 T. R. 79, a quakers' meeting-house was solely appropriated to charitable and religious purposes, the basement-story being divided into a number of small rooms, one occupied by a door-keeper, with a small salary, payable out of the quakers' donations; the remainder by a number of their poor, who were likewise maintained out of the same fund; the meeting-house, or upper part, being also appropriated solely to religious and charitable purposes; and it was held that neither the trustees nor any other person were rateable, for there was no occupier, nor any profit made of the premises. *Rex v. Agar*, 14 East, 256, will be relied upon by the other side; but there the trustees of the meeting-house were the original proprietors of the land on which it was erected; and it produced a profit, which they disposed of as they pleased. In *Rex v. St. Bartholomew's the Less*, 4 Burr. 2435, the governors of St. Bartholomew's Hospital were held not to be rateable occupiers; and in *Rex v. St. Luke's Hospital*, 2 Burr. 1058, it was held that the five lessees being mere nominal trustees, could not be esteemed occupiers, or rated as such. Here the trustees have no personal benefit from the funds, and no control over them. It is true that money is received from some of the persons taken into the asylum, but the trustees do not receive it: its application is directed by the governors and subscribers; and it is, and must be, wholly applied in furtherance of the charitable objects of the institution.

**Coltman* and *Alexander*, *contrâ*. The cases cited are distinguishable from the present. In *Rex v. St. Luke's Hospital*, 2 Burr. 1058, the trus- [578]

tees had no beneficial occupation whatever. In *Rex v. Salter's Load Sluice*, 4 T. R. 730, the commissioners of the navigation were directed by statute to apply the whole of the tolls to public purposes, and to no other. So in *Rex v. Liverpool*, 7 B. & C. 61, the act of parliament required that the sums levied by rate should be applied, after paying off the debt incurred in making the dock, to keeping it in repair, and to no other use or purpose whatsoever. So, in *Rex v. The Trustees of the River Weaver*, 7 B. & C. 70, note (c), the act of parliament confined the application of the tolls to public purposes. In *Rex v. Woodward*, 5 T. R. 79, the meeting-house was solely appropriated to religious and charitable uses, and no profit whatever was made of it by the trustees. So in *Rex v. Waldo*, Cald. 358, no profit was made of the building; but here it is manifest that a considerable profit has been derived from the occupation of the property. In five years, an accumulation of 2000*l.* has taken place after paying all current expenses. Whether that sum be necessary or not for carrying on the institution does not appear. At all events, it is a present profit. It is no answer to say that the occupiers are bound to apply this sum to the purposes of the institution. They have not done so in the first instance, but have suffered the money to accumulate, and laid it out in land. While it is so dealt with, there is, for the time at least, a beneficial occupation. And if so, the trustees must be the

*579] persons to be rated, for the legal estate is in them; *and the occupation by the servants and lunatics, with their permission, must be their occupation. In *Rex v. Agar*, 14 East, 256, the trustees of a methodist chapel receiving money annually for the rent of the pews, were held rateable for the profits made of the building, though, in fact, they expended the whole of what they received in making disbursements for repairs, &c., and to attendants in the chapel, and in paying the salaries of the preachers, and were not authorized, more than the trustees of this asylum, to put the money in their own pockets. That case is precisely in point. *Cur. adv. vult.*

Lord TENTERDEN, C. J., now delivered the judgment of the Court. After stating the facts of the case, his Lordship proceeded as follows:—

Upon these facts, it seems to us impossible to say, that this building does not produce a profit by means of the entertainment of those persons who are able to pay for their reception; and if any profit be made, the application of it, when made, is immaterial as to the question of rateability. Then, supposing the building to be rateable, the next question is, who are the occupiers to be rated? Not the servants, for they cannot be considered as occupiers, and certainly not the unhappy lunatics received into the building. Then the property being subject to rate, the trustees, who are in the actual receipt of the profits, must be the persons rateable. There are no persons who can be rateable but the owners, and these are the owners. The case is not distinguishable from *Rex v. Agar*, 14 East, 256. The order of sessions must be quashed.

Order of sessions quashed.

*580] *EDWARD THORPE v. WILLIAM THORPE. May 8.

A. remitted a bill of exchange to B., to be paid to a third person on A.'s account. B. discounted the bill, but did not pay over the proceeds, upon which A. sued him in assumpsit for money had and received:

Held, that in this action a set-off was admissible.

ASSUMPSIT for money had and received. The cause was referred to a barrister, who in his award stated, that before the commencement of this action, a sum of 448*l.* was and still is due from the plaintiff to the defendant; that before the commencement of the said action, the defendant received from the plaintiff a sum of 13*l.*, and also a bill of exchange for 84*l.* endorsed and payable to the plaintiff, which sum of money and bill of exchange were so received by the

defendant for the purpose of being paid to one J. Wigfull, on account of a debt due to the said J. W. from the plaintiff; that the defendant received the amount of the said bill before the commencement of this action, and that the said several sums of 13*l.* and 84*l.* have not been paid to the said J. W. according to the purpose for which the same were so received by the defendant, but are still in his hands; whereupon if the Court should be of opinion, that the sum due from the plaintiff to the defendant might be set off in this action against the said sums of 13*l.* and 84*l.* received by the defendant, then the arbitrator ordered a verdict to be entered for the defendant; otherwise a verdict for the plaintiff, with damages to the amount of either or both of the said sums, according to the decision of the Court upon the question of set-off. A rule having been obtained calling on the plaintiff to show cause why, upon this award, a verdict should not be entered for the defendant, the Court ordered the case to be set down in the special paper, and it was now argued by

**Kelly*, for the plaintiff. The bill in this case was delivered by the plaintiff to the defendant for a specific purpose, namely, the payment of [581] a debt due from the plaintiff to a third party. The defendant retained the proceeds in breach of trust. Trover would have lain, and there no cross demand could have been alleged; and the bill was not given under circumstances upon which a lien could arise. It makes no difference in principle that the action is for money had and received. In *Buchanan and Others*, assignees of *Duff and Brown*, against *Findlay and Others*, 9 B. & C. 738, which was an action in this form, *Duff and Brown* had remitted bills to the defendants to be discounted, and the proceeds applied in a particular way; the defendants neither discounted the bills, nor would return them to *Duff and Brown* on request made, but received the proceeds when due, and on being sued by the assignees of *Duff and Brown* (who had become bankrupt before the bills were due), insisted on a set-off. All the cases bearing on the subject were there cited, and the Court, on deliberation, held, that the assignees were entitled to recover the amount of the bills as money had and received, and that the defendants could not set-off. Lord TENTERDEN, C. J., in delivering judgment there, says, "If the bankrupts could have maintained trover for these bills, or if the plaintiffs could have maintained an action in that form, they may waive the wrong, and maintain the action in its present form. A lien before payment, and a set-off after payment of the bills, are to be governed by the same rules." The only distinction between that case and the present is, that the action there was brought by assignees of **bankrupts*: but that makes no difference as to the ground of [582] the judgment. The action there was not brought to disaffirm any act of the bankrupts, but only to recover something due to them: the assignees stood in precisely the same situation as the bankrupts would have done if solvent. If it is contended here that the plaintiff ought to have brought trover, it might also have been said in *Buchanan v. Findlay*, 9 B. & C. 738, that the remedy for the bankrupts, if they had continued solvent, was trover. [PARKE, J. The assignees there might have brought trover, but they chose to sue as for money had and received, and it was held that the action lay, and the defendants could not set-off. But such an action brought by the assignees was not the same as if the bankrupts had remained solvent, and had sued the defendants for money had and received after the bills became due.] The plaintiff here, as in that case, might have brought trover, or might (as he had done) waive the tort and sue in assumpsit. [Lord TENTERDEN, C. J. In *Buchanan v. Findlay*, there was a demand and refusal of the bills before they were turned into money. The defendants there had no right to discount the bills; here the defendant was authorized to discount, and was guilty of no conversion in doing so.] The principle of that case equally applies, whether the defendant received the bill to discount, and would not return it on demand, or received the money upon the bill and did not pay it over as directed. The bankruptcy is the only circumstance that distinguishes the two cases, and that makes no essential diffe-

rence. The question is, whether the defendant here had any lien upon the bill which would *have entitled him to refuse to deliver it up if required? *583] If he had not, then as lien and set-off (according to *Buchanan v. Findlay*, 9 B. & C. 738) are governed by the same rules, he cannot set-off his present demand against the plaintiff's claim upon the bill. It was not competent to him, in either way, to make the bill available to his own debt. The Court will look at the substance of the transaction, and not to what may be alleged as the result of suing in one form or another.

B. Andrews, contra, was stopped by the Court.

LORD TENTERDEN, C. J. This language used in delivering a judgment must, like the words of any other written instrument, be taken with reference to the facts upon which it turns; it may otherwise be applied to purposes quite different from those for which it was intended. No two cases can well be more different than the present is from *Buchanan v. Findlay*, 9 B. & C. 738. There the bills were remitted to the defendants with directions to get them discounted, pay in 900*l.* of the proceeds at a banker's on account of the remitters, and place the balance to the credit of Duff, Findlay & Co., with the defendants. Before the bills arrived, the defendants stopped payment; but they received and kept the bills. The remitting parties, when they heard of the suspension of payment, desired that the bills might be returned, but this was not done. These bills, then, having been sent to the defendants for a specific purpose, which was not fulfilled, nor the bills returned on demand, an action of trover would have *584] lain at the suit of *the bankrupts if they had continued solvent, or of the assignees. Before any action was brought the defendants received the amount of the bills, and the assignees then proceeded against them for money had and received. The Court, in its judgment, observes, upon these facts: (His Lordship then read the observations of the Court, in p. 749, of the report of *Buchanan v. Findlay*, 9 B. & C. 738.) The judgment, upon these grounds, is no authority for the plaintiff in the present case, and I am therefore of opinion, that the defendant is entitled to judgment.

LITTLEDALE, J. If the defendant, being desired to pay over the bill, refused to do so, an action of trover would have lain for the bill. Here, it appears that he has discounted the bill and received the proceeds, but has failed to do that which was his duty under the circumstances, namely, to apply the amount as directed, and there remains a sum of money in his hands unappropriated to the plaintiff's use. For that the plaintiff was, no doubt, entitled to use; but the form of action which he has chosen is money had and received. The defendant then proves a set-off; and it is no answer to such a defence, to show the circumstances under which the plaintiff's money came into his hands. If the plaintiff had wished to exclude the set-off, he might have brought a special action for the breach of duty. *Buchanan v. Findlay*, 9 B. & C. 738, is clearly distinguishable from this case.

PARKE, J. This is a very plain case. If the plaintiff had chosen, instead *585] of assumpsit for money had and *received, to bring a special action for the breach of duty, there could have been no set-off, because it would have been an action for unliquidated damages. But by bringing assumpsit for money had and received, he lets in the consequences of that form of action, one of which is the right of set-off. The expressions of the Court in *Buchanan v. Findlay* must be taken with reference to the subject-matter. In that case the bills remained in the hands of the defendants unapplied to the purpose for which they had been sent, when the parties (Duff and Brown) who had sent them, countermanded the order for their being discounted, and desired to have them returned, which was not done. At the time when Duff and Brown became bankrupt no set-off could exist, for the money had not then come to the defendants' hands, the bills not being due. It was not a case of mutual credit, because the transaction on the part of the defendants was against good faith. The assignees in that case did not affirm any contract by bringing an action for

money had and received, which merely stood in the place of an action of trover. The judgment must be for the defendant.

PATTESON, J., concurred.

Judgment for the defendant.

*THORN, surviving Executor of PETER PAIGE, v.
WOOLLCOMBE. May 8.

[*586]

A lease was granted in 1759 for ninety-nine years, if certain parties should so long live. The lessees in 1818 demised the premises to P. for sixty-two years, from the 25th of March, 1821, if their interest should so long continue, subject to a rent of 42*l.* and various covenants, with a proviso for re-entry in case of default. P. had already the reversion in fee, subject to a mortgage granted by him before the last-mentioned demise. By lease and release executed in 1820, to which the mortgagee was a party, P. in consideration of a sum of money (part of which went to discharge the mortgage), conveyed the premises in fee to a purchaser, to whom the mortgagee also assigned his term; and it was stipulated that the purchaser should retain 800*l.* of the purchase-money, upon trust, that, if P. should pay the 42*l.* rent, and perform the covenants contained in the lease of 1818, the purchaser should pay over to him the 800*l.* at the expiration of the term or extinguishment of the lease of 1759, and interest in the mean time:

Held, that the deed of 1818 was an assignment of all the interest of the then lessees to P., and that by the conveyance of 1820, that interest, as well as the reversion in fee, passed to the purchaser, and (the mortgage being at the same time put an end to) the term became merged in the inheritance; and consequently, that as soon as the term became vested in the purchaser, P. was discharged from the rents and covenants, and entitled to the 800*l.*

COVENANT.—The declaration stated that by indenture made between Peter Paige, the testator, of one part, and the defendant of another, it was agreed that the defendant should retain in his hands a certain sum of 800*l.* in the indenture mentioned during a certain term created by lease of the 16th of July, 1818; and that if P. P. should during that term pay the rent reserved by the lease, and fulfil the covenants therein, the defendant would pay interest on the 800*l.* to P. P.; and after the expiration of the said term, or the extinguishment of a certain indenture of lease of the 1st of December 1759 by surrender or otherwise, and the payment by P. P., his executors, &c., of the before-mentioned rent, down to the time of such extinguishment, he, the defendant, would pay over to P. P., his executors, &c., the said sum of 800*l.* Averment, that before any of the rent became due, to wit, on, &c. all the residue of the term granted by the lease of 1759 legally came to the defendant, who was then seised in fee of and in the reversion of the premises demised by that lease expectant *on the determination of the term thereby granted, whereupon and whereby the residue of the said term became merged in the said [*587 inheritance of the defendant, and utterly extinguished; and that until that time P. P. kept all the covenants in the indenture of 1818 on his part to be performed. Breaches, that the defendant did not pay the interest, and that although the residue of the term granted by the lease of 1759 became merged and extinguished as aforesaid, the defendant did not pay the 800*l.* There was another count stating particularly the manner in which, as it was alleged, the residue of the term became merged in the defendant's estate in fee. Pleas, non est factum, and a special plea, among others, denying that the residue of the term in the lease of 1759 became merged or extinguished as stated in the declaration. There was also a plea of set-off for moneys paid, &c. At the trial before Park, J., at the Exeter Spring assizes 1831, a verdict was found for the plaintiff, subject to the opinion of this court on the following case:—

By indenture dated 1st of December, 1759, certain premises were demised to three parties therein named for ninety-nine years, if William Hicks, Philip Hicks, and Mary Hicks should so long live, subject to certain rents, &c. The

term so created passed by an indenture subsequently made, to William Hicks, Philip Hicks, and John Hicks. By indenture bearing date 16th of July, 1818, between these three last-mentioned persons of the one part, and Peter Paige, the testator, of the other, it was witnessed that, for the considerations therein mentioned, the three Hicks's did demise, lease, set and to farm let unto Paige the said premises (then in the possession of W. and J. Hicks and of the said *588] Paige) excepting as in the original lease was excepted, to hold *from the 25th of March, 1821, for sixty-two years thence next ensuing if the right and interest of the Hicks's should so long continue, at the yearly rent of 63*l.* as therein mentioned. The indenture (which, as well as the deeds after-mentioned, was to be taken as part of the case) contained covenants for payment of rent to the Hicks's, and of heriots, for repairing, for keeping all the covenants in the original lease, so that the same might not be forfeited, for payment of taxes, &c. then payable or thereafter to be imposed, and for re-entry by W., P., and J. Hicks, in case the rent should be unpaid, or the covenants in that and in the original lease not performed.

By indentures of lease and release bearing date the 3d and 4th of May, 1810, James Barry, in whom the fee in the premises then was, conveyed the said fee to Paige to the uses, and upon the trusts, and in the manner therein mentioned; and in 1817 Paige demised the premises to one Chapman for 1000 years from the day preceding the demise, as security for 1000*l.*

By lease and release, bearing date the 24th and 25th of August, 1820, between Peter Paige of the one part, Chapman of another part, and the defendant of another part, reciting the indentures above mentioned, and that W., P., and J. Hicks had become entitled to the premises for the remainder of the said term of ninety-nine years, determinable on the deaths of William and Philip Hicks; reciting, also, an assignment by Philip (executed just before the present lease and release) of his share in the premises during the remainder of the term to Paige, so that (as was alleged) Paige then had the fee-simple and inheritance of the premises, subject to the payment of 42*l.* per annum to *589] William Hicks and John Hicks during the said term: *reciting, also, that the defendant had agreed for the purchase of the fee-simple and inheritance in possession of the said hereditaments and premises for 2245*l.*, and that Chapman had been applied to, and had agreed, to join in the conveyance on being paid his 1000*l.*, and to surrender his term of 1000 years to the intent after mentioned: and further reciting that it had been agreed between the said Peter Paige and the defendant, that 300*l.* part of the said sum of 2245*l.*, should be retained by the defendant as after mentioned: It was witnessed, that in consideration of 1000*l.* then paid by the defendant to Chapman, and 945*l.* to Paige, and of the 300*l.* so to be retained, Paige conveyed the premises to the defendant in fee, and Chapman assigned to the defendant the said term of 1000 years and the interest created by the said indenture of mortgage, in order that such term and interest might absolutely vest in the defendant, and merge in the inheritance conveyed to him by Paige. It was further declared and agreed that the defendant should retain the 300*l.*, upon trust, that if Paige, his heirs, executors, &c. should pay the rent and perform the covenants mentioned in the lease of 1818, and save the defendant harmless therefrom, then the defendant should pay 5 per cent. per annum interest thereupon, and after the expiration of the said term, or extinguishment of the said lease of 1759 by surrender or otherwise, pay over the said 300*l.* to Paige, his executors, &c. Evidence was given on behalf of the defendant, to show that he had paid the 42*l.* a year to the Hicks's during the life of Paige, with his consent, and, after his death (which happened in 1826), with the consent of the plaintiff.

Upon these facts, if the Court should be of opinion that, by the operation of *590] the deeds of July 16th, 1818, *and August 24th and 25th, 1820, the term created by the deed of 1759 became extinguished in the rever-

sion in fee, and the entire freehold passed from Paige to the defendant, and that the defendant, therefore, was bound to pay the 300*l.* to Paige, and interest upon it until payment, the verdict was to stand for such sum as the plaintiff should appear entitled to; if not, a nonsuit to be entered. This case was argued^(a) on a former day of the term, by

Follett, for the plaintiff. The term created in 1759 merged in the inheritance when the fee-simple was conveyed to the defendant in 1820. The lease of 1818 was an assignment to Paige by William, Philip, and John Hicks of the residue of their term. It could not merge on the execution of that lease, because of the term of 1000 years which Chapman then had; but it did merge, when that intervening term was put an end to by the deed of 1820. The lease executed by the Hicks's to Paige was clearly an assignment; for where a party, though professedly making an underlease, parts with his whole term, that amounts to an assignment; which is, in point of law, merely the transferring and setting over to another that interest, however it came, which the party has, *Bac. Abr. Assignment*. It may be contended, the word "demise" does not import an assignment; but it is of general application, and only means conveyance. Thus it is said, 2 *Inst.* 483, that "demise" is applied to an estate either in fee-simple, fee-tail, or for life, and is so taken in many writs. In *Hicks v. Downing*, 1 *Ld. Raym.* 99, it is laid down, that if lessee for three years assigns his *term for four years, or demises the house for four years, it is an assignment of his interest: and it appears [*591] from *Palmer v. Edwards*, 1 *Doug.* 187, note, that wherever the whole interest is conveyed and no reversion left, that is an assignment. That case also explains *Poultney v. Holmes*, 1 *Str.* 405, and shows that a reservation of the rent to the party transferring his interest, and not to the original lessor, makes no difference. In *Parmenter v. Webber*, 8 *Taunt.* 593, though the terms of the agreement were such as clearly showed that an underlease was contemplated, yet as the whole interest was transferred, the Court of Common Pleas held that it was an assignment. The same principle is recognised in *Preece v. Corrie*, 5 *Bingh.* 24. Then if the deed of 1818 was an assignment, the term was merged in the fee-simple by the conveyance of 1820. In equity, indeed, a merger may be permitted to take effect or not, according to the apparent intention of parties, and the interest to be affected: this is laid down in *Donisthorpe v. Porter*, *Amb.* 600, and is exemplified there, and in *St. Paul v. Lord Dudley*, 15 *Ves.* 167, and *Thomas v. Kenneys*, 2 *Vern.* 348. But, at law, the views or beneficial interests of parties will not control the operation of a deed creating a merger, *Co. Litt.* 54 b, *Utben v. Godfrey*, 3 *Dyer*, 309 b, n. 78, ed. 1794, *Lewis Bowles's case*, 11 *Rep.* 83 b, *Webb v. Russell*, 3 *T. R.* 393. [Lord TENTERDEN, C. J. That decision excited a great deal of feeling at Westminster.] It shows that the rule of law is unbending. *Thre'r v. Barton*, *Moor.* 94, cited in that case, is a strong authority on the same point. The rule is also recognised in the late case of *Burton v. Barclay*, 7 [*592] *Bingh.* 756. Other cases are referred to, and the doctrine on this subject discussed, in 3 *Preston on Conveyancing*, c. 5, p. 43, 3d ed. In the deed of 1820, now in question, it was not the intention or interest of the parties (though it was the interest of the Hicks's) that the term should not merge. But at all events it did so in point of law, and the defendant had no longer any right to retain the 300*l.*

R. Bayly, contrd. If the plaintiff succeed in this case it is clear some one must be defrauded. The lease of 1818 was not an absolute demise, but only carried a contingent interest, to have effect if the lessee should perform the covenants in the original indenture: if they were not performed, a right of re-entry was to accrue. Such an interest would not merge in the fee. The case does not state an entry upon the premises by Paige, or any person claiming by

(a) Before Lord Tenterden, C. J., Littledale, Parke, and Patteson, Js.

virtue of the deed of 1818; the defendant, therefore, could have only an *interesse termini* under that deed, *Miller v. Green*, 8 Bingh, 92; and of this there could be no merger. [PATTERSON, J. The deed states Paige to be in possession.] Several ancient cases have been cited to show that a merger will take place, though contrary to the evident intention of the parties. But the rule in later times has been to give greater effect to the intention, as is fully laid down in *Roe d. Earl Berkeley v. The Archbishop of York*, 6 East, 104, by Lord Ellenborough, who cites the maxim "*verba intentioni, et non à contrà, debent inservire*," and refers to several cases on this point. Here it evidently was not intended that the term should be considered as merged or surrendered. *593] A yearly rent was reserved by the lease, and this, by the indenture of 1820, Paige covenanted to pay during the term. His doing so is made a condition precedent to the defendant's payment of the 300*l*. The lease was not to commence till 1821. A right of re-entry is reserved by the lease if the rent should not be paid, or the covenants in that of the original lease not performed; and those covenants are expressly referred to in the deed of 1820. The intention that Chapman's term shall merge and be extinguished is specifically declared in that deed; but nothing of the kind is said as to the term granted in 1818. The declaration states that the 300*l*. were to be paid to Paige, if he should have paid the yearly rent of 42*l*. No fulfilment of that condition is alleged.

Follett, in reply. It is averred that Paige kept all the covenants in the indenture of 1818 by him to be performed, and that is not denied. The lease did not depend upon any contingency that could prevent its merging. The only contingency to which it was subject, was, if the right of the Hicks's or any of them should continue to the end of sixty-two years. In *Palmer v. Edwards*, 1 Doug. 187, note, there was a proviso of re-entry in the deed which was there held to be an assignment. As to the non-avertment of an entry under the deed of 1818, it will not now be presumed that there was no entry. The case does not raise any question upon it. It is true the intention of parties is to be regarded in construing deeds, but no case has been cited to show that *594] such intention can control the legal effect of a deed by which a term merges. Some estate at least passed by the deed of 1818. Where is it, since the deed of 1820, if not in the defendant? Clearly it vested in him by that conveyance, with an immediate reversion in fee, in which it merged. *Curr. adv. vult.*

LORD TENTERDEN, C. J., now delivered the judgment of the Court. This cause came before the Court upon a special case; the question being whether a term of years granted in the year 1759, had become merged in the fee and inheritance of the land thereby demised.

The action was covenant on an indenture made in August, 1820. (His Lordship then stated the pleadings which are set out above.) By the special case it appears that the lease of 1759 was for a term of ninety-nine years, if three persons of the name of Hicks should so long live; this lease afterwards became vested in two of those persons, and another of the same name; and in the year 1818, the persons in whom it was so vested, executed a deed purporting to be a demise of the land to Peter Paige for the term of sixty-two years, if their right and interest should so long continue, at the yearly rent of 63*l*. payable in equal third parts to each of those three persons; the habendum being from the 25th of March, 1821. Before the date and execution of this deed, Peter Paige had become the purchaser of the fee of the demised land, and had mortgaged it for 1000 years to one Joseph Chapman as a security for 1000*l*.

In 1820 Peter Paige sold and conveyed the land to the defendant by the indenture on which the action was brought. To this indenture the Hicks's were not parties, but Joseph Chapman was a party and received his mortgage *595] money, and assigned his term to the defendant, that it might be merged in the inheritance. The deed executed by the Hicks's to Paige

was recited in this conveyance to the defendant, and it is obvious that all the parties to that conveyance considered the instrument to be a good lease, and the rent of 42*l.* (Peter Paige having purchased the share of one of the Hicks's) to be a charge upon the land, and provision was made indemnifying the defendant against it. It was so considered during the life of Peter Paige, and the 42*l.* a year was paid for some short time after his death.

But it was now contended that the instrument executed by the Hicks's in 1818 was not a lease, but operated in law as an assignment of the entire residue of the term granted by the lease in 1759: and that although that term might not be merged in the inheritance immediately by reason of the intervening term of years then vested in Chapman, yet that it did become merged by the operation of the conveyance in 1820 as soon as the term came in esse, if not before, and consequently the 42*l.* a year was no longer a charge upon the land.

We have reluctantly come to that conclusion, by reason of the prejudice to the Hicks's, but the principles of the law on this subject are plain, and the authorities quoted by Mr. *Follett* are unanswerable.

The deed of 1818 left no reversion in the Hicks's; their entire interest passed by it; and when that takes place the deed operates as an assignment, whatever be the form of words used in it.

That entire interest, having thus become vested in Peter Paige, passed by his conveyance to the defendant: the intervening term of 1000 years was merged, and the term created by the lease of 1759 became merged also.

On behalf of the defendant, however, it was urged *that no entry [*596 being stated in the case, the term was not vested, but the defendant had only an *interesse termini*. It is not necessary to consider what might be the effect of such an interest, because it is not usual to aver an entry in a special case, whatever may be necessary on a special verdict, and the facts stated furnish sufficient evidence of an entry, because the 42*l.* was paid for some time after the 25th of March, 1821, and at least on one occasion by the defendant himself.

Postea to the plaintiff.

ANNE SAMMON v. MILLER. May 8.

A bond to replace stock at a certain day, and in the mean time pay dividends, became forfeited by non-payment of the dividends. The arrears were afterwards paid. The obligor became insolvent, and being in prison, petitioned for his discharge under the then existing insolvent act, 58 G. 3, c. 102, the time for replacing the stock not having yet arrived, and there being no dividends in arrear:

Held, that he might insert the bond in his schedule of debts, and was entitled to be discharged from it under the act.

DEBT on a bond for 3485*l.*, dated October 9th, 1815, the condition of which was that the defendant should reinvest, on or before the 9th of October, 1820, the sum of 2000*l.* navy 5 per cent. bank annuities in the name of the plaintiff, which stock she had sold out, and the produce of which she had lent to the defendant; and that he should in the mean time pay her the sums which would have been due as the dividends of such stock. Plea, that on the 28th of May, 1819, the defendant was duly discharged from the said debt under the insolvent act, 58 G. 3, c. 102. Replication, that the defendant was not duly discharged, &c., upon which issue was joined. At the trial before Lord Tenterden, C. J., at the sittings in Middlesex after Michaelmas term, 1830, a verdict was found for the plaintiff, subject to the opinion of this Court upon the following case:—

In 1817, the defendant having made default in paying the above dividends, an action was commenced against *him, upon which he paid the arrears then due; and for better securing the dividends and reinvestment of [*597

stock above mentioned, gave a warrant of attorney to confess judgment in an action by the plaintiff for 3485*l.*, money borrowed. On the 7th of January, 1819, judgment was signed thereon. On the 3d of May in the same year, the defendant being in custody at the suit of one Street, petitioned the insolvent debtor's court for his discharge, and included the plaintiff in his schedule, as a creditor for 2150*l.*, describing the debt as follows:—

"For 2000*l.* navy 5 per cent. bank annuities lent by her to me, with the current half year's dividends thereon. To secure the replacing of this stock on the 9th of October, 1820, and the payment of the dividends in the mean time, she holds my bond, and has a judgment entered upon a warrant of attorney."

When the petition was heard (in the same month of May), there was no dividend in arrear. The defendant obtained his discharge. If the Court should be of opinion that the discharge was a bar to this action, a verdict was to be entered for the defendant. This case was argued on a former day by

Campbell, for the plaintiff. It may be admitted that if this had been a case under the bankrupt laws, the bond, having once been forfeited at law, would have become a debt proveable under the commission (though there were no arrears unpaid at the time), and the bankrupt would have been discharged from such debt by his certificate, *Perkins v. Kempland*, 2 W. Bl. 1106, *Wyllee v. Wilkes*, 2 Doug. 519, *Ex parte Leitch*, Cook's Bankrupt Law, 149, *598] *Ex parte Day*, 7 Ves. 301. A bankrupt obtaining his *certificates was,

by 5 G. 2, c. 30, discharged from *all debts* by him due or owing at the time of the bankruptcy. But there is no corresponding provision in the insolvent act 53 G. 3, c. 102, which was in force when the defendant obtained his discharge. Sect. 21 of the statute will be relied upon; (a) that section, however, applies to *sums of money* payable by virtue of the bond, &c., and provable before the Court. It would not apply, in such a case as this, to the security itself, which (as far as it comes in question here) was not for the payment of money, but for the doing of an act, namely, replacing stock. It was an obligation, under a penalty, to purchase a commodity at a future day. The plaintiff, if she claimed to be a creditor when the defendant petitioned, must have done so on the ground that he was to perform something at a time not then arrived, the non-performance of which would entitle her to put in force the security she held. That is not within the intention of the act. How could the insolvent state a debt in his schedule, the amount of which would *599] depend upon the value *of stock in the following year? The discharge under this statute could only be from liquidated demands, *Lloyd v. Peel*, 3 B. & A. 407. The same doctrine was held in *Wilmer v. White*, 6 Bingh. 291, upon the construction of the words "debt or sum of money" in the more recent act 7 G. 4, c. 57, s. 61. It may be said that sect. 32 of the 53 G. 3, c. 102, contains some words relative to the insolvent's discharge from "any cause of action," or "debt or demand," more comprehensive than those in the former part of the act, but this clause is framed with a view only to the mode of pleading a discharge under the statute, and not meant to extend the relief given by the previous sections. (A second objection was that the order for the defendant's

(a) Which enacts, "That all and every creditor and creditors of any prisoner who shall be discharged by virtue of this act, for any sum or sums of money payable by way of annuity or otherwise at any future time or times, by virtue of any bond, covenant, or other security, of any nature whatsoever, shall be entitled to be admitted a creditor or creditors, and to receive a dividend or dividends of the estate of such prisoner, in such manner, and upon such terms and conditions as such creditor or creditors would have been entitled unto such dividends by the laws now in force if such prisoner had become bankrupt, and without prejudice in future to their respective securities, otherwise than as the same would have been affected by proof made in respect thereof by the creditor under a commission of bankruptcy, and a certificate obtained by the bankrupt under such commission, but subject nevertheless to the terms of the engagement of such prisoner for future payment of his or her debts, in case such prisoner should become able to pay the same as hereinbefore directed.

discharge did not specify the creditors and persons from whose demands he was entitled to be discharged, pursuant to s. 10 of the statute, and was therefore void: but on reference to 54 G. 3, c. 23, which was in force when the order was made, it appeared that that act (s. 7) rendered such enumeration in the order unnecessary.)

F. Pollock, contra. The insolvent debtors' court had power, under the act of the 53 G. 3, c. 102, to discharge the defendant from this cause of action. It is admitted that if this were the case of a bankrupt, the certificate would be a discharge from the bond; and it is clear from *Ex parte Groome*, 1 Atk. 115, and *Ex parte Winchester*, 1 Atk. 115, that long before the passing of that act, if a bond was forfeited before bankruptcy, it was considered as a debt provable under the commission. It could make no difference whether the condition was payment of money or the doing of an act; if the amount due by reason of the forfeiture could be ascertained, the penalty still became a debt. [Lord TENTERDEN, C. J. A bail-bond, when forfeited, is considered as constituting a debt.] There can be no reason for assuming that the legislature, in passing the insolvent act 53 G. 3, c. 102, overlooked the class of cases to which *Ex parte Groome* and *Ex parte Winchester* belong. Their object was to give a relief at least as extensive as that under the bankrupt laws; and the words are sufficiently comprehensive to include the demand in question. It is not necessary to rely merely on sect. 21. Sect. 1 provides, that every person who shall be a prisoner as there specified "for or by reason of any debt, damage, costs, sum or sums of money, or contempt for non-payment of money, and who shall have been in actual custody upon some process for some one of the said debts or demands" for three calendar months, may petition for his discharge, stating in his petition "the amount of the debts or sums of money" for which he is detained, and praying to have liberty against the "demands" for which he is in custody, and against the "demands" of the creditors named in his schedule: and the schedule is to describe the persons claiming to be creditors, with the nature and amounts of such "debts and claims." These terms include every demand which could be calculated and turned into money: there is no reason that they should not extend to a forfeited bond, although no equitable right should yet have accrued in respect of it. In bankruptcy such bond would have been provable, and it is clear the legislature intended it to be so here. Sect. 21 does not profess to give any new or further relief than is provided by the former clauses, but by the words there used it is evidently assumed that those clauses are to operate as a discharge from the securities like the present. Sect. 32 [*601] supports the same construction. *Ex parte Groome* and *Ex parte Winchester*, 1 Atk. 115, support it in principle. [PATTESON, J., Perkins v. Kempland, 2 Sir W. Bl. 1106, is very like this case in its circumstances.] In practice, bonds like this are proved under commissions. The obligee is clearly entitled to some indemnity, whatever be the rule of calculation; and it is sufficient in this case to show that the bond having been once forfeited, there was a debt, or demand, or cause of action. [LITLEDAL, J. In *Utterson v. Vernon*, 3 T. R. 539, overruled 4 T. R. 570 (between the same parties), on a ground not affecting this point, Lord Kenyon held, that the price of the stock on the day of the bankruptcy was the amount recoverable by the plaintiff. PARKE, J. In *Ex parte Fisher* (Buck's Cases in Bankruptcy, 188), a bond was given with 1000*l.* penalty, for replacing 550*l.* in three years, and paying the dividends in the mean time; before the end of the three years the obligor became bankrupt, and the bond had been forfeited by non-payment of dividends: and the Vice-Chancellor there said, "The bond being forfeited at the time of the bankruptcy, there was then a legal demand for the penalty. The amount of the penalty would, upon proof of the debt under the commission, have been reduced upon equitable principles to the then actual value of 550*l.* stock."] Another point in favour of the defendant is, that a judgment had been

entered up under the warrant of attorney, for the penalty of the bond, so that it had been turned into a complete debt of record, for which the plaintiff might have proved in the insolvent debtors' court.

Cur. adv. vult.

*Lord TENTERDEN, C. J., now delivered the judgment of the Court.
*602] We are clearly of opinion that, the bond being forfeited, the penalty became a debt from which the insolvent was entitled to be relieved by the order of the insolvent court. It is not necessary to decide for what amount the creditor would have a right to prove; but the case *Ex parte Fisher* (a) seems to leave no difficulty in that respect. The verdict must be entered for the defendant.
Postea to the defendant.

(a) *Buck's Cases in Bankruptcy*, 188. And see *Ex parte Day*, 7 Ves. 301.

CUMBERLAND, and ANN his Wife, v. KELLEY. May 8.

The grant of an annuity, in consideration of government stock transferred from the grantee to the grantor, need not be registered under the statute 17 G. 3, c. 26. At least the want of a memorial is no objection, if it be not shown, by the party seeking to set aside the annuity, that the transfer was only a colour for an advance of money, to be raised by sale of the stock.

DEBT on an annuity bond, bearing date the 10th of April, 1813, given by the defendant to the plaintiff, Ann, while unmarried. The condition of the bond, as set forth in the declaration, recited that the said Ann had agreed with the defendant for the purchase of an annuity of 20*l.* for her life, in consideration of the transfer of 333*l.* three per cent consols then standing in her name in the books of the Governor and Company of the Bank of England; and that the said Ann, at the time of the sealing and delivering of the said obligation had, that day, well and truly transferred the sum of 333*l.* three per cent consols in the books of the said Governor and Company into the name of the defendant, the receipt and transfer whereof he thereby acknowledged. The action was for non-payment of arrears. The defendant *pleaded among
*603] other things, that no memorial of the said writing obligatory, by which the above-mentioned annuity was granted, had been enrolled, pursuant to the act of 17 G. 3 (c. 26), "for registering the grants of life-annuities," wherefore the said writing was null and void. Replication, that no such memorial was requisite, for that the said writing obligatory was not a deed, bond, &c., within the meaning of the act. Demurrer to the replication, as tendering a mere issue in law. Joinder in demurrer. This case was argued, as to the sufficiency of the plea (the replication being clearly bad), in Michaelmas term, 1831, by *Cole-ridge* for the defendant, and *R. V. Richards* for the plaintiffs, and the Court then desired to hear the case further argued, unless the defendant's counsel should think proper to amend; observing that the question was difficult, and had not arisen before. The case was now re-argued.

N. R. Clarke, for the defendant. This was an annuity granted for a pecuniary consideration, and ought to have been registered pursuant to the statute
*604] 17 G. 3, c. 26, (a) *which was in force when the deed was executed. The object of the act was to regulate the purchase and sale of annuities.

(a) The act 17 G. 3, c. 26, s. 1, recites, that "The pernicious practice of raising money by the sale of life annuities, hath of late years greatly increased, and is much promoted by the secrecy with which such transactions are conducted." It therefore enacts, that a memorial of every deed, whereby an annuity shall be granted for life or lives, &c., shall be enrolled as there directed; and shall contain, among other things, the consideration or considerations of granting such annuity, otherwise every such deed shall be null and void. Section 8 enacts, that in every annuity-deed the consideration really and bona fide (which shall be in money only), and also the name or names of the person or persons by whom, and on whose behalf, the said consideration, or any part thereof, shall be advanced, shall be fully and truly set forth and described in words at length, other-

But the mention of "*raising money* by sale of life-annuities," in the preamble, the clause in s. 3, requiring the consideration to be "in money only," and the exception in s. 8, of annuities granted "without regard to pecuniary consideration," must not be taken as confining the operation of the act to annuities granted for *money*, in the strict sense of that word. *Crossley v. Arkwright*, 2 T. R. 603; *Wright v. Reed*, 3 T. R. 554; *Morris v. Wall*, 1 B. & P. 208; *Crespigny v. Wittenoom*, 4 T. R. 790; *Kelfe v. Ambrose*, 7 T. R. 551; *Poole v. Cabanes*, 8 T. R. 328, show that it is not so limited. That the consideration might be paid in notes, appears from the act itself, s. 4. The intention of this statute, namely, that the sale of annuities should no longer be transacted in secret, might be easily evaded, if the necessity of enrolment could be prevented by a transfer of stock. **Brown v. Dowthwaite*, 1 Madd. 446, may be cited on the other side: it was held there, that an annuity granted in consideration of a reversionary interest in stock, need not be enrolled; but here the consideration is not a reversionary, but a present interest in stock. Nothing is more frequent in practice, than to deal with stock as money; as in the purchase of estates, where payment is very commonly made by a transfer in the funds. Stock is, in fact, scarcely less convertible than notes. It was suggested on the last argument (a) that, for anything that appeared, this annuity might have been granted with the intention, *bonâ fide*, of purchasing so much stock, and holding it; and not of turning it into money. But if this were so, it should be shown by the grantee, who is cognizant of the fact, and relies upon it.

R. V. Richards, contrâ. It does not appear from the deed in this case, that the consideration was pecuniary, and the defendant ought to have supplied that defect by averment in his plea. To bring an annuity within the act as requiring registration, the consideration must be money, bills or notes, or goods. *Crespigny v. Wittenoom*, 4 T. R. 790; *Hutton v. Lewis*, 5 T. R. 639; *Doe dem. Johnston v. Phillips*, 1 Taunt. 356; where *Chambre, J.*, explains *Crossley v. Arkwright*, 2 T. R. 603, by observing that in that case "the consideration wholly consisted of money and goods; and goods most strongly belong to the class of annuities that requires registration." The observations of Lord **Ellenborough* in *Horn v. Horn*, 7 East, 529, and those of *Bayley, J.*, in *Hick v. Keats*, 4 B. & C. 69, are also strongly opposed to the extension of the statute now contended for. In *Doe v. Phillips*, 1 Taunt. 356, *Mansfield, C. J.*, says, "the act would embrace a case of fraudulent evasion;" but if that had been relied upon here, the fraud should have been averred in pleading. It is not necessary in this case to establish that the annuity would have been exempt from registration under the act 53 G. 3, c. 141, but there are cases which would bear out that proposition, though by sect. 10 of this latter act it

wise the deed shall be void. Section 4 enacts, that "if any part of the consideration shall be returned to the person advancing the same; or, in case the consideration or any part of it is paid in notes, if any of the notes, with the privity and consent of the person advancing the same, shall not be paid when due, or shall be cancelled or destroyed without being first paid; or, if the consideration, or any part of it, is paid in goods; or if any part of the consideration is retained on pretence of answering the future payments of the annuity or any other pretence;" in every such case proceedings to enforce the deed may be stayed on motion, and the court may order the deed to be cancelled. Section 8 provides, that the act shall not extend to "any annuity or rent-charge given by will or by marriage settlement, or for the advancement of a child; nor to any annuity or rent-charge secured upon lands of equal or greater annual value, whereof the grantor was seised in fee-simple or in fee-tail in possession at the time of the grant, or secured by the actual transfer of stock in any of the public funds, the dividends whereof are of equal or greater annual value than the said annuity; nor to any voluntary annuity granted without regard to pecuniary consideration; nor to any annuity or rent-charge granted by any body corporate, or under any authority or trust created by act of parliament."

(a) By *Parke, J.*, who mentioned *Horn v. Horn*, 7 East, 529, as deciding that where the defendant relies on the want of a memorial, it rests with him to show that the consideration was pecuniary, if that does not appear from the bond itself.

is provided that the statute shall not extend to voluntary annuities granted "without regard to pecuniary consideration or money's worth." In *Blake v. Attersoll*, 2 B. & C. 881, 882, Bayley, J., considers the second section of that act (which directs the form of memorial) as evidently contemplating a consideration paid in money, notes or bills: and *Littledale, J.*, says, "I am clearly of opinion that to bring a case within the 53 G. 3, c. 141, there must be an actual sale of an annuity for money, bills or goods." The same view of it is taken in *James v. James*, 2 B. & B. 702, and *Tetley v. Tetley*, 4 Bingh. 214. It is contended that although stock be not money, bills, or notes, yet it is equally a pecuniary consideration within 17 G. 3, c. 26, because it is immediately convertible into these. But the Court cannot say that three per cent. consols were so at the time when this annuity was granted. And it is not to be assumed that the grantor meant to turn them into money. There is nothing to show that he did not accept the stock with a *bonâ fide* intention of keeping it in his hands. The stock itself cannot be regarded as a pecuniary consideration. In *607] *Wildman v. Wildman*, 9 Ves. 177, the Master of the Rolls says, "there is a great difference between a transfer of stock and payment of money. The interest in stock is properly nothing but a right to receive a perpetual annuity, subject to redemption; a mere right therefore: the circumstance that government is the debtor, makes no difference: a mere demand of the dividends, as they become due, having no resemblance to a chattel movable, or coined money, capable of possession and manual apprehension." *Brown v. Dowthwaite*, 1 Madd. 446, is not essentially distinguishable from this case: it is true the interest in the stock there was reversionary, but such an interest may be turned into money as well as a present interest. [PARKE, J. All that can be said is, it is not quite so easily convertible.] The Vice-Chancellor there says, "this case is decided by *Crespigny v. Wittenoom*, 4 T. R. 790, which is, in principle, the same. Nothing was immediately paid to the grantor. Because the stock might have been immediately sold, it is not therefore to be considered as money." The decisions, then, confine the meaning of these statutes to cases where the consideration is strictly money, bills or notes, or goods; that is, goods in the mercantile sense, and which may be the subject of trover. If stock may be considered money for one purpose, it may for another. In *Jones v. Brinley*, 1 East, 1, the defendant had agreed to pay the plaintiff a certain percentage, when F. N. should receive any money through the plaintiff's information. F. N. did, through such information, obtain 500*l.* stock, but the Court held that this did not entitle the plaintiff to his percentage, though it was argued that the stock ought to be estimated as so much money, into which it was *608] convertible. In *Nightingall v. Devisme*, 5 Burr. 2589, 2 Sir W. Bl. 684, S. C., it was held that the value of East India stock could not be recovered in an action for money had and received, because stock is not money. The same was decided in *Waynam v. Bend*, 1 Camp. 175, as to a promissory note (in an action by the endorsee), yet a good note is readily convertible into money. And so it was held in *M'Lachlan v. Evans*, 1 Y. & J. 380, as to the value of foreign securities which had never been turned into money; though it might have been different (as has been determined in the case of country notes, see *Pickard v. Bankes*, 13 East, 20), if the party to whose hands they came had treated them as money. The offence of usury is not completed by taking a promissory note, because the mere giving of the note is not a payment of money or money's worth, *Maddock v. Hammett*, 7 T. R. 184. These cases are applicable to the present, since it does not appear upon these pleadings that the 33*l.* 3 per cents. were converted into money, or even that the transaction was not a *bonâ fide* purchase of stock by the defendant.

N. R. Clarke, in reply. Stock may not be money for all purposes, but it is a sufficient "pecuniary consideration" to distinguish an annuity from voluntary annuities granted "without regard to pecuniary consideration." *Hutton v. Lewis*, 5 T. R. 639, and *Horn v. Horn*, 7 East, 529, were cases clearly not

within the mischief of the act. In *Hick v. Keats*, 4 B. & C. 69, it was a sufficient ground of decision that the supposed consideration was not stipulated for at the time of granting the annuity, but had passed long before: *and the decision in *Blake v. Attersoll*, 2 B. & C. 875, went on the ground [*609 that there was no consideration moving from the grantee to the grantor. If a consideration paid in "money, bills, or goods" (as there stated) will bring a deed within the statute, it is not clear that stock may not answer the description of goods sufficiently for this purpose.

LORD TENTERDEN, C. J. I am of opinion that this was not an annuity deed requiring enrolment under the act 17 G. 3, c. 26: the other statute need not be taken into consideration. It is clear that stock is not "money." Its value cannot be recovered in an action for money had and received. The agreement here is that the defendant shall receive, not so much money, but a certain amount of stock. To hold that a deed of this nature does not require enrolment, may (as it has been urged) give rise to inconvenience and fraud; but the question before us is merely, whether this deed is or is not within the meaning of the act. It is possible that the present transaction, if unravelled, might prove to be within the mischief of the statute, but there is nothing to show that, and in the absence of any averment to such an effect we have no right to infer an intention to evade the law. All we can say is, that, stock not being money, this deed, by which an annuity is granted in consideration of the transfer of stock, does not come within the statute, as a deed requiring enrolment.

LITLEDALE, J. The act 17 G. 3, c. 26, is shown by the preamble to contemplate the raising of money by the sale of annuities, and sect. 8 exempts from the operation *of the act voluntary annuities granted without regard to pecuniary consideration. The first section directs that a memorial of [*610 every annuity deed there described shall be enrolled in chancery, and shall state the consideration for granting the same: and sect. 3 requires that every such deed shall set forth the consideration for granting the annuity, which consideration shall be in money only. The intention of the act is further explained by sect. 4, which enacts that if any part of the consideration be returned, or if any part be given in notes, which are not paid when due, or are cancelled or destroyed without being first paid, or if the consideration or any part of it be paid in goods, proceedings on the annuity deed may be stayed on summary application to the Court, which may direct the deed to be cancelled. It was foreseen, that, according to the practice commonly adopted in such transactions, a part of the consideration to be stated in the deed and memorial would on some occasions be returned, or would be paid in goods of a mere nominal value, and therefore the statute gives a remedy in such cases by summary application to the Court. All this part of the act evidently contemplates cases, in which the consideration mentioned in the deed and in the memorial would be money. Here that is not so, the consideration stated in the deed being stock. This cannot be considered a voluntary annuity, that is, one granted without regard to pecuniary consideration according to sect. 8. The term "pecuniary consideration," must relate to those things which pass as money in the ordinary intercourse of life. A note perhaps may come within that description. It is said that stock does, because it is convertible into money, but all property is so with more or less difficulty. The present argument *would apply to Bank [*611 stock or India stock: then why not to shares in canal, dock or mining companies? The facility with which a thing may be converted into money, does not make it a pecuniary consideration: and it may be observed that even stock is not convertible at all times. I am therefore of opinion that the plaintiff is entitled to judgment.

PARKE, J. I am of the same opinion. On these pleadings we must intend that the annuity deed was of a kind not requiring enrolment, for that the granting of the annuity was, on the part of the grantor, a bona fide purchase of 833 $\frac{1}{2}$ 3 per cent. consols. If his object had, in fact, been to raise money, the

case might have been different, but that does not appear. The term "pecuniary consideration" in sect. 8 of the statute is sufficiently explained by *Crespigny v. Wittenoom*, 4 T. R. 790, to mean money, or such securities for money as bills or notes; and that construction is supported by *Hutton v. Lewis*, 5 T. R. 639, and *Horn v. Horn*, 7 East, 529, and the cases, upon the subsequent annuity act, of *James v. James*, 2 B. & B. 702, and *Tetley v. Tetley*, 4 Bingh. 214. Upon these pleadings the present case is not distinguishable, in principle, from those, and therefore I think the deed is not void for want of a memorial.

PATTESON, J. We are not at liberty on these pleadings to assume that the transaction was a fraud upon the act; and all that appears is, that the grantor *612] makes a purchase of so much stock, to be paid for by an annuity. *This falls within the cases that have been referred to, and I think they were rightly decided.

Judgment for the plaintiffs. (a)

(a) The following case was decided in Trinity term 1832:—

FROST v. FROST. June 1.

A., being indebted to B., it was agreed between them, that in lieu of payment A. should by bond secure the payment of an annuity to B.'s widow, after his decease, during the joint lives of A. and the widow. B. died in 1825, and in 1828 A. executed an annuity deed pursuant to the agreement: Held, that the deed did not require enrolment. under the statute 58 G. 8, c. 141.

DEBT on a bond, dated 4th of January, 1828, for the payment of 2000*l*. The condition (set out on oyer) recited, that the defendant having been some years indebted to T. F., the late husband of the plaintiff, in a large sum of money, upon a balance of accounts between them, it was agreed, that in lieu of payment of 479*l*., part of such balance, the defendant should by his bond secure the payment after the decease of T. F. to the plaintiff, during the joint lives of the plaintiff and defendant, of the annuity of 450*l*., which annuity was stated in the said T. F.'s will to be settled upon the plaintiff: that T. F. died in November, 1825, and that the annuity had been paid up the 1st of November, 1827: the condition, therefore, was, that the defendant should, during the said joint lives, pay the said annuity to the plaintiff or her assigns, on the 1st of November in every year. The defendant pleaded, 1. Non est factum. 2. That the supposed deed was executed after the passing of the annuity act 58 G. 8, c. 141, and that no memorial thereof was enrolled pursuant to the act. 3. That the supposed deed was entered into by the defendant after the passing of the act, upon a pecuniary consideration, viz. 1500*l*. advanced by T. F. to the defendant on the 1st of October, 1825, as the consideration for the grant of the said annuity; and that no memorial was enrolled, &c. 4. A similar plea, stating the consideration to be 479*l*. advanced and paid by the plaintiff to the defendant. Replication, joining issue on the first plea, demurring generally to the second, and denying that the considerations were as alleged in the third and fourth.

R. V. Richards, in support of the demurrer, relied upon the view taken by the Court in *Cumberland v. Kelley* (supra) of the two annuity acts 17 G. 8, c. 26, and 55 G. 8, c. 141. The latter act, in prescribing the form of memorial, directs that the "pecuniary consideration" shall be stated as there laid down; and the exempting section (s. 10), provides that the act shall not extend to "any voluntary annuity granted without regard to pecuniary consideration or money's worth." The intention of these clauses is explained by Bayley, J., in *Blake v. Attersoll* (2 B. & C. 879), and Best, C. J. in *Tetley v. Tetley* (4 Bingh. 216). Those cases, and *James v. James* (2 B. & B. 702), clearly show that an annuity granted on a consideration like that in the present case, does not require enrolment under 58 G. 8, c. 141. [Lord TENTERDEN, C. J. *Hick v. Keats* (4 B. & C. *613] 69), *though under the old act, is very likely this case.] The Court then called

upon
N. R. Clarke, contra. An annuity given for an antecedent debt may be within the mischief of the act. The object was to prevent improvident bargains by the grantors of annuities. That evil is not prevented if a party having advanced a sum by way of loan, may, whenever he pleases, call for his money, and then take an annuity instead. This cannot be said to be an annuity granted without regard to pecuniary consideration or money's worth. [PARKER, J. The advance of money should have been originally part of the contract under which the annuity is granted.] The statute may be easily evaded if a grantee may say, "instead of advancing money I will release such a debt."

Lord TENTERDEN, C. J. That is not the present case; and here the annuity might

never have become payable. To make an enrolment necessary there must be at least something analogous to the sale of an annuity. It is useless to go into the cases.

LITTLEDALE, J. This was only giving what was considered a better security for an already existing debt.

PARKE, J., and TAUNTON, J., concurred.

Judgment for the plaintiff.

*The KING v. E. BRAIN. May 9.

[*614

By ancient custom a select vestry was to consist of the rector, churchwardens, and those who had served the office of upper churchwarden, and other parishioners to be elected by the vestrymen. The practice in modern times had been to elect as vestrymen those parishioners only who had been fined for not serving the office of upper churchwarden: Held, that they were good vestrymen.

By an act of parliament for paving, lighting, and watching the streets of a parish, the rector, churchwardens, overseers of the poor, and vestrymen, were appointed trustees for putting the act in execution. By a subsequent act, the trustees appointed to put the first act in execution, were appointed trustees for executing that act, and the said trustees, or any thirteen, or more of them, were authorized to elect four constables for the parish annually:

Held, that the presence of the rector at a vestry for the election of a constable was not necessary if thirteen other trustees were present.

The trustees appointed four constables for the year, on the 21st of December, 1829. One of the persons so appointed having in March, 1830, removed from the parish, and given notice of his removal to the trustees, they elected another:

Held, that the trustees having so appointed the four constables for the year, might also, on the removal from the parish of one of the persons so appointed, elect another person in his stead; for that they were not *functi officio*, and were the proper persons to supply the vacancy.

By the custom of the city of London, all persons appointed constables on St. Thomas's Day, attend at Guildhall on Plough Monday, and are sworn by the registrar, and those who, when vacancies occur, are appointed at any other period of the year, are sworn in before the registrar at the lord mayor's court office: Held, that that custom applied to all constables in the city of London, in whatever manner appointed, and that a party elected constable by the trustees under the local act, was bound after notice to attend at the lord mayor's court office to be sworn in.

Indictment charged, that the defendant being elected to the office of constable, had neglected and refused to take upon himself the execution of the office. The proof was, that he refused to take the oath of office: Held, that that was *prima facie* evidence of a refusal to take upon himself the execution of the office:

Held, also, on motion in arrest of judgment, that the indictment sufficiently charged an offence, by alleging that the defendant had wholly neglected and refused to take on himself the execution of the office, and that it was not necessary to state that he had refused to be sworn.

INDICTMENT stated that the defendant on the 16th of March, 11 G. 4, and long before, was an inhabitant of and residing within the parish of St. Bartholomew the Great, London, and able and liable to serve the office of constable for the said parish, and that at a meeting of the trustees for putting in execution an act of the 9 G. 3, c. 23, entitled, &c., duly holden on, &c., aforesaid, the defendant by the said trustees, so met, consisting of thirteen and more, to wit, J. D. and C. J., &c., then being the churchwardens of the said parish, H. S. and R. B. then being two overseers of the parish, *and nine [*615 others named in the indictment, then being vestrymen of the said parish, was duly elected and appointed to be one of the constables of the said parish for preserving the peace, and doing and performing all matters and things relating to the said office of constable for the then remainder of the constable's then present year of office for the said parish, in the room of one T. T., who having been previously elected and appointed one of the constables for the said parish for the then present year, had since gone out of the said parish; whereof the defendant afterwards had notice. Breach, that the defendant not regarding his duty in that behalf, unlawfully, wilfully, obstinately,

and contemptuously did neglect and refuse to take upon himself the execution of the said office, although duly required so to do, &c. Plea, not guilty.

At the trial before Lord Tenterden, C. J., at the London sittings after Michaelmas term, 1830, it appeared that by an act, 28 G. 2, c. 37, for the better lighting and cleansing the streets, &c., within the parish of St. Bartholomew the Great, London, and regulating the nightly watch and beables within the said parish, it was enacted, that the rector, churchwardens, overseers of the poor, and vestrymen of the said parish of St. Bartholomew for the time being, should be trustees for putting in execution all the powers by that act given. By another act, 9 G. 3, c. 23, for amending the former, it was, by section 1, enacted, that the trustees appointed by the former act should also be trustees for putting the present act in execution. And by section 40, after reciting that the number of constables for the said parish was insufficient, it was enacted, that it should be lawful "for the trustees, or any thirteen or more *616] of them, to elect and appoint four constables for the parish annually."

In pursuance of this act the trustees had, yearly, on the 21st of December, being St. Thomas's Day, or its morrow (whenever that feast fell on a Sunday), chosen four constables, from the passing of the act to the present time. On St. Thomas's Day, 1829, the usual annual meeting of the trustees for the choice of constables was held, when T. T. and three other persons were chosen constables for the year ensuing, and sworn in (in usual course) on Plough Monday, and T. T. continued to serve as constable until the 16th of March, 1830, when he gave notice to the trustees (who were then assembled in the vestry-room), that he had removed out of the parish. The trustees present (being thirteen in number) then proceeded to choose the defendant constable in his room. Several instances (both before and after the act of 9 G. 3) were proved, where vacancies having occurred in the office of constable by death or removal from the parish, during the year, others had been appointed in the place of the persons so dying or removing. Notice of the appointment was given to the defendant on the day he was elected, and on the 19th of March he was served with a notice requiring him to take upon himself the execution of the office, and personally to appear at the lord mayor's court office, over the Royal Exchange, in the city of London, before the registrar of the said court, or his deputy, on the 20th of March, at eleven o'clock in the forenoon precisely, to be sworn in. He did not attend pursuant to the notice. It appeared to be the custom in the city of London, that all persons elected to the office of constable on St. Thomas's Day, should attend at Guildhall on Plough Monday, *617] to be sworn in by the registrar before the lord mayor; and that those appointed at any other period of the year, should attend at the lord mayor's court office, there to be sworn in before the registrar.

The trustees present when the defendant was elected constable, were the two churchwardens, two overseers, and more than nine others who claimed to be trustees as vestrymen of the parish. On an issue tried in the Court of Common Pleas, 9 G. 1, the custom in the parish of St. Bartholomew was found to be, that the rector of the said church for the time being, and the two wardens of the same church for the time being, such parishioners as had served the office of upper churchwarden of the church aforesaid, and such other parishioners who, by the suffrage of the greater number of the said rector and parishioners being members of the vestry of the said parish in vestry parochially assembled, should have been elected to be members of the vestry of the said parish, have been used and accustomed to be members of the vestry of the said parish, and exclusively of the other parishioners to meet in the vestry of the said church, and there to consult on parochial matters. For more than twenty years last past it had been the practice for the rector and parishioners being members of the vestry, to elect as vestrymen those parishioners only who had been fined for not serving the office of upper churchwarden; and the vestrymen who acted as trustees at the meeting when the defendant was chosen con-

stable were selected from that particular class. Several objections were taken at the trial, but overruled by Lord Tenterden, and the defendant having been found guilty,

Prendergast, in Hilary term, 1831, moved for a new trial, and again stated the principal objections before *urged. First, those trustees who attended as vestrymen when the defendant was elected to the office of [*618 constable, were not duly constituted members of the select vestry. According to the custom established on the issue, the rector, churchwardens, those who had filled the office of upper churchwarden, and those who had been elected by the vestry from the parishioners, were to be vestrymen. Here, the vestrymen were selected from those parishioners only who had paid the fine for not serving the office of upper churchwarden. The modern practice of selecting from a particular class was inconsistent with the ancient custom which was general: it was a departure from that custom, and the parties so elected were not duly constituted vestrymen.

Secondly, the rector was an integral part of the vestry, *Wilson v. M'Math*, 3 B. & A. 246, note (b), and ought to have been present.

Thirdly, the authority given by the act of parliament to the trustees to choose four constables annually, must be strictly pursued; and having exercised that authority on St. Thomas's Day, they were functi officio. It was held under the 43 Eliz. c. 2, s. 1, that when an appointment of overseers had been once legally made, the magistrates were functi officio; *Rex v. Great Marlow*, 2 East, 244; and to remedy the inconveniences resulting from the death or removal of an overseer from the parish during the year for which he was appointed, it was considered necessary to pass the statute 17 G. 2, c. 38, which enables justices to appoint another in his stead.

Fourthly, by the common law, a constable cannot *vacate his office by leaving the parish. And, here, the local acts make no provision for [*619 supplying such vacancy. The statute 13 & 14 Car. 2, c. 12, s. 15, authorizes two justices to supply vacancies occasioned by death of constables, or their removal from the parish. By the local act 28 G. 2, c. 37, s. 27, if any of the collectors of rates (whom the trustees are authorized to appoint by s. 14 of the act) shall, during the year for which he is appointed, remove out of the parish, the trustees may appoint another in his stead; but neither of the local acts contains any provisions applicable to constables who remove out of the parish. It seems therefore to have been intended, that the case of constables dying or removing within the year should remain subject to the provisions of 13 & 14 Car. 2, c. 12. If so, the effect of the statutes is, that any vacancies occurring during the year in the office of constable, by death, or by removal from the parish, if they can be so created, are to be supplied pursuant to the statute 13 & 14 Car. 2, c. 15, by two justices.

Further, these trustees being a body created by statute, cannot claim to appoint by an immemorial common law custom; and if they might, the indictment should have alleged such custom.

Then as to the refusal to serve. The evidence was, that a notice having been served upon the defendant, he refused to attend to be sworn before the registrar of the lord mayor. But the registrar was not the proper person to swear him. By common law, the constable is to be sworn at the court leet, or, by act of parliament, before justices of peace. If the defendant is to be considered as appointed in pursuance of the local act, he ought to have been sworn in before two justices; he *might therefore be right in refusing to be sworn [*620 before the registrar. And the custom of swearing in constables in the city of London at the lord mayor's court office, if relied upon, should have been stated in the indictment. Again, the defendant is charged with refusing to take upon himself the office, but it was only proved that he refused to be sworn in. He might have duly executed the office without ever being sworn, *Rex v. Corfe Mullen*, 1 B. & Ad. 211.

Lord TENTERDEN, C. J. I am of opinion that there ought to be no rule in this case. The first objection is to the vestrymen. It appears that, by the custom as established on the trial of an issue many years ago, the select vestry was to consist of the rector and churchwardens, those who had served the office of upper churchwarden, and certain other parishioners to be elected by the vestrymen. The practice of late years had been to elect as vestrymen those parishioners only who had been fined for not serving offices. Now, as the power of choosing vestrymen was in its own nature not limited to a particular description of parishioners, a practice to limit, for their own convenience, their choice to persons of a particular class, is not by any means inconsistent with the custom, because it is competent to the vestry, at any time, to elect other persons who are not of that class. It is matter of choice in both cases.

The next objection is that the rector, who, it is contended, is an integral part of the vestry, was not present when the defendant was elected constable. But *621] there is a peculiarity in this parish: the act of parliament *expressly provides, that constables are to be elected by the trustees, *or any thirteen or more of them*. This expression, in my judgment, renders it unnecessary that the rector should be present at a vestry for electing a constable.

Another objection is, that the trustees being required, by act of parliament, to choose four persons annually, and having appointed four on the 21st of December, 1829, for the year, had executed their powers and had no right afterwards to appoint the defendant, and reference was made to the difficulty in the case of overseers under the 43 Eliz., which was remedied by the 17 G. 2, c. 38. It is to be observed, however, that the power of appointing overseers is given by statute only, and ought therefore to be strictly pursued. The 17 G. 2, c. 38, may have been necessary to supply defects in the former act, though it may have been passed only to prevent or remove doubts. But this is the case of an office not created by statute, but existing by custom. And it seems to me that where custom gives the power of appointing constables to any particular persons at a particular time, there, if a vacancy happens by one of the persons so appointed quitting his office, those who have the power of appointing in the first instance have also the power of supplying the vacancy. The fifteenth section of the 13 & 14 Car. 2, c. 12, enabling justices to appoint on the death or removal of a constable, was referred to. It recites "that the laws for the apprehending of rogues and vagabonds have not been duly executed sometimes for want of *officers*, by reason lords of manors do not keep court leets every year for the making of them," and then enacts "that in case any *constable*, *622] &c., shall die or go out of the parish, any two justices of the *peace may make and swear a new constable, &c., until the said lord shall hold a court or until next quarter sessions, who shall approve of the said officers so made and sworn as aforesaid, or appoint others as they shall think fit." It is manifest from this enactment that where the lord had appointed a constable who died or removed from the parish, and a vacancy had occurred, he might hold another court and appoint another person to fill up that vacancy. The act implies that, for it says the justices may do so until the lord shall hold a court. Another thing may also be inferred from this statute, viz., that a party who quits the parish may be understood to have abandoned his office, so that another may then be appointed in his place. It would be extremely inconvenient if it were not so, because I know of no law which compels the person appointed to the office of constable to remain in the parish the whole year. Then if the lord of the leet might appoint persons to fill up vacancies as they occurred during the year, it seems to follow that, in other instances, whosoever has the original power of appointment must have a similar power of filling up those vacancies. Upon this view of the enactment referred to, I think the statute rather goes to defeat the objection than to support it. Besides it was proved, with respect to this particular parish, that the usage had been for trustees to fill up vacancies as they occurred during the year. Several instances were proved of such

appointment of persons to fill up vacancies, both before and since the act of 9 G. 3, c. 23.

Then an objection was made, that the defendant was not duly summoned to be sworn. But he had notice to attend before the registrar, that he might take the oath; and it appeared in evidence that the custom of *the city was, [*623 for all persons appointed constables at the usual time of the year to attend at Guildhall on Plough Monday, and be sworn in by the registrar before the lord mayor; but that those appointed afterwards at an intermediate period of the year should attend at the lord mayor's court office, and be there sworn in before the registrar. If that be the general custom of the city of London, it will apply to all constables appointed within the city and its liberties, in whatever manner the appointment takes place.

Then it was said, that the evidence against the defendant only showed a refusal to be sworn in, whereas the indictment charged that he refused to take upon himself the office, and *Rex v. Corfe Mullen*, 1 B. & Ad. 211, was cited, where a person chosen tithingman at a court leet, having actually discharged the office, was held to have gained a settlement by execution of an office in the place for which he served, although he was not sworn in. Here, however, the refusal to take the oath was evidence of a refusal to take upon himself the execution of the office. If, indeed, it had been proved that, although not sworn, he had acted as constable, then it would have been true that the refusal to take the oath did not prove that he refused to take the office; but here the evidence was that the defendant refused to be sworn, and that constables were always sworn in, and there was no proof that he ever did act as constable; the evidence of his refusal to attend to take the oath, was therefore abundant evidence of a refusal to take the office.

It was further alleged, that the special mode of swearing in constables in the city of London ought to have been set out in the indictment, but that was quite *unnecessary. Such a practice might lead to very great length in indictments, and to a failure of justice by reason of the allegation not [*624 being proved in the precise form in which it was laid. The indictment here alleges that the defendant was duly elected and appointed to be one of the constables, and that he obstinately and contemptuously refused to take upon himself the execution of the office, although required so to do. That is a sufficient allegation of the offence charged, namely, that the defendant was appointed constable, and refused to accept the office.

LITTLEDALE, J. I am of the same opinion. As to the objection, that the defendant was summoned to attend at the lord mayor's court to be sworn before the registrar there, and that this being an election pursuant to act of parliament, and not by the persons who by custom would elect, the customary mode of swearing in was not applicable; the answer is, that the general practice in the city of London being, for all persons elected to the office of constable, to be sworn in before the lord mayor's registrar, this applies to constables appointed in a different mode from that which was formerly the custom. In *Wilkes v. Williams*, 8 T. R. 681, it was said by the Court, that an ancient custom might well extend to newly created offices, and that when an immemorial privilege is claimed for all the officers of a court, and new officers are made within the time of legal memory, they must also fall within the privilege; and *Rex v. Warner*, 8 T. R. 375, was cited, where a privilege was claimed by custom-house officers to be exempted from serving offices, and it was holden that they were [*625 *exempted from serving the office of overseer of the poor, though that was created by statute within the time of legal memory. Then, here, the constable, if he is to be considered a newly created officer, would still be bound to be sworn in before the registrar of the lord mayor. With regard to another objection, that in order to sustain the charge in the indictment, more ought to have been proved than a mere refusal to be sworn in; it is true, that a man may discharge the duty of the office of constable without being sworn in: and

if, notwithstanding the defendant had refused to be sworn in, it appeared that he had discharged the duties of the office in person, such refusal would not be proof of a refusal to take upon himself the office. But here, the fact of his having refused to be sworn in, and of his having taken no other step to perform the duties of constable, was abundant evidence to go to the jury that he refused to take upon himself the office; and, although he might be indicted for refusing to be sworn in, yet that fact is also evidence to support an indictment against him for a refusal to take the office.

TAUNTON and PATTESON, Js., concurred.

Rule refused.

Prendergast afterwards obtained a rule nisi for arresting the judgment, on the ground that the indictment was defective, because it did not allege specifically that the defendant refused to take the oath of office.

Sir *James Scarlett* and *Platt* showed cause in the present term. The neglect to take on himself the execution of the office is the substantial offence.

*626] The refusal to take the oath is evidence of that offence. A man may execute the office of constable without taking the oath, *Rex v. Corfe Mullen*, 1 B. & Ad. 211. In *Starkie's Criminal Pleading*, 2d edit. page 619, there is a precedent of an indictment against a party for refusing to take on himself the office of chief constable, and there is no allegation that he refused to take the oath.

Prendergast, contrd. The refusal to be sworn is an offence for which a party, if he be present in the court leet at the time of the election, may be fined; and if he be absent, and have a certain time and place appointed him for taking the oath before a justice of the peace, and have also express notice of such appointment, and be presented at the next court for having refused to take it accordingly, he may be amerced, *Hawkins, P. C.*, book 2, c. 10, s. 46. In *Rex v. The Inhabitants of Whitchurch*, 7 B. & C. 573, *Littledale, J.*, doubted whether a churchwarden could lawfully do any act before he was sworn into office; and in *Tremayne's Pleas of the Crown*, 471, there is the form of a mandamus to justices to swear in a constable of a manor, and it recites, as the object of the mandamus, that the business of the office of constable may not remain undone. If an officer be known and sworn in, it is not necessary for him to show his warrant; otherwise it is; *Hawk. P. C.*, b. 2, c. 13, s. 28. The taking the oath is the admission to the office, and the refusing to take the oath constitutes the offence. In *Starkie's Crim. Pleading* (2d edit., page 620), there is a precedent of an indictment against a person for refusing to take the *627] oath of constable of a manor, to which office he had been duly elected at a court leet. In *Tremayne's P. C.*, p. 217, 219, there are two precedents of indictments against persons who were duly chosen constables, for refusing to take the oath of constable and to execute the office. [Lord TENNERDEN, C. J. There is another precedent in *Tremayne's P. C.*, page 221, of an indictment for refusing to execute the office of chief constable in a hundred, and there is no allegation that the defendant refused to be sworn.] The office of chief constable was created by the statute of *Winton*, (a) 13 Ed. 1, st. 2, c. 6 (4 Inst. 267; 2 Hale's P. C. 96), which does not require that the party appointed to the office should take an oath; whereas the office of petty constable existed at common law, and that imposes upon the party appointed the obligation of taking an oath duly to execute the office. In *Rex v. Halford*, Comb. 328, the defendant was indicted, for that he, being a fit person, &c., was tali die elected to be constable, and afterwards had notice, but from that day to

(a) The office of high constable was instituted long before that statute. This appears by a writ or mandate of the 36 Hen. 8, preserved in the *Adversaria* to *Watts's* edition of *Matthew Paris*, by which writ it is provided, that in every hundred there should be constituted a chief constable, at whose mandate all those of his hundred sworn to arms (i. e. to have such arms, according to the quantity of their lands or chattels, as there directed), should assemble and be observant to him for the doing of those things which belong to the conservation of the king's peace.—*Ritson's Office of Constable*, 2d ed. p. 18.

the time of the indictment non suscepit, &c., sed totaliter neglexit, &c. *Pemberton* moved to quash the indictment, for that he was not summoned to appear before a justice of the peace to take the oath, &c., and cited *Prigg's case*, *Aleyn*, 78; and *Holt*, C. J., said, that by the new *statute, 13 & 14 [*628 Car. 2, two justices of the peace may make a constable in default of the leet; but then they should issue their warrant, signifying that he was elected constable, and requiring him to take the oath, &c., and the indictment was quashed nisi. There the indictment was precisely in the same form as in the present case, and it was quashed because it did not allege that the defendant was summoned to take the oath. Besides, the indictment ought, on the face of it, to disclose to the court an absolute refusal by the defendant to take the office. That can only be by alleging that he refused to be sworn; for the general terms used in this indictment might be satisfied by proof of a refusal to apprehend a party in any particular instance.

Lord TENTERDEN, C. J. It is sufficient in an indictment to charge the corpus delicti. Here the indictment states that the defendant unlawfully, wilfully, obstinately, and contemptuously did neglect and refuse to take upon himself the execution of the office, although duly required so to do. That of itself is an offence, and the refusal to take the oath of office (although it may constitute a distinct offence) is *prima facie* evidence of a refusal to execute the office. The allegation that he wholly refused, &c., would not be satisfied by proof of a refusal to do some particular act. In *Starkie's Crim. Pleading*, 2d edit., p. 619, there is a precedent of an indictment against a person for not taking on himself the office of chief constable in a hundred, without any statement that he refused to be sworn; and there is no distinction in that respect between a high and a petty constable.

*LITLEDALE, J. I am also of opinion that an offence is sufficiently [*629 charged in this indictment. The precedent of an indictment for refusing to serve the office of chief constable is in point. In *Com. Dig. tit. Leet* (M), 5, it is said that by common law there was a chief constable as well as a petty constable; and in *Regina v. Wyatt*, 2 *Ld. Raym.* 1192, there is a dictum of *Powell, J.*, to that effect. It is the duty of a petty constable to take the oath to execute his office, if required so to do, but taking the oath is not the only evidence of taking the office. The refusal by a party elected to take the oath would, generally speaking, be evidence of a refusal to execute the office; but it is not necessarily so, for a party might execute the duties though he refused to be sworn. The refusal to take the office is undoubtedly an offence, and that is charged in the indictment.

PARKE, J., concurred.

PATTESON, J. The refusal to take the office of constable is an offence. In *Starkie's Crim. Pleading*, p. 622, there is an indictment against a person for refusing to take his oath for the due execution of the office of constable of the ward of *Farringdon Within*, after being elected at a court of wardmote, or to execute his office in any manner whatever. Rule refused.

*NEWLAND v. CLIFFE. May 11.

[*630]

By letters patent King James the First granted to A., his heirs and assigns, that he and they, by his or their bailiff or bailiffs for that purpose by him and them from time to time to be deputed, should have the full return of all writs, mandates, and precepts within a certain district, and that no sheriff or other officer of the king concerning the same returns within the said district, should in any manner intermeddle, &c., nor enter in execution of the premises unless through default of the bailiff or bailiffs of the said A., his heirs or assigns, or some of them:

Held, that under a grant containing this special provision that the grantee might return writs by his bailiff for that purpose deputed, and an exception in case of default

by such bailiff, the bailiff so deputed might return writs and mandates in his own name; but
 Semble, that if there had been no such special provision and exception, the grantee then would be bound to make the return either by himself or by his officer in his (the grantee's) name.

In January, 1829, a writ of fi. fa. was sued out of this court by the plaintiff, directed to the sheriff of Glamorganshire, endorsed to levy 1004*l.*; and in the same month the sheriff made his mandate to the bailiff of the liberty of Gower in that county, commanding him to levy that sum of the goods and chattels of the defendant. The mandate commenced with these words:—"Glamorganshire, to wit, R. F. Jenner, Esq., sheriff of the county aforesaid, to the bailiff of the liberty of Gower, in the said county, greeting;" and after reciting the writ of fi. fa., which was returnable on the morrow of the Purification, and that the defendant was the proprietor of the Loughor Colliery, near Swansea, into which the bailiff of Gower was to enter immediately and execute the mandate, it proceeded as follows:—"And because you claim to have the execution of all writs, and the return thereof within the liberty aforesaid, in which same liberty the execution of this writ wholly remains to be made as I am informed, therefore I command and require you on the part of our lord the king, that the tenor of this writ you execute as the writ itself requires and commands, and that immediately or at least before the return of the said writ, you send me a full return thereof. Hereof fail not at your peril." To this mandate a return was *631] made in the following words:—"The within named Wastel Cliffe hath not any goods or chattels within my bailiwick whereof I can cause to be made the debt and damages within mentioned, or any part thereof as within I am commanded. The answer of Lewis Thomas, bailiff of the liberty of Gower." A rule nisi was obtained for quashing this return, on the ground that it ought to have been made by the Duke of Beaufort, he being then the bailiff of the liberty of Gower designated in the mandate.

It appeared on affidavit, that by letters patent of the 5 Jac. 1, that king made a grant to Edward, Earl of Worcester, an ancestor of the Duke of Beaufort, and to his heirs and assigns, among other things, in the words following, "That he, the aforesaid Earl of Worcester, his heirs and assigns, may have and hold, and shall and may be able to have and hold for ever, within (amongst others) the boroughs, manors, and castles of Swansea, Oystermouth, and Loughor, and also within all those his lordships and lands of Gower and Kilvey, and within his manors of Kithull, Trwythoa, Limon, Peviard, and West Gower, in Glamorganshire, the liberties following, that is to say, that he the aforesaid earl, his heirs and assigns, *by his or their bailiff or bailiffs for that purpose by him the said earl, his heirs and assigns, from time to time to be deputed, shall and may have the full return of all writs* as well of assize, novel disseisin, mort d'ancestor, and attain, as of all other writs, mandates, and precepts of his said majesty, his heirs, and successors, at the suit of whatever person to be prosecuted, and also all manner of summonses of the exchequer of the said king, his heirs, and successors, and other extracts whatsoever, and all manner of executions of the same within the castles, manors, boroughs, lands, and other *the *632] premises hereinbefore mentioned; and that no sheriff or other officer or minister of the said lord the king, his heirs and successors whomsoever, concerning the same returns or execution within the said castles, manors, &c., or any parts thereof, or precincts of the same, shall in any manner intermeddle, nor shall they nor any of them into the said castles, &c., or any of them in any-wise enter to do anything in execution of the premises, or any of them, *unless through the default of the bailiff or bailiffs of him the said earl, his heirs and assigns, or some of them.*"

It also appeared by affidavit, that the Duke of Beaufort as the lord of the liberty of Gower, and his ancestors, had from time to time appointed a bailiff of the liberty; that after diligent search no instance could be found in which

the lord of the liberty had at any time made or been called upon to make any return to any writ or mandate, but that the bailiff of the liberty for the time being so appointed had been always called upon to make, and in fact had in all instances made and signed, the returns in his own proper Christian and surname, and had always in his own proper name, and not in the name or as the deputy of the duke as the lord of the liberty or franchise, directed warrants, upon all mandates addressed to the bailiff of the liberty, to his sub-bailiff to execute the same; and that bail bonds given by persons arrested upon bailable writs within the liberty were given to the bailiff of the liberty in his own proper name, and not to the Duke of Beaufort or his ancestors.

Sir *James Scarlett*, *Ludlow*, Serjt., and *Talfourd*, showed cause. The Duke of Beaufort was not bound to make *the return in his own name. The charter does not grant him the return of writs generally, but by his [*633 bailiff or bailiffs to be by him for that purpose deputed. To exercise that privilege, therefore, it appears, from the very words of the charter, that he must appoint a bailiff. From the earliest period sheriff's mandates have been directed to the bailiff generally or by name, and the returns have usually been made in the name of, or at least by, the bailiffs of the liberty. The Bishop of Ely has the return of writs within the Isle of Ely, but it may be collected from the report of the case of *Grant v. Bagge*, 3 East, 128, that the mandates were directed not to the Bishop but to his bailiff. In the soke of Peterborough, of which the Marquis of Exeter is lord, the mandates and precepts are directed to and returned by, not the Marquis of Exeter, but the bailiff by name. In the hundred of Towland and Laytonstone, of which the Duke of Manchester is lord, he appoints a bailiff, and the mandates are directed to the bailiff, and the return is made in his name. The same practice prevails in the hundred of Hurstingstone, of which the Earl of Sandwich is lord, in the hundreds of Norman Cross, of which the Earl of Carysfort is lord, of Scarsdale, of which the Duke of Devonshire is lord, and of Kidwelly in the county of Carmarthen, of which Lord Cawdor is lord.(a) It is not unusual, therefore, for the lord of a liberty to have the appointment of a bailiff who makes returns in his own name. Mr. Carrett, who was lessee under the duchy of Lancaster, of the office of bailiff of the *Honour of Pontefract for thirty-one years (see 9 East, [*634 330), made the returns in his own name. But it may be said, that although the king by his prerogative may grant the return of writs, he cannot confer on the grantee the power of appointing a deputy; and the case of *Sutton's Hospital*, 10 Co. Rep. 23 a, will be cited, as showing that the king cannot confer a privilege contrary to the common law. If the king, however, has, from all time, made grants of the execution and return of writs within particular districts, and the grantees have appointed bailiffs who have returned writs in their own names, that will be sufficient proof that the king has that prerogative. The king has the undoubted prerogative of delegating the power to appoint a mere ministerial common-law officer, though he cannot delegate the power to appoint judges: the office in question, however, is purely ministerial, and not judicial. The king, then, has the right to appoint the bailiff of a franchise, with power to name any ministerial officer, and this is frequently done in charters to corporations. Thus the city of London by charter appoints the sheriff of Middlesex; and although that charter has been confirmed by statute, still, before any statute of confirmation, the appointment was by charter. So there are instances of portions of counties being separated by the king's charter from the county at large, and made counties themselves, and incorporated; and by virtue of the charter of incorporation the sheriffs are appointed by the corporations of those counties, as in the county of the town of Newcastle. The ushers in this court are appointed by a superior officer, who holds the appointment by letters patent *from the crown; and though it be true generally [*635 that a judicial officer cannot make a deputy, nor can a ministerial officer,

(a) This was stated as the result of inquiries made at the sheriffs' offices.

if the office be granted to be executed by him in person, yet if a judicial office be granted to any one tenendum per se vel deputatum, he may make a deputy, as the Recorder of London, and the recorder of several other cities and boroughs, the steward of the borough court of Southwark, and the steward of the palace court; and where ancient usage allows a deputy, a judicial officer may make one, as constable and earl marshal: Com. Dig. tit. *Officer*, (D) 2. Besides, the Duke of Beaufort is not bailiff of the liberty of Gower, but lord of the franchise, and the lord of a franchise and the bailiff are persons having different duties and responsibility, and have been so recognised from the earliest times. In Dalton's Office of Sheriffs, chap. 39, tit. *Return of Writs*, p. 185, it is said that whosoever the return of the writ pertaineth to the bailiff of a liberty, yet if the sheriff doth it himself it is well enough, but the lord of the liberty may have his action sur le case against the sheriff, and Finch, 52, is cited. Again, in Dalton's Sheriffs, tit. *Bailiffs of Franchises*, p. 545, it is said, if the lord of a liberty shall choose any man to be bailiff of his liberty who hath not sufficient lands within the same county, then a writ shall be sent to the sheriff of the same county wherein such liberty is, commanding him to discharge or remove such bailiff, and to choose another bailiff in his place, and Fitzh. Nat. Brev. 164 b, is cited. Now it is quite clear that the sheriff could not remove the lord of the franchise, and therefore the officer appointed by him to execute the writs must be the person intended by the word bailiff. By the statute of Westm. 2, 13 Edw. 1, st. 1, c. 39, "if the sheriff return that he hath *636] delivered the writ to a bailiff of some liberty, that indeed hath return, the sheriff shall be commanded that he shall not spare for the foressaid liberty, but shall execute the king's precept; and that he do the bailiffs to wit, to whom he returned the writ, that they be ready at a day contained in the writ, to answer why they did not execute the king's precept. And if they come at the day and acquit themselves, that no return was made to them, the sheriff shall be forthwith condemned to the lord of the same liberty, and likewise to the party grieved by the delay, for to render damages. And if the bailiffs come not in at the day, or do come, and do not acquit themselves in manner aforesaid; in every judicial writ, so long as the plea hangeth, the sheriff shall be commanded that he shall not spare for the liberty," &c. In 19 Viner's Abr. tit. *Return*, p. 206, there is appended as a note to this statute the following passage from Gilbert's History of the C. P., pp. 25, 26, 3d ed. "After the conquest, the lords (whose private jurisdictions were then retrenched as inconvenient to the Normans), to maintain their authority within their neighbourhood, purchased the bailiwicks of the hundreds, sometimes for years, for life, in fee, at a certain rate in fee farm; and for this, they had the court leets, &c., and the return of the writs, so that the lord appointed his bailiff to execute the king's writ within his franchise, and the sheriff, who is the ordinary bailiff of the crown, could not enter the same, which was a great obstruction to the public justice; to remedy this, Westm. 2, cap. 39, enacts, that if such bailiffs give no answer to the sheriff, the court should grant a special warrant, with a non omittas, which authorized the sheriff to enter the franchise, by which it appears *637] that the king's bailiff was to answer the sum due from the franchise, yet they were bailiffs to the sheriff, to answer the king's process sent from him to them." The statutes 12 Edw. 2, stat. 1, c. 5, and 1 Edw. 3, stat. 1, c. 5, distinguish between the lord of a liberty and the bailiff of a liberty. [PARKE, J. The stat. 12 Edw. 2, c. 5, enacts, that of returns thereafter delivered to the bailiffs of franchises, an indenture shall be made between the bailiff of the franchise by his proper name, and the sheriff by his proper name: and if any sheriff change the return so delivered to him by indenture, and be thereof convict at the suit of the lord of the franchise, of whom he received the returns (if the lord have had any damage), he shall be punished. That does not assist you.] In Dalton's Sheriffs, c. 39, tit. *Return of Writs*, page 183, Bracton, lib. 6, cap. 32, is cited, to show that if the sheriff wish to enter a liberty, and be prevented

through the power of the bailiffs, a non omittas shall issue, and if the sheriff then meet with any resistance, he is with sufficient aid to arrest the persons resisting, and to keep them in prison, &c., nevertheless the lord of the liberty may be attached to appear to defend himself if he can from the trespass; and if he avow it, or cannot defend it, the liberty itself may be taken into the hands of the king, and detained at his will. In 19 Vin. Abr. tit. *Return*, p. 213, the following case is cited from 14 Edw. 4, fo. 1, b (abstracted in Bro. Ab. *Retorne de Briefe*, pl. 99). "The sheriff returned quod maudavi ballivo (libertatis) episcopi de E., who returned quod cepit corpus, &c., and had him not at the day, &c., by which distringas ballivum issued, and the sheriff returned quod ballivum mortuus est, and (on debate what process should issue), by some distringas *episcopum dominum libertatis has been seen in such case, but at last [638] distringas ballivum successorum of the first bailiff issued; and if he returned that the defendant is not taken, he (the plaintiff) shall have capias, and process of outlawry, and where the bailiff returned nihil, capias ballivum shall issue." So that, although it seems to have been intimated that, on a former occasion, there had been a distringas upon the lord of a liberty, yet after consideration the proper course was deemed to be, that there should be a distringas upon the bailiff.

Campbell and Cresswell, contra. The return is bad, as being made by a bailiff of the lord of the liberty of Gower in his own name. It is material to advert to the terms of the mandate. It is addressed by the sheriff of the county of Glamorgan to the bailiff of the liberty of Gower. It recites the writ and then states, as a reason for so directing the mandate, that the party to whom it is addressed claims to have the execution and return of writs, and then it commands the bailiff to execute the writ. The execution and return of writs is claimed, however, not by Lewis Thomas but by the Duke of Beaufort; and although he is to execute them by his bailiff or bailiffs from time to time appointed, the charter in that respect merely expresses what would otherwise be implied, because the grantee by common law might appoint a deputy to execute this (a ministerial office), but then the deputy must act for and in the name of the principal, Com. Dig. *Officer*, (D) 5. The duke claims the return of writs, and to him, therefore, the mandate was directed. Lewis Thomas is the duke's bailiff and not the king's. The Court can only look *to the king's [639] bailiff. Besides the charter is "that the Earl of Worcester by his bailiff or bailiffs, to be from time to time deputed." [PARKE, J. Many franchises are granted to the earl by the charter; he is to have the return of writs in the boroughs, lands, manors, and castles therein mentioned, and, therefore, the term *bailiffs* may apply to the different franchises. Lord TENTERDEN, C. J. Or the lord may appoint two bailiffs for one franchise.] Wherever acts of parliament speak of the bailiff of a liberty, this refers to the lord of the franchise, and not to the officer appointed by him. In the 4 Ed. 3, c. 9, "it is accorded that no sheriff, bailiff of hundred, wapentake, nor of franchise, nor under-escheators, shall be from henceforth, except he have lands sufficient in the place where they be ministers, whereof to answer the king and his people, in case that any man complain against them." Now the words "bailiff of a hundred" must necessarily import the lord of franchise, and not the person by him appointed bailiff; the object of the act being, that there should always be a substantial person who shall be answerable to the king and his subjects. The person appointed by the lord of a franchise may sometimes be styled bailiff; in the second passage referred to from Dalton it is so; but the mandate of the sheriff is manifestly directed to the king's bailiff, and not to the person by him appointed to execute process within the franchise. The king's bailiff is the person intended in all process. There are various remedies given against the bailiffs of the sheriff; if they misconduct themselves they are liable to penalties, but that does not show that they are king's bailiffs, or can be called upon to return the writs: and so there may be remedies against the bailiff of the fran-

*640] chise. So in various acts *of parliament, the bailiffs of franchises are recognised, but that does not show they are the parties to whom process is to be directed. The 27 H. 8, c. 24, s. 9, enacts that the amerciaments for insufficient returns of writs or process made by stewards or bailiffs of liberties or franchises having returns of writs, &c., shall be set upon the heads of such stewards or bailiffs and not upon the sheriffs. That manifestly imports that the liability shall be thrown on the bailiffs or stewards of liberties, but not upon the mere deputies appointed to execute process. [PARKE, J. In *Tyler v. The Duke of Leeds*, 2 Stark. N. P. C. 218, which was an action against the Duke of Leeds as lord of the manor of Wakefield, for a false return to a mandate from the sheriff of York, the process was directed to the duke, and the return made in his name by his bailiff, and this return was held to be the act of the duke as lord of the manor.] In the eight instances referred to, where the bailiffs appointed by the lord of the franchise have made the return, it does not appear whether or not they are made by the bailiffs *as deputies of the lords*, and in that case such returns would be good. No instance has been cited of a return made by an officer of the lord of a franchise styling himself bailiff of the liberty. The interest which the Duke of Beaufort has in the execution and return of writs within the liberty of Gower is parcel of the office of the sheriff. In *Atkyns v. Clare*, 1 Ventr. 399, Lord Hale goes very fully into the foundation of this franchise of the return of writs. Originally hundreds, liberties of hundreds, &c., appear to have been granted to farm to particular lords in like manner as the county at large *641] was to the sheriff. The sheriff had to collect the revenue of the *crown in the county at large, and the lord of the franchise in his liberty, and these grants did not necessarily or usually contain a grant of the return of writs. Lord Hale in *Atkyns v. Clare*, 1 Ventr. 399, says, "Retorna brevium is a superadded liberty, though the hundreds were granted, yet the sheriff might, and must still return the writs executed there." It is said that the mandate and the rule to return it were addressed not to the *lord*, but to the *bailiff* of the liberty of Gower, and that Lewis Thomas being bailiff, the return by him must be good. But the lord of a liberty who has the return of writs, may, when that franchise is concerned, be properly called bailiff. In Com. Dig. *Retorn* (A), it is laid down, that "if the king grants the return of writs in such a precinct to another, the sheriff remains officer to the court, and the grantee is but a *bailiff* of a franchise;" and in the case of *The Town of Derby v. Foxley*, 1 Roll. Rep. 118, the mayor, bailiffs, and burgesses sued the late sheriff of the county of Derby for invading their franchise, and set out a grant of the return of writs by Jac. 1, and it was said by the Court, "Notwithstanding the grant, the sheriff remains the immediate officer of the court. The town are but in the situation of *bailiff* of a franchise, who shall return the writ to the sheriff, and he to the court." In all returns from counties, or more limited districts, they are called *bailiwicks* of the officer having the return, he therefore must be *bailiff*. Sheriffs are in some sense bailiffs, and were formerly so considered, according to the authorities referred to by Jacob's Law Dict. tit. *Sheriff*. Here Lewis Thomas returns that W. C. has no goods in his bailiwick, but he *642] has no bailiwick, it is the bailiwick *of the Duke of Beaufort, and Lewis Thomas is bailiff of the Duke of Beaufort, and not bailiff of the liberty of Gower. The charter gives him no power to appoint a bailiff of the liberty, but says that he may execute and return writs by *his* bailiffs; and the non intromittat clause also speaks of the defaults (not of the bailiffs of the liberty, but) of the bailiffs of the lord. Again, in the case of *Atkyns v. Clare*, 1 Ventr. 406, it is said, "A grant to have return of writs in a county is void, for, in effect, it taketh away the office of a sheriff." If so, it is clear that return of writs is parcel of the sheriff's office, and he who has that part can have no higher authority than a sheriff. Now a sheriff may make a return by his under-sheriff, but it must be in his own name; and so also should the lord of a liberty make the return himself, or by his bailiff in his name. It is imma-

terial, therefore, whether the party having the return of writs be called the lord or bailiff of the hundred; he is the king's representative. It is supposed (Dalton, 545) that if the lord of a liberty appointed an insufficient *bailiff*, the sheriff could be commanded to dismiss him and appoint another, and hence an inference is drawn that there is a wide distinction between the lord and bailiff. No doubt there is, in one sense of the word bailiff, as between sheriff and bailiff, but not where the return of writs is in question. But the position quoted is altogether questionable, for in *Derby v. Foxley*, 1 Roll. Rep. 118, it is said by Lord Coke, "If the king makes a man bailiff to the lord of a hundred, this is void, for if it were good, the lord would have a bailiff against his will, and yet would be liable for escapes allowed by the bailiff." The duke *then, [*643 claiming to have the return of writs by his bailiff, must make the return if not in person, at all events by his bailiff. This is not his return, it professes to be the return of Lewis Thomas, and not of the duke or the lord of Gower. The duke could not be sued upon it for a false return. To support that which has been done, the duke must alter the nature of his claim, and say not that he has the return of writs, but that he has a right to appoint the person who shall have the return. But he does not set out any grant of such a right, and it is very doubtful whether the crown could make such a grant. Sutton's Hospital case, 10 Rep. 83 b, shows there are some privileges which the king cannot grant to a subject, for it is there said that none but the king alone can create or make a corporation; and in Com. Dig. tit. *Franchises* (F) 5, it is said, "If the king grants power to another to make a corporation, it is void, except when it may commence upon the charter, or grant of the king, and not by the power conferred upon the other by such grant;" and under the head (A) 2, it is said that the privilege (among others) of making a corporation cannot be claimed by prescription; but that a man may claim these privileges indirectly by prescription, for he may claim a county palatine by prescription, to which *jura regalia* belong. The expression used by Bracton, b. 3, c. 8, s. 4, is perhaps more proper, viz.: that the count of the county palatine has *regalem potestatem* in omnibus. Thus a count palatine might until the statute 27 Hen. 8, c. 24, pardon treason. So he might make a tenure in capite, Com. Dig. tit. *Franchises* (D) 2. But there is nothing to show that the king alone could create *a county palatine by charter (which is always supposed in cases of prescription) since [*644 the existence of parliaments. The two counties palatine of Chester and Durham, which exist by prescription, were created by William the Conqueror when he exercised all the rights now vested in the king and houses of parliament. The county of Lancaster was created a county palatine in full parliament, anno 50 Ed. 3. In counties palatine, the counts appointed the sheriff; and in the great case, *Del Countie Palatine*, Sir J. Davis, 62, it is said that every count palatine has *jura regalia*, one of which is to have royal jurisdiction, and by reason thereof, he has all the high courts and officers of justice that the king has. In 1 Hen. 7, 23 b, it is said, "a franchise which exalts itself into the prerogative of the king cannot be claimed by prescription." Now, this franchise of appointing one to stand in the place of the sheriff is similar to the franchise of appointing the sheriff himself, which exists only in the king and counts palatine; and in the latter, because they have *regalem potestatem* in omnibus. The Duke of Beaufort must, therefore, have the return of writs by his bailiffs as his deputies only, and he is answerable for their acts. It is clear that an officer generally shall answer for his deputy, 2 Inst. 466; and a deputy ought regularly to act in the name of his principal, as an under-sheriff does all acts in the name of the sheriff and as a servant in respect of his principal. And it is said by Holt, C. J., delivering the opinion of the Court in *Parker v. Kett*, 1 Salk. 95, that "an under-sheriff must act in the name of the high sheriff because the writs are directed to the high sheriff." The Duke *has no [*645 power (for the charter does not even profess to give it) to appoint bailiffs of the liberty, but only bailiffs deputed to execute process. He may appoint

several, but surely they cannot all make returns. The duke here claims the return of writs by his bailiffs. Then, by analogy to other cases, he is the person to be ruled to make such returns. The lord of a manor, *by his steward*, admits to and grants seisin of a copyhold estate; but the mandamus to admit is directed to the lord, though sometimes to the steward together with him, *Rex v. The Lord of the Manor of Hendon*, 2 T. R. 484, *Rex v. Coggan*, 6 East, 481, *Rex v. The Marquis of Stafford*, 7 East, 521. *Cur. adv. vult.*

Lord TENTERDEN, C. J., now delivered the judgment of the Court. This was an application to quash a return made by Lewis Thomas, as bailiff of the lordship of Gower, to the sheriff's mandate for the execution of a writ of fieri facias issued by the plaintiff Newland against the defendant Cliffe. And the question was, whether the return could be made by Lewis Thomas in his own name, as bailiff of the lordship, or ought to be made by the Duke of Beaufort, the present lord of the franchise, or by Lewis Thomas in the name, or as the bailiff of the duke.

There is much variety and some confusion on this subject, in the books of learned writers and the dicta of former judges; and this has probably arisen, in some measure, from the difference in the royal grants of franchises, and the practice that has prevailed in different lordships. It is perfectly clear from the *646] language *and enactments of several ancient statutes, that the lord of a liberty and the bailiff of that liberty were, in many cases, considered as distinct persons, having distinct duties and responsibility. Some of these acts were referred to in argument; but there is no one that places this matter in a clearer light than the stat. 1 Ed. 3, stat. 1, c. 5, which enacts, "That from henceforth against the false returns of bailiffs of franchises which have full return of writs, a man shall have averment, and recover as well against them as against the king's sheriff, as well of too little issues returned as in other cases, so that it falleth not in prejudice of the lords in blemish of their franchises; and that the estate of holy church be always saved; and that all the punishment fall only upon the bailiffs, by punishment of their bodies, if they have not whereof to answer." The distinction is also to be found in two chapters of Dalton's Office of Sheriffs, and appears to have been taken and acted upon in the case in the Year Book 14 Ed. 4, fo. 1 b, quoted in Viner's Abridgment, vol. 19, *Return* (R). In that case the bailiff had returned cepi corpus, but had not the body ready at the day, whereupon a distringas issued against the bailiff, to which the sheriff returned that he was dead. And then one question made was, whether a distringas should issue against the bishop of E., the lord of the liberty. In the end, a distringas was awarded against the successor of the bailiff.

The distinction between the lord and the bailiff being thus recognised, and there existing that variety in the books to which I have before alluded, it becomes necessary, in the particular case now before the Court, to consider the *647] terms of the grant of this lordship, and the *practice that has prevailed according to the affidavits now before us.

The grant which was made by James the First to the Earl of Worcester, of this and other lordships, contains the following clause:—It is granted that the Earl of Worcester, his heirs and assigns, by his or their bailiff or bailiffs for that purpose, by the said earl, &c., from time to time to be deputed, shall and may have full return of writs, &c. It cannot, in our opinion, be denied that the king might authorize the lord of the liberty to appoint a bailiff who should have the return of writs, such a bailiff being a ministerial, and not a judicial officer. If it had been intended that the grantee and his heirs should be the persons to return the writs in the character of bailiff, the words "by his or their bailiff," &c., would have been unnecessary and improper, and the concluding words, prohibiting the sheriff to enter unless through the default of the bailiff of the earl, would have been incorrect; and the expression should rather have been "unless through the default of the said earl."

If a lordship, with a return of writs therein, be granted by the crown without such a special provision as is found in the present grant, the grantee, that is the lord, may and probably must be the person to make the return, either by himself or by his officer in his name. Under such a grant it cannot be supposed that the grantee would, *in fact*, execute the sheriff's mandate, or make the return to it, though, in contemplation of law, all must be considered as done by him. The grantee must, in fact, appoint an officer to do the business, and the person so appointed would be like the sheriff's officers, and would, in common speech, be called the bailiff of the liberty, and in practice it may be expected *that the sheriff's mandate would be delivered to him, though he would return it in the name of his principal. There are in Coke's Entries two [*648 instances of grants in this latter form. The one occurs in some proceedings in quo warranto against the inhabitants of the vill and borough of Denbigh, Co. Entr. 538 b. They, in their plea, set out letters patent, whereby King Edward the Sixth granted to the burgesses, their heirs, successors, and assigns, the return of all writs, precepts, &c. The other occurs in proceedings in quo warranto against individuals for usurping the franchise, inter alia, of the return of writs, Co. Entr. 552 a. The plea sets out letters patent, whereby King Edward the First granted that the Bishop of Winchester, and his successors, should have the return of all writs, &c. In neither of these instruments is there any provision that the grantee should have the return by his officer. (a) And the difference in the grants may account for the differences in practice, and reconcile much of the contrariety of doctrine that is found in the books.

In this lordship of Gower the practice has been conformable to our interpretation of the grant. It does not appear that in any one instance the sheriff's mandate has been directed to the lord of the liberty by name, or has been served upon the lord, or returned by the lord, or by any person in the name or as the bailiff or minister of the lord. On the contrary, the practice appears to have been to direct the mandate to the bailiff, sometimes mentioning his personal name, and at other times omitting it, and that the mandate has always been *served on the person filling the office of bailiff at the time, and returned by him in his own name as bailiff, in the manner in which the [*649 return in question has been made.

The only question now before us is, the propriety of the return; and, for the reasons given, we think the return properly made; and consequently the rule must be discharged.

Rule discharged.

(a) The latter, however, provides that the sheriff shall not enter to execute writs, &c., unless in default of the bishop and his successors, or of their bailiffs. The other has a non-intromittat clause without any exception.

Sir CHARLES MERRICK BURRELL v. NICHOLSON. May 11.

In trespass for entering to distrain for poor-rates, the defendant (who had acted on behalf of the parish officers) averred in justification that the plaintiff's house was within the parish, which the plaintiff denied:

Held, that the plaintiff could not demand an inspection of the parish books, on the ground that the defendant alleged him to be a parishioner.

THE parish officers of St. Margaret in the city of Westminster assessed the plaintiff to the relief of the poor for his house in Richmond Terrace, Whitehall. The plaintiff refused to pay the rate, contending that his premises were not within, or parcel of, the parish, being situate within the verge of the ancient royal palace of Whitehall, in the county of Middlesex. He was thereupon summoned before two justices, and they issued a distress-warrant for the rate, which was executed by the defendant. The plaintiff, for the purpose of trying the question between himself and the parish officers, brought an

action of trespass against the defendant for entering his house to distrain. He pleaded a justification. The plaintiff subsequently applied to the attorney acting on behalf of St. Margaret, Westminster, for an inspection of all the books and other documents belonging to the parish, then in the custody or power of the parish officers, with a view of collecting such information as they *650] might afford, touching the matter in dispute. This *being refused, Sir *James Scarlett* in the present term obtained a rule, calling upon the defendant to show cause why the plaintiff should not be allowed to inspect the parish books, upon notice of the rule nisi being in the mean time given to the vestry clerk; and it was stated on affidavit in support of the rule, that the books were believed to contain information material to the question between the parties.

Campbell and *J. Jervis* now showed cause. This is a new application, and *Cox v. Copping*, 1 Ld. Raymd. 337, is a clear authority against it. It is stated in 1 *Tidd's Practice*, p. 593, 9th ed., that books of a public nature, and, in particular, parish books, may be inspected by parties *who have an interest therein*; but the plaintiff here disclaims having an interest, for his case is, that he is no parishioner.

Sir *James Scarlett* and *Follett*, *contrd.* The defendants have averred on the record that the plaintiff is a parishioner; they cannot, therefore, for the purpose of resisting this application, allege that he is a stranger. *Cox v. Copping*, 1 Ld. Raymd. 337, was the case of an impropriator claiming against the churchwardens; as regarded the dispute between them, he was a stranger, and unquestionably acting upon a distinct and adverse interest; and at the time of that decision the courts of law were less liberal than they have since been, in granting equitable remedies.

Per Curiam. (a) This is in the nature of an application for a mandamus; *651] for the books, to be the subject *of a motion like the present, must be books for the inspection of which mandamus would lie; and if that had been moved for, the party must have shown that he had some interest in the documents to be examined. Now that the present plaintiff could not have done. He disclaims being a parishioner, and at the same time demands an inspection of the evidence on the side of the parishioners. *Cox v. Copping*, 1 Ld. Raymd. 337, is in some degree different from this case, but there is no reason for departing from the rule there acted upon. Rule discharged.

(a) Lord Tenterden, C. J., Littledale, J., and Parke, J.

The KING v. The Churchwardens of ST. MARY, LAMBETH. May 11.

Where the inhabitants of a parish have made an application to the commissioners for building new churches, conformably to 58 G. 3, c. 45, s. 14 & 60, and 59 G. 3, c. 134, s. 24, and have in consequence obtained a loan for the purpose of building churches within the parish, the churchwardens may make a rate for repaying the interest and principal (as directed by s. 61 of the first-mentioned act) without any further consent of the parishioners to such rate.

The making of such rate is not a matter of ecclesiastical cognisance.

A RULE nisi had been obtained for a mandamus calling on the churchwardens of Lambeth to make a church rate, under the following circumstances. In March, 1819, the parishioners in vestry passed resolutions that certain new churches and chapels should be built in the parish; that the parishioners would raise money by loan for purchasing and enclosing the sites of such churches and chapels, and for defraying half the expense of their erection; and that such loan should be paid by certain limited instalments, to be raised by subscription, or by a church-rate not exceeding 4d. in the pound per annum. A committee was appointed for carrying these resolutions into effect; and they presented a

petition to the *commissioners under the act for building additional churches (58 G. 3, c. 45), stating the above resolutions, and praying [652] the commissioners to grant a moiety of the sum required for erecting the proposed churches and chapels, and a loan for further carrying the resolutions into effect, according to the fourteenth section of the act. The commissioners made the grant and loan required, and also advanced further loans at the request of the committee; and it was agreed by the parishioners that a rate of 4*d.* in the pound per annum should be raised and paid to the commissioners in discharge of the interest and principal. The whole amount of such rate was pledged to the commissioners as security for the loans. The rate was annually made and levied till 1830, and the interest to September, 1831, and a part of the principal, paid. But at a vestry held in January, 1831, for making the rate as usual, the meeting refused to consent. The commissioners called upon the churchwardens to make and levy a rate, and proceed to discharge the debt according to agreement, but these parties declined doing so without the consent of the vestry: whereupon the present application was made.

Thesiger now showed cause. A preliminary objection in this case is, that the making of a church rate is a matter of ecclesiastical jurisdiction, *Rex v. The Churchwardens of St. Peter, Thetford*, 5 T. R. 364. In *Rex v. The Churchwardens of St. Margaret*, 4 M. & S. 250, where the same objection was taken without success, the proceeding called for was only preliminary to making the rate. And if this be a matter within any ecclesiastical law or *con- [653] stitution, it is expressly excepted from the operation of 58 G. 3, c. 45, s. 84. Supposing this objection not to prevail, the question turns principally on sects. 56, 58, and 61. By sect. 56 the church rates are, in all cases, to be the security for all sums of money advanced by the commissioners to any parish under this act; and the churchwardens are empowered and required to make proper rates for repaying such sums. By sect. 58, the churchwardens of any parish, with the consent of the vestry, may borrow any money upon the credit of the rates, and are empowered and required, in any case in which such money shall have been borrowed, to raise by rate a sum sufficient from time to time to pay the interest, and the principal by instalments as there specified. Sect. 60 provides, that no application or offer be made to build any church or chapel by means of rates, unless the major part of the inhabitants and occupiers assessed to the relief of the poor, in vestry assembled, or where there is a select vestry, four-fifths of such vestry, shall consent thereto; nor unless two-third parts in value of the proprietors of messuages, lands, &c., within such parish shall have given their consent in writing: this, however, is altered by 59 G. 3, c. 134, s. 24, which provides that no such application shall be made, if one-third in value of the proprietors there described shall dissent. Then, by sect. 61 of the former statute it is enacted, that "it shall be lawful for the churchwardens of the parish in which any such church or chapel shall be built, upon any such application of the parishioners as aforesaid, and they are thereby authorized and required, to make rates for raising the portion stated in any such application to be provided by means of rates," if a portion only is to be so provided, or the whole, if the whole *expense is to be [654] so defrayed; "or to borrow any such sums upon the credit of any such rates; and in every such case to make rates for the payment of the interest of any moneys advanced for the building any such church or chapel upon the credit of the rate," and for providing a fund for repayment of the principal. On the construction of these clauses, the churchwardens doubt if they can, of their own authority, make the rate, and whether the consent of the parishioners be not necessary for imposing the rate, as well as for making the application to the commissioners.

Lord TENTERDEN, C. J. There is no doubt, upon the sixty-first, compared with the other sections, that the churchwardens have authority to make the rate. They cannot borrow money of the commissioners under these acts, unless an

application to them shall have been agreed to by the vestry, and not dissented from by one-third in value of the proprietors within the parish. But unless the churchwardens had authority to make a rate, the vestry and proprietors might consent to the application, and afterwards declare that they would never pay the money borrowed. As to the first objection, making a rate to pay a debt, under these circumstances, is not a matter of ecclesiastical cognisance.

LITTLEDALE and PARKE, Js., concurred. (a) Rule absolute.

The *Attorney-General* and *Wightman* were to have supported the rule.

(a) Patteson, J., had gone to the Bail Court to hear motions.

*655] *HALL v. HARRIET TAPPER, Executrix of ROBERT TAPPER. (a)

To *scire facias* on a judgment, the defendant, an executrix, pleaded that she fully administered *before she had notice of the recovery*, and that she had had no assets since. Replication, that the defendant had notice of the recovery on, &c., and had assets afterwards: Held, that the mention of notice in the plea was surplusage, and the replication bad, as leading to an immaterial issue; for a judgment, to be entitled to preference in administration, must be docketed pursuant to 4 & 5 W. & M., c. 20; and the notice of it in any other way is of no consequence.

SCIRE FACIAS on a judgment. Plea, that after the testator's death, and before the issuing of the writ, and *before the defendant had any notice of the recovery* of the debt and damages as in the writ mentioned, she had fully administered, &c.; and that she hath not, nor had *at the time when she first had notice of the said recovery*, or at any time afterwards, any goods or chattels which were of the testator, &c. Replication, that after the recovery, and after the testator's death, and before the writ issued, to wit, on, &c., the defendant *had notice* of the recovery; and that *after she so had notice*, she had goods of the testator in her hands to be administered, wherewith she could and ought to have satisfied the debt, &c. General demurrer and joinder.

Jeremy, in support of the demurrer. The replication is bad, as consisting of immaterial averments. It does not appear on the pleadings that this judgment was docketed; and if it was not, then, by the statute 4 & 5 W. & M. c. 20, s. 3, any other notice of it was ineffectual: it stood on the footing of a simple contract debt. *Hickey v. Hayter*, 6 T. R. 384. To allege that the executrix had notice of a judgment, and afterwards had assets, when it is not shown that the judgment was docketed, is no plea, *Steel v. Rorke*, 1 B. & P. 307; and the *656] essential part of *the defendant's plea, viz., that she fully administered, remains without answer.

Dampier, contrd. The replication answers the plea, and contains sufficient matter for that purpose. The defendant should have pleaded that the judgment was not docketed; and, at all events, it was unnecessary for the plaintiff to reply that there was a docket. In *Steel v. Rorke*, 1 B. & P. 307, the rejoinder that the defendant *had notice* of the judgments was held insufficient; but there the replication had expressly stated that they were not docketed. In this case there is no such averment; it was sufficient, therefore, to say generally that the defendant had notice of the judgment, and afterwards had assets. It must be inferred from these pleadings, that the notice was that which alone is good in law. [LITTLEDALE, J. Notice or no notice to the executor is quite immaterial in pleadings on a judgment; it is not as if it had been a bond.] Then the same objection applies to the plea; and it should have been averred there that the judgment was not docketed.

Lord TENTERDEN, C. J. The difficulty, in this case, has arisen from the

(a) This case was decided on the 4th of May, but has been unavoidably postponed.
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liable in an action for money had and received. A bill accepted on a wrong stamp has been held to be no payment by the acceptor, even though the acceptor would have honoured it if it had been presented in time, *Wilson v. Vysar*, 4 Taunt. 288. The parties to such a bill are in precisely the same situation as they were before it was drawn. Then, if the drawer of a bill has in such a case a remedy against the acceptor, surely an endorsee, who has given the drawer value for the bill, must have a remedy against the latter when it becomes of no value. He is then in the same situation as if the bill had never been drawn, and is entitled to recover the value of his goods. There is no express authority upon this point, but it may be inferred from *Pierson v. Hutchinson*, 2 Campb. N. P. C. 211, that if a bill be lost and not destroyed, there can be no remedy in respect of it at law, unless it was in such a state, when lost, that no person but the plaintiff could have acquired a right to sue on it. Now, here the bill was in such a state that no person could have acquired that right. It is true that the drawer may be prejudiced in his remedy against the acceptor by the result of the alteration, but in this as in any other instance of special damage arising from that circumstance, an action on the case may be maintained against the party in fault, for the amount of damage really sustained. A different rule might be productive of great injustice. Suppose the bill accepted for the accommodation of the drawer, *or in part for his accommodation, the acceptor having received but a small [662 part of the amount of the bill. In the first case, the drawer would sustain no injury by the alteration of the bill, and yet, if the endorsee could not resort to the consideration, he must lose his just debt, and the drawer escape payment: in the second case, if an acceptance has been given for 1000*l.* when 50*l.* only was due, the drawer will have endorsed the bill in payment of a debt of 1000*l.* at the expense of 50*l.* only.

Platt, contrâ. The plaintiff, by altering the bill in a material part, has rendered it of no value, and, by laches, made it his own. Now, it is well established that in such a case the bill operates in satisfaction of any debt for which it was originally given. That applies to the present action. This is not analogous to the case of a bill drawn on an improper stamp, because in that case there never was a valid bill in existence. Here a bill, originally valid, was rendered void by the act of the plaintiff. It is not correct to say, that the drawer in such a case has always his remedy left against the acceptor. An acceptance given in satisfaction of a claim in respect of which no action can be maintained—as to a physician for fees, or in consideration of a promise, not in writing, to pay the debt of another—may be enforced: but if the bill be destroyed, the remedy is wholly lost. Permitting the plaintiff to recover in this action, and allowing the defendant to bring a cross action for the special damage occasioned by the destruction of the bill, would lead to a multiplicity of suits in the same matter, which the law discourages. *Our adv. vult.*

*Lord TENTERDEN, C. J., now delivered the judgment of the Court, [663 and, after stating the facts of the case, proceeded as follows:—

In this case we have come to the conclusion, that the opinion which I expressed at the trial, namely, that the plaintiff was entitled to recover on the count for goods sold, cannot be supported. It is perfectly clear that a bill of exchange will operate as a satisfaction of a preceding debt, if the holder make it his own by laches—as by not presenting it for payment when due. Here, we think that the plaintiff, by altering the bill in a material part, made it his own as against the defendant, and caused it to operate as a satisfaction of the debt for which it was originally given. Allowing the plaintiff to recover the value of the goods in this action, and the defendant to bring a cross action for the special damage sustained by reason of the destruction of the bill, would lead to a multiplicity of actions, which is against the policy of the law. For these reasons, we are of opinion, that the rule for entering a nonsuit must be made absolute.

Rule absolute.

CASES

ARGUED AND DETERMINED

IN THE

COURT OF KING'S BENCH,

IN

Trinity Term,

IN THE SECOND YEAR OF THE REIGN OF WILLIAM IV.(a)

JAMES RIGHT, on the Demise of RICHARD TAYLOR, v. BENJAMIN BANKS and CHARLES HEWITT and FRANCES his Wife.

An heir at law may devise a copyhold estate descended to him, without having been admitted, and without previous payment of the lord's fine, where due on admission.

EJECTMENT. At the trial at the Summer assizes for the county of Stafford, 1830, a verdict was found for the lessor of the plaintiff, subject to the opinion of this Court on the following case:—

By a surrender of the 13th of February, 1781, a small parcel of land, being then an entire garden, contained about sixteen perches, and copyhold of inheritance, situate in the township of Bilston, within the manor of Stowheath, in the county of Stafford, was surrendered by Homer, and Sarah his wife, to John Taylor of Bilston, maltster, his heirs and assigns for ever, and at the same *665] *court John Taylor was admitted thereto. On the 10th of July, 1781, John Taylor surrendered the above-mentioned small parcel of land to the use of his will. He subsequently erected three messuages with outbuildings on the land, which were occupied by J. Pearson, W. Mason, and W. Green, as his tenants. John Taylor had issue Mary Taylor and Samuel Taylor, and died, leaving them, and also his wife, his survivors. He made a will which contained (*inter alia*) the following devise:—"I give to my daughter, Mary Taylor, the house that J. Pearson holds of me, and the small house that W. Mason holds of me, with the garden and all appurtenances thereunto belonging, for her own use for ever, at my decease. And to my son, Samuel Taylor, I give, after my wife's decease, all that tenement, garden, and appurtenances thereunto belonging, that W. Green holds of me, or any other tenement, and that small parcel of land, &c., ranging or lying against Walter Rowley's workshop, for ever."

(a) Patteson, J., usually sat in the bail court during this term.

This will was duly proved by Mary Taylor, and she, on the death of her father, entered into the receipt of the rents and profits of the houses and premises in the occupation of J. Pearson and W. Mason, devised to her as aforesaid. Mary Taylor afterwards married, and died without issue, leaving her brother Samuel her heir at law. She was never admitted to the houses devised to her by her father.

Samuel Taylor, on the death of his mother, entered into the receipt of the rents and profits of the house, &c., in the occupation of W. Green, devised to him after his mother's death; and, on the death of his sister, Mary Taylor, he also entered into the receipt of the *rents and profits of the houses and premises late in the occupation of J. Pearson and W. Mason, and devised [666 to her as aforesaid. He married in the year 1828, and afterwards made his will, whereby he devised all his real and personal estate, with some immaterial exceptions, to his wife. Samuel Taylor died in 1829, without issue, without having been admitted either to the premises, late the property of his sister, or to those left to himself by his father, and without having surrendered to the use of his will. Frances, the widow of Samuel Taylor, afterwards married Charles Hewitt; and the said Charles and Frances his wife, were two of the defendants in this action of ejectment. The houses formerly in the occupation of J. Pearson, W. Mason, and W. Green, now form one messuage, which, with the small parcel of land, are in the occupation of Benjamin Banks, the other defendant, and the ejectment was brought to recover possession of these premises. The lessor of the plaintiff, Richard Taylor, was heir at law of the above mentioned John Taylor, the father. This case was argued in the last term, (a) by

Godson, for the lessor of the plaintiff. The heir at law of John Taylor is entitled to recover, because, in order to give effect to the will of Samuel Taylor, it was necessary that he should have been previously admitted tenant. He took either as devisee under the will of his father, or as heir at law. Now it is well established, that a devisee of a copyhold estate cannot re-devise it before admittance. *Smith v. Triggs*, 1 Str. 487; *Doe dem. Vernon v. *Vernon*, 7 East, 8; *Wainwright v. Elwell*, 1 Madd. 627. And if he took as heir [667 at law, he could not, before admittance, devise the estate descended to him. In *Smith v. Triggs*, Jane Day was the customary heir of Jane Triggs. The latter had surrendered to the use of her will, and devised to her daughter and heir, Jane Day, in fee, and the Court held that Jane Day took by descent; and she, before admittance, devised to the defendant; and Pratt, C. J., said, "There is no title in him, *for want of an admittance of Jane Day*, and also for want of a surrender to the use of her will." In *Wainwright v. Elwell*, 1 Madd. 627, Sir Thomas Plumer laid it down that an heir at law cannot, before admittance, devise a copyhold estate descended to him; and in *King v. Turner*, 2 Simons, 545, the very point was decided on the authority of those two cases. The statute 55 G. 3, c. 192, renders a disposition of a copyhold estate by will effectual without a surrender, but does not dispense with admission. Section 2 enacts, that no person entitled to copyhold lands by will, shall be entitled to be admitted by virtue of that act, except on payment of such stamp duties, fees, &c., as would have been payable in respect of a surrender to the use of such will. And sect. 3 provides, that the act shall not be taken to render any devise valid, which would have been invalid if a surrender had been made. The object of the act was to cure defects of form only, not of substance, *Doe dem. Nethercote v. Bartle*, 5 B. & A. 492. In *The King v. The Brewers' Company*, 3 B. & C. 172, a mandamus was granted to compel the lord to admit a copyholder claiming by descent, and one reason given was, that he might wish to surrender to the use of his will.

**Preston, contra*. It may be conceded, that the devisee of a copyhold cannot, before admittance, re-devise it, and that the statute 55 G. 3, c. 192, supplies the want of a surrender only, and not of an admittance; but here,

(a) Before Lord Tenterden, C. J., Littledale, Parke, and Patteson, Js.

Samuel Taylor, at the time when he made his will, was seised of the entire copyhold estate as heir at law; and being heir as well as devisee, he took by his better title. Now, an heir at law before admittance is complete tenant of the copyhold estate. Before the statute 55 G. 3, c. 192, he might have devised after surrender to the use of his will, without admittance. Watkins (on Copyholds), vol. i., p. 244, treating of the admission of an heir at law, says, that "the heir has as good a title without admittance as with it, against all the world but the lord; Rex v. Rennett, 2 T. R. 197: it is a matter only between the lord and tenant; and if the lord refuse admission, he is tenant as to others without it, and the lord shall not be suffered to take any advantage of his own neglect:" that "on the death of his ancestor, the heir may enter and take the profits (Brown's case, 4 Rep. 22 b), and maintain an action for any trespass done to his possession (4 Rep. 23 b). He may also make a lease of the copyhold as warranted by custom. If he die after entry, and before admittance, there shall be a *possessio fratris* (Dyer, 291 b, pl. 69), and his heir may enter also, as he himself could have done (4 Rep. 23 b). His widow shall be endowed, and the husband of an heiress shall have his curtesy. *The heir may even surrender to the use of another*, on satisfying the lord for his fine (Brown's case, 4 Rep. 22 b), whether the inheritance be in possession, or only in remainder or reversion; and if he would devise his interest, he must *surrender* to the use of his will;"

*669] *and for this latter position, Smith v. Triggs, 1 Str. 487, is cited. One ground of that decision was, that the devise was void for want of a surrender to the use of the will; which, undoubtedly, before the stat. 55 G. 3, c. 192, was requisite. But what was said there as to the necessity of admittance by Pratt, C. J., was unnecessary to the decision of the case, which was sufficiently determined by the want of surrender on the one hand, and the defective title of the lessor of the plaintiff on the other. The expression of Sir Thomas Plumer, in Wainewright v. Elwell, 1 Madd. 627, was also a mere dictum, upon a point not material to the case. The judgment in King v. Turner, 2 Sim. 546, proceeded chiefly on the authority of Smith v. Triggs. Again, in 1 Watkins, p. 302, it is said: "In most manors, a fine is due on the admission of an heir; and though the heir may surrender before admission, he shall not defeat the lord of his fine. The lord is not obliged to receive his surrender until the fine be paid." The heir at law, therefore, was tenant upon the death of his ancestor, as well before as after admittance, except so far as the rights of the lord were concerned. He could not be sworn on the homage or maintain a plaint in the nature of an assize in the lord's court, because till admittance he was not complete tenant to the lord; but to most intents, especially as to strangers, he was perfect tenant upon the death of his ancestor, Co. Copyh., sect. 41, Brown's case, 4 Rep. 22 b. It is quite clear, upon the authorities, that at common law an heir might before admittance surrender to a stranger, and it seems evidently to follow that he might to the use of his will. Before the statute 55 G. 3, c. 192, surrender was the *only thing required to make the will take effect; *670] and that statute now enables the heir to devise a copyhold estate without surrender, as he might have done before the statute, if he had surrendered it.

Cur. adv. vult.

Lord TENTERDEN, C. J., in this term delivered the judgment of the Court.

This case was argued before us in the course of the last term. The facts were these: John Taylor having duly surrendered a copyhold estate to the use of his will, devised one part of it to his daughter Mary Taylor in fee, and another to Samuel, his son and heir at law, in fee, after his, the testator's, wife's death. Mary entered and died without having been admitted, leaving Samuel her heir at law. Samuel, after the death of the testator's wife, entered on the part devised to him, and after his sister's death, on that devised to her; he afterwards made a will and left the whole to one of the defendants, and died, without having been admitted to the copyhold estate, and without having surrendered to the use of his will; and the question was, whether the estate passed

by Samuel's will? If it did, the lessor of the plaintiff, who is the heir at law of John Taylor, is not entitled; and we are of opinion that the estate passed, and that our judgment ought to be for the defendants.

It is quite clear that Samuel Taylor, on his sister's death, stood in the same situation as if the copyhold estate had immediately descended to him as heir at law, and the part devised to himself he took by descent. The question then is, whether a person entitled to a copyhold of inheritance as heir at law may make a will without having been admitted, or surrendered to the use *of his will? This depends upon the nature of the interest which the heir at law takes in such a copyhold before admittance: if before the statute 55 G. 3, c. 192, he was capable of devising after a surrender to the use of his will *only*, without any other previous condition, he is capable since that statute of devising without such a surrender.

Upon reference to the authorities in the old books, describing the nature of the interest of a copyhold tenant, it seems to admit of no doubt that an heir at law was capable of devising without any admittance, upon a surrender to the use of his will only. In Coke's Copyholder, section 41, it is said, that "admittances upon surrender differ from admittances upon descents, in this, that in admittances upon surrender nothing is vested in the grantee before admittance, no more than in voluntary admittances, but in admittances upon descents, *the heir is tenant by copy, immediately upon the death of his ancestor*, not to all intents and purposes, for peradventure he cannot be sworn of the homage before, neither can he maintain a plaint in the nature of an assize in the lord's court before, because till then he is not complete tenant to the lord, no further forth than the lord pleaseth to allow him for his tenant: so that to all intents and purposes the heir till admittance is not complete tenant; yet to most intents, especially as to strangers, the law taketh notice of him as of a perfect tenant of the land instantly upon the death of his ancestor; for he may enter into the land before admittance, take the profits, punish any trespass done upon the ground, *surrender into the hands of the lord to whose use he pleaseth*, satisfying the lord his fine due upon the descent." In **Brown's case*, 4 Rep. 22 [*672 b, it is laid down that the "heir may surrender to the lord to the use of another before admittance, *as any other copyholder may*, but it *cannot prejudice* the lord of his fine due to him by the custom of the manor upon the descent, and *he is tenant by copy of court roll*, for the copy made to his ancestor belongs to him; as the admittance of tenant for life is the admittance of him in remainder, to vest the estate in him, but shall not bar the lord of his fine, which he ought to have by the custom." In *Brown v. Dyer*, 11 Mod. 73, it is said, "The heir *may surrender before admittance*, because he has a title by descent; but the lord in this case shall have a fine." In the case of *Morse v. Faulkener*, 1 Anstr. 13, the Court of Exchequer say that "in copyholds the heir takes without actual admittance, and may surrender and convey without it, which he could not do if he were not seised, but the lord is in that case *entitled to the double fine* on the surrender." In *Doe v. Tofield*, 11 East, 251, Lord Ellenborough says, "The heir is tenant before admittance; he may surrender or forfeit." In *Wilson v. Weddell*, Yelv. 145, a difference was taken as to an heir to whom a copyhold descends; "he may surrender before admittance, and well, because in by course of law, for the custom, which makes him heir to the estate, casts the possession upon him from his ancestor; but a stranger to whom a copyhold is surrendered has nothing before admittance, because he is a purchaser," and there are many other authorities to the same effect.

To these authorities is opposed the dictum of the late Sir Thomas Plumer in the case of *Wainewright v. Elwell*, 1 Madd. 632, *who is there stated to have said, that "an heir at law cannot, before admittance, devise a copyhold descended to him;" but the decision in the case of *Smith v. Triggs*, 1 Str. 487, which he quotes, does not support that proposition. One point only was necessary to the decision of that case, viz., that by a devise to the heir at

law he takes by descent, for he takes only the same estate that would have descended to him without the will; and the dictum of Lord Chief Justice Pratt, that the devisee of the heir could have no title, for want of her admittance, "and also for want of a surrender to the use of her will" (for there was no surrender in that case), is the only authority in support of Sir Thomas Plumer's position. There is also the more recent case of *King v. Turner*, 2 Sim. 545, in which the present Vice-Chancellor held that a copyholder, heir at law, could not devise, unless he had been admitted. The authorities relied upon by his Honour are the dicta of Lord Chief Justice Pratt and Sir Thomas Plumer, which have been before noticed, and Brown's case, 4 Rep. 22 b (above cited), in which he supposes that the surrender of the heir before admittance was considered not to be good, unless the lord's fine were *first* satisfied. We think, for the reasons already given, that the dicta referred to are not sufficient to warrant the Vice-Chancellor's opinion; and nothing appears to us to have been stated in Brown's case, nor indeed in any other, from which it can be inferred that the lord's fine was to be paid as a *condition precedent* to the validity of a surrender by the heir at law. All that can be collected upon that subject is, that the lord, though the heir is entitled to surrender, is not ^{*674]} to be deprived of his right to his fine on the admission of the heir, where it is due by custom; whether it was so in this case does not appear; but even if it was, we think it makes no difference.

We are of opinion, therefore, that the heir at law could have devised his copyhold tenement upon a surrender to the use of his will merely, without having been previously admitted, or previous payment of the lord's fine as a *condition precedent*; that he is in the same situation in this respect as a copyholder taken by purchase, is, after his admittance; and if so, it is clear that the statute 55 G. 3, c. 192, supplies the want of an actual surrender.

For these reasons we are of opinion that the judgment of the Court should be for the defendants. Judgment for the defendants.

^{*675]} **DOE dem. STURGES and JAMES BATTEN v. TATCHELL.*
May 29.

Testator bequeathed a term in premises to S., his executors, &c., in trust to sell and dispose of the same, as might seem most advantageous, and apply the proceeds to the maintenance of testator's son during his life. He bequeathed the remainder, after the son's decease to such uses as the son should by will appoint, and he appointed S. his executor. When the testator died, his journeyman was managing his business on the premises, as he had done for some years, and the testator's son also resided there. At the funeral, S. said, in presence of the journeyman and other persons, "The house is young B.'s" (meaning the son's). "T." (the journeyman), "must stay in the house and go on with the business, but young B. must have a bidding-place." T. accordingly continued on the premises, carrying on the business, paying no rent, but maintaining the testator's son, who was weak in intellect and unable to provide for himself. S. lived twenty years afterwards, and did not interfere further with the property:

Held, that this was sufficient evidence of a disposal of the property by S. according to the trusts in the will, and that he had assented to take under the will as legatee in trust, and not as executor.

EJECTMENT for a dwelling-house, &c. At the trial before Alderson, J., at the Salisbury summer assizes, 1831, the following facts appeared. The father of James Batten, one of the lessors of the plaintiff, was possessed of the premises in question for a term of ninety-nine years, if he and James Barren should so long live. By his will, dated 1791, he bequeathed the premises to Robert Sharp, his executors, &c., for the above term, together with all the testator's stock in trade and other personal estate, after payment of his debts, &c., upon trust to sell and dispose thereof as should seem most advantageous, and to

apply the yearly interest, rent, and other produce (and the principal, if necessary,) to the support and maintenance of his son James Batten during his life; and he bequeathed the remainder of his said personal estate or of the produce thereof, after J. B.'s decease, to such uses and purposes as J. B. should, by his will, direct; and he appointed the said Robert Sharp his executor. On the death of Batten, senior, which happened in May, 1796, Sharp duly proved the will. The testator was a collar and harness maker; the defendant was his journeyman, and had lived with the testator upon the premises many years before his death, carrying *on the business for him. James Batten, [676 the son, who also lived there when the testator died, was of weak intellect, and unable to take care of himself. At the testator's funeral, Sharp said, in the presence of the defendant and a number of other persons, that "it was young Batten's house, but Mr. Tatchell must carry on the business as before: he considered that Tatchell must stay in the house and go on with the business, but young Batten must have a biding-place." From this time Tatchell occupied the premises, carrying on the business, and providing for young Batten, who continued to live with him. No assignment of the term ever took place, nor was any rent ever paid, and Sharp, who lived twenty years afterwards, made no further disposal of the premises: but, about twenty years ago, the defendant bought the reversion in fee. The rent of the house would not have been more than sufficient to keep one person. The testator left very little other property. In 1829, Sharp being then dead, Sturges, a relation of the testator, and one of the lessors of the plaintiff, took out administration to the testator, de bonis non. The only demises on which the ejectment was brought were those of Sturges and of Batten, junior. It was urged, on behalf of the defendant, that the interest in the premises was not properly unadministered, for that Sharp, the executor, had assented to the legacy in trust, and had disposed of the premises for the purposes of the will. On the other hand it was contended, that, as far as appeared in evidence, Sharp had taken the premises as executor merely, and had made no disposal of them during his lifetime. The jury having found a verdict for the plaintiff, a rule nisi was obtained, on the ground above stated, for setting aside the verdict and entering a nonsuit.

**Coleridge, Serjt., and Bartow*, now showed cause. Where a party has [677 two titles under a will, the one as executor, the other as legatee, some clear and specific act must be done, to show that he elects to take in the latter character. As it was said in *Welcken v. Elkington*, Plowd. 520, "some circumstance is necessary to be used," to show whether the executor will assent to the legacy or refuse it. In default of such evidence, the party will be presumed to take as executor only. This doctrine was recognised in *Paramour v. Yardley*, Plowd. 539; and there it was held, that the executrix had assented to take as legatee, for a lease was devised to her during a certain time, to the intent that she might, with the profits, educate the issues of the testator, and she did so educate them, which was a plain unambiguous act of assent. In *Doe dem. Hayes v. Sturges*, 17 Taunt. 217, which is a leading case on this subject, Gibbs, C. J., after noticing *Paramour v. Yardley*, and *Young v. Holmes*, 1 Str. 70, observes, "The principle established in these, and all the cases cited, is, that if an executor, in his manner of administering the property, does any act which shows that he had assented to the legacy, that shall be taken as evidence of his assent to the legacy; but if his acts are referable to his character of executor, they are not evidence of an assent:" and he distinguishes between the cases where the devise to the executor is absolute, and where the estate is devised over; in which latter case, if his general entry were considered evidence of an election to enter as legatee, thereby confirming the remainder over, he would be chargeable with a devastavit if it afterwards proved that the estate in remainder was *wanted for the payment of the testator's debts, which [678 would be a great hardship on the executor. In the present instance there was a devise over, and there was no specific act of assent to the legacy.

The words used at the funeral cannot be considered as a disposal of the property; the executor did not then know what debts there might be, and the effect of his declaration was merely to leave things as they were at the time. If they had altered the situation of parties, their effect, as evidence of an intention to dispose of the property, might have been different. And, according to Gibbs, C. J., in *Doe v. Sturges*, 7 Taunt. 223, if there was no assent at the time of the declaration, nothing that happened afterwards could make it an assent; nor is there any other specific act relied upon.

Eric and Moody, contra. By the will of Batten, senior, Sharp was left executor, and was also legatee of a chattel interest coupled with a trust, namely, to take care of and provide for James Batten, the son. That trust he executed by directing the defendant to continue the business and maintain James Batten; for *qui facit per alium facit per se*. It is clear, therefore, that he elected to stand in the situation of legatee, and not of executor. *Paramour v. Yardley*, Plowd. 589, where the same conclusion was come to, was not so strong a case as this. In *Young v. Holmes*, 1 Str. 70, a term was devised to an executor, paying 50*l.* to J. S.; and it was contended that the executor took as such, and not as legatee: but it being proved that he had paid J. S. the 50*l.*, this was *679] held a sufficient assent. And in *Manning's case*, 8 Rep. 187, *payment of a rent, according to the direction of the will, was so considered. In *Doe v. Sturges*, 7 Taunt. 217, it was held, that there appeared no assent to take as legatee: there the party had not (as in this case) taken upon himself any charge or trust, and the act which he had done was equally inconsistent with the character of legatee and that of executor. In the present case there was a trust executed for twenty years during the life of the legatee, according to his direction, which having given, he never interfered further with the property.

Lord TENTERDEN, C. J. It seems to me that our safer course in this case will be to consider the conduct of Sharp as evidence of an assent to stand in the situation of legatee; in which case he would take the property subject to the trusts in the will, for young Batten, and for his legatee if he should leave one. His words on the particular occasion, which has been referred to, are, "This is young Batten's house; Mr. Tatchell must carry on the business as before, but young Batten must have a bidding-place." The parties continue in this situation; the defendant carries on the business, and the unfortunate young man is maintained in the house. This goes on for many years, and nothing further is done. If there had been debts of the testator which required that his property should be made available for their payment, Sharp, instead of acting as he did on the death of the testator, might, as executor, have disposed of the premises to pay such debts: the facts, however, seem to show that there was no duty for him to perform as executor, but that he had a duty, which he fulfilled, as legatee in trust.

*680] *LITTLEDALE, J., concurred.

PARKE, J. I think there was sufficient evidence that Sharp assented to take under the will as legatee. The principle of law on this subject has been correctly laid down by my brother Coleridge, and is, as stated in *Doe v. Sturges*, 7 Taunt. 217, that where an executor takes an interest, but not an absolute estate, under the will, he must do some act as legatee, to show his assent to the legacy, and a mere entry is not sufficient. But in this case there is much more. It may be taken, on the evidence, that the defendant's entry, under the circumstances stated, was equivalent to an entry by Sharp; and the defendant was in twenty years during the lifetime of Sharp taking the profits of the estate, and applying them to the maintenance of young Batten. If Sharp had taken as executor, his duty would have been merely to receive the rents, and apply them in the payment of debts, or defraying other charges on the estate; but it does not appear that he had anything to do with the property in the character of executor. On the other hand, his performance of the trusts

is sufficient proof that he took as trustee. The result of the evidence, therefore, is, that he assented to take as legatee, and not that he acted as executor.(a)

Rule absolute.

(a) Taunton, J., was in the bail court, Patteson, J., being absent on account of illness in his family.

*The KING v. ROBERT WRIGHT. May 29.

[*681]

On indictment for encroaching on a public highway, it appeared that in 1771, commissioners under an enclosure act had been empowered to set out public and private roads, the former to be repaired by the township, and the latter by such persons as the commissioners should direct. The public roads were to be sixty feet wide between the fences. The commissioners in their award described a road as private, and eight yards wide; but in setting it out, a space of sixty feet was left between the fences: and they directed both the public and private roads to be repaired by the township. The centre only of the sixty feet was ordinarily used as a carriage road, and the township repaired it. The space said to be encroached upon was at the side of this road, and there was a diversity of evidence as to the use made of this space by the public, and its condition, since the time of the award:

Held, that the commissioners had exceeded their authority in awarding that private roads should be repaired by the township; but that on the whole of this evidence it was a proper question for the jury, whether or not the road in question, though originally intended to be private, had been dedicated to, and adopted by, the public. *Semble*, per Lord Tenterden, C. J., that when a road runs through a space of fifty or sixty feet between enclosures set out by act of parliament, it is *prima facie* to be presumed that the whole of that space is public, though it may not all be used or kept in repair as a road.

INDICTMENT for a nuisance by encroaching on a public highway. At the trial before Parke, J., at the Lancaster summer assizes, 1831, it appeared that the road in question was set out in 1771 by commissioners under an enclosure act, which authorized them to set out public and private roads, "so as such public roads should be and remain sixty feet in breadth, at least, between the fences." It also provided that the public roads should be repaired by the township, and the private ones by such persons and in such manner as the commissioners should by their award direct. The present road was described in the award of the commissioners as a private road, and of the width of eight yards; but, in fact, a space of sixty feet was left between the adjoining fences till the time of the alleged encroachment, which was lately made by the defendant. The centre of this space was commonly used by the public as a carriage road, and had been repaired by the township for eighteen years before the encroachment. The commissioners, in their award, directed that the township should repair as well the public as the private ways. With *respect to the use made of the spaces at the sides of the beaten road, and their condition from the time of the award, there was a diversity of evidence. The case, on behalf of the prosecution, was, that although the road was originally made private by the award, it had subsequently been dedicated to and adopted by the public, and ought therefore to have continued of the width of sixty feet. The learned judge, in summing up, observed that the commissioners had exceeded their authority in awarding that a private road should be repaired by the township, but he left it to the jury to decide, upon the whole evidence, whether the road, originally meant to be a private one, had not subsequently been dedicated to the public. He added, that the case was one which required strong evidence of dedication. The jury found a verdict of guilty. Jones, Serjt., in the following term moved for a rule to show cause why there should not be a new trial, contending, first, that there was no evidence of any part of the road having been public; but, on the contrary, it had been set out as a private road, and the commissioners could not legally oblige the township to

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repair such road; nor would the inhabitants have been indictable for not doing so, *Rex v. Richards*, 8 T. R. 634; and the mistake of the commissioners in this respect could not make the road public: secondly, that the evidence of user did not sufficiently show an adoption by the public, to which point he cited *Rex v. St. Benedict*, 4 B. & A. 447; and, thirdly, that as to the sides of the road the evidence did not support the verdict. A rule nisi was granted, Parke, J., however, noticing as a strong fact against the defendant that the original width between the fences was sixty feet.

*683] *Starkie* and *Roscoe* now showed cause, and contended, that it was rightly left to the jury under all the circumstances, whether or not the road had become public.

Crompton and *Tomlinson*, in support of the rule, contended, that there was no sufficient evidence of dedication of the part enclosed by the defendant; and that if he had become proprietor of that part (which they contended he had) he might lawfully enclose it, according to the judgment of Lord Mansfield in *Rex v. Flecknow*, 1 Burr. 465.

Lord TENTERDEN, C. J. I think the case was for the jury, and that they found a right verdict. I am strongly of opinion when I see a space fifty or sixty feet through which a road passes, between enclosures set out under an act of parliament, that, unless the contrary be shown, the public are entitled to the whole of that space, although perhaps from economy the whole may not have been kept in repair. If it were once held that only the middle part, which carriages ordinarily run upon, was the road, you might by degrees enclose up to it, so that there would not be room left for two carriages to pass. The space at the sides is also necessary to afford the benefit of air and sun. If trees and hedges might be brought close up to the part actually used as the road, it could not be kept sound. The rule must be discharged.

LITTLEDALE and PARKE, Js., concurred.

Rule discharged.

*684] *ASHCROFT v. BOURNE, PORTER, BROOKES, MERCER, LYTHGOE, and BILLINGE.* May 29.

Two magistrates having, at a landlord's request, given possession of a dwelling-house as deserted and unoccupied, pursuant to the 11 G. 2, c. 19, s. 16, the judges of assize of the county, on appeal, made an order for the restitution of the farm to the tenant, with costs. The latter brought an action of trespass for the eviction, against the magistrates, the constable, and the landlord: Held, that the record of the proceeding before the magistrates was an answer to the action on behalf of all the defendants.

TRESPASS, for breaking and entering the plaintiff's dwelling-house, and evicting him. Plea, by all the defendants, the general issue; and further, by the first two, that they were justices of peace for the county of Lancaster, that the trespasses were committed by them in the execution of their office as such justices, and that they tendered 40*l.*, being sufficient amends. The plaintiff replied that the sum was not sufficient, upon which issue was joined. At the trial before Parke, J., at the summer assizes for the county of Lancaster, 1831, the following appeared to be the facts of the case. The plaintiff was tenant of a house and farm to the Rev. Mr. Brookes, one of the defendants. A year's rent being in arrear, and the goods being removed off the premises, Mr. Brookes applied to the first-named two defendants to give him possession pursuant to the statute 11 G. 2, c. 19, s. 16. They went to view the premises on the 13th of October. The plaintiff was not there, but his wife and children were. There was no furniture in the house except three or four chairs, which were stated by the wife to belong to a neighbour. The magistrate then affixed a notice on the premises, that they would return to take a second view

on the 28th of October. On that day they went to the premises with Brookes and the other defendants, two of whom were constables. The plaintiff was there, and the rent was demanded of him, but he did not pay it. The *magistrates then delivered possession to Mr. Brookes, and he and the [685 other defendants turned the plaintiff and his family out of the premises. The plaintiff appealed to the judges of assize, and they being of opinion that the premises had not been deserted within the meaning of the act, made an order for the restitution of the farm, together with the tenant's expenses and costs, which were ascertained and paid to the plaintiff. A record of the proceedings of the magistrates was given in evidence, and it was contended that this was an answer to the action not only by them, but by all the other defendants, they having acted in aid of the magistrates. The learned judge was of opinion that the magistrates were protected, but that the other defendants were not. The jury found a verdict for the plaintiff against these last for 100% damages, but leave was reserved to move to enter a verdict for all the defendants. A rule nisi having been obtained for that purpose,

Wightman now showed cause. The question is, whether the immunity of the magistrates, who had jurisdiction over the matter on which they pronounced judgment, extends to the other defendants. Now, although the record of their proceedings is a conclusive answer to the action of trespass brought against them, *Basten v. Carew*, 3 B. & C. 649, it does not follow that it is so as to persons acting in their aid. At all events, Brookes, the landlord, was not protected by these proceedings. The statute 24 G. 2, c. 44, s. 6, extends only to constables, headboroughs, &c., or to persons acting *by their order or in their aid*. Brookes was not acting in aid of the *justices, but put them in motion. The action was brought for what was done on the 28th of [686 October, when possession was delivered. Brookes attended on that occasion, though he was not obliged to attend to be put into possession. He voluntarily took an active part in the proceedings, without being called upon to do so by the magistrates; and if he had pleaded specially that he acted in aid of the justices, that allegation would not have been supported by the fact.

J. Williams and Cresswell, contra. The constables are clearly entitled to have a verdict entered in their favour, if the magistrates were justified in doing what they did; for the constables acted in aid of the magistrates, and they were entitled to give this defence in evidence under the general issue by 7 J. 1, c. 5. The stat. 24 G. 2, c. 44, protects a constable, not merely where the justice is protected, but where the constable acts under warrant of a justice, though the latter may have no jurisdiction. Then, as to Brookes, if he is to be deemed a trespasser merely because he set the justices in motion to put the law in force, every suitor who institutes proceedings, must be equally liable to an action if his suit be defeated. Here the magistrates were judges of record, they were to act on their own view and judgment, and not on the information of the landlord; they did go to the premises and view them, and afterwards, upon their own consideration of the matter, pronounced judgment. The stat. 11 G. 2, c. 19, undoubtedly gave them jurisdiction over the subject-matter of their inquiry; and supposing the award of restitution to be equivalent to a reversal of their judgment (which may be doubtful), still where a court has jurisdiction, *and proceeds erroneously, no action lies against the party who sues, or [687 against the officer or minister of the court who executes its precept or process; though, where the court has not jurisdiction of the cause, the whole proceeding is *coram non iudice*, and actions will lie against them without any regard to the precept or process. Case of the Marshalsea, 4 Rep. 76. Then in this case no action will lie against Brookes for setting the justices in motion; nor can he be sued as a trespasser for acting in aid of the justices in carrying their judgment into effect. If he was not acting in their aid, still, if they were not trespassers by putting out the tenant and putting the landlord into possession, he could not be a trespasser for allowing himself to be put in; and if it

was lawful for him to receive possession, he certainly might attend for that purpose. And the stat. 11 G. 2, c. 19, s. 21, enables the landlord to give this matter of defence in evidence under the general issue.

LORD TENTERDEN, C. J. I am of opinion that the verdict must be entered for all the defendants. I take no distinction between the constables and assistant, and the justices; the remaining question, therefore, is, whether Brookes be justified as having acted in aid of the magistrates, or as having put them in motion. He submitted his complaint to their judgment; they went to view the premises on the 13th of October, and as far as the case had then gone, they were of opinion that the complaint was true. They go again on the 28th, and Brookes, the landlord, goes with them to receive possession, if they *688] think fit to deliver it, and they do deliver it to him: he is then put in possession by act of the law, and he is not a trespasser. It turns out that the justices had mistaken the law: but it would be hard if the landlord, who had submitted his case fairly and honestly to them, should therefore be deemed a trespasser *ab initio*. If it had appeared that the proceedings had been maliciously commenced or persisted in, that might have been the ground of an action, on account of his having misled the justices, but in the present case that is not imputed.

LITLEDALE, J. I am of the same opinion. The justices here acted according to the directions of the statute 11 G. 2, c. 19, s. 16, and, considering, upon their view of the premises, that they were deserted, gave possession to the landlord. In so doing they acted as judges of record, and though on appeal the judges of assize of the county palatine of Lancaster directed restitution with expenses and costs, that was at most but equivalent to reversing a judgment on writ of error. There was no trespass committed by Brookes, for this action was not brought for anything done before the 28th of October. The justices took with them on that day two constables, to assist them in delivering possession. The landlord also went with them, and he was justified in so going, first, in order to be put into possession, and secondly, in aid of the justices; he received possession from them, and put the plaintiff out. He was in the first instance acting in aid of the justices, and secondly in his own right. After possession was delivered to him, if the plaintiff had entered, Brookes would have been justified in turning him off the premises. The defence that he was *689] acting in aid of the justices, might be given in evidence under the general issue, by the stat. 7 Jac. 1, c. 5; and, assuming that he was not acting in aid of the justices when he turned the plaintiff out, but in his own right merely, he was entitled to give that in evidence under the general issue, by the stat. 11 G. 2, c. 19, s. 21, which gives the plea of the general issue in all actions of trespass brought against any person entitled to rents or services, relating to any entry, by virtue of that act, upon the premises chargeable with such rents, &c. Now here the action was brought against a person entitled to the rent, and it related to an entry by virtue of the act. The justices are protected by the same act; and as the constables and assistant, and Brookes the landlord, are also justified, for the reasons which have been given, there must be a general verdict for all the defendants.

PARKE, J. I am of the same opinion. I thought at Nisi Prius that Brookes the landlord was not protected by the record of proceedings before the magistrates, unless all the facts there alleged were true, and I afterwards thought that the pleadings were not right. As to the latter point, I still think that Brookes cannot defend as having acted in aid of the magistrates; my attention, however, having been now called to the twenty-first section of the 11 G. 2, c. 19, I think that under that section he might give the special matter in evidence upon the general issue, this being an action brought against a person entitled to rents, relating to an entry by virtue of the act. The constables were acting either in aid of the landlord or in that of the magistrates, and might give the special matter in evidence under the general issue, in one case by the stat. 11

G. 2, c. 19, s. 21, or, in the *other, by 7 Jac. 1, c. 5. Then the question comes to this: Whether, upon the special matter, Brookes be responsible in an action of trespass? Now, the 11 G. 2, c. 19, s. 16, empowers the justices at the request of the landlord, to go upon and view the premises, and to affix a notice, what day they will return to take a second view; and if, upon such second view, the tenant does not appear and pay the rent, or there be not sufficient distress, they are then to put the landlord in possession. The justices, therefore, are to go upon the premises and adjudicate upon the truth of the facts stated by the landlord. They have here adjudicated, as it appears, erroneously, on the fact of desertion; all the other facts were true, and although that turned out to be untrue, the landlord is not responsible for their error. If the matter had been specially pleaded, it would have been sufficient to state the adjudication of the justices without averring the fact of the desertion; as, in other cases, persons justifying under the judgment of an inferior court are not obliged to show in pleading a sufficient ground of action, though if the action was brought maliciously and without probable cause, the party who brought it may himself be liable to an action on that account. Whether Brookes was so liable here, it is not necessary to say; but he is protected in this action by the authority of the justices.

Rule absolute.

*WHITCHURCH v. CHAPMAN. May 30.

[*691]

By a local act for certain incorporated parishes, guardians of the poor were appointed, and were authorized to appoint a clerk, and to make rates; and all poor-rates and books purporting to be rates made for the said parishes, and all papers relating to the settlement of the poor, were to be delivered by the churchwardens and overseers to the clerk of the guardians for the time being, who was to cause the same to be preserved and filed. The clerk to the guardians paid the casual and out-poor weekly, and transacted some other matters relating to the poor, and had the custody of the books: Held, that he was not a person liable to the penalties imposed by the 17 G. 2, c. 3, s. 8, upon churchwardens, overseers, or other persons *authorized to take care of the poor*, for not permitting an inhabitant to inspect the rates.

DEBT for penalties on 17 G. 2, c. 3, s. 8. The declaration stated that the plaintiff was an inhabitant and parishioner of the parish of St. Lawrence, in the town and county of the town of Southampton, that the defendant was clerk to the guardians of the poor within the town and county, and was a person authorized to take care of the poor within the same; that a poor-rate was made by the guardians, confirmed by two magistrates, and duly published; that the plaintiff requested the defendant, being such clerk to the guardians, and a person authorized as aforesaid, and having the care and custody of the books and rates, to permit him, the plaintiff, to inspect the rate, and tendered to him 1s. for the same, but that the defendant refused. The second count stated that the defendant was clerk to the guardians, and had by law the care and custody of the rates of the said town and county of the town of Southampton; and then alleged demand and refusal. At the trial before Taunton, J., at the Summer assizes for the county of Hants, 1831, it appeared that by a local act, 13 G. 3, c. 50, the several parishes in the town and county of Southampton were united into one district for the purpose of maintaining, relieving, and employing the poor of those parishes, and that certain persons therein named were incorporated by the name of "The Guardians of the *Poor within the Town and County of the Town of Southampton," [*692 to whom the care and management of the poor of the said several parishes was thereby committed. Section 16 authorized the guardians, or any nine or more of them, to nominate, appoint, and employ from time to time, such person and persons as they should think proper, to be and officiate as clerk. By sect. 21

the guardians were authorized to make rates. By sect. 48, it was enacted, that "all rates and books purporting to be rates made for the relief of the poor of the said several parishes, and all other writings and papers whatsoever relative to the settlement of any poor within the said several parishes, shall be delivered by the said churchwardens and overseers respectively to the clerk of the said guardians for the time being, who shall cause the same to be preserved and filed, so that reference may be had thereto at any future time." It appeared further, that the defendant was appointed clerk to the guardians, and that he every week paid money to the casual poor and out-poor, amounting sometimes to 60*l.* or 70*l.*; that he received a check for the amount from the chairman of the guardians; that the assistant overseer collected the rates; that the defendant always applied to the justices on the subject of illegitimate children; and that when the guardians were applied to for relief, they always referred to the defendant. He attended the meetings of guardians, which took place twice a week, and acted as clerk. The books remained in his custody. A rate having been duly made and published in April, 1831, the plaintiff, a rated inhabitant and rate-payer, demanded to inspect the same, but was refused. Upon these facts, Taunton, J., was of opinion that the defendant was not a *693] party authorized *to take care of the poor within the 17 G. 2, c. 3, s. 3, and therefore not liable in this action, but he directed the jury to find a verdict for the plaintiff for one penalty of 20*l.*, reserving liberty to the defendant to move to enter a nonsuit. A rule nisi having been obtained for this purpose,

Follett and *Sewell* now showed cause. The clerk to the guardians of the poor, appointed under the authority of the local act, is a person authorized to take care of the poor within the 17 G. 2, c. 3. By the local act, the power of regulating the affairs of the poor is taken from the churchwardens and overseers, and given to the guardians: but the defendant, their clerk, in fact had by their authority the care of the poor, and performed many of the duties of overseer. The custody of the rates is also taken away from the overseers and churchwardens, and given to the clerk of the guardians. *Bennett v. Edwards*, 7 B. & C. 586, shows that an assistant overseer may be liable to the penalties imposed by the 17 G. 2, c. 3, s. 3, upon overseers not permitting inhabitants to inspect the rate, if it appear, from the nature of his duties, to be incumbent on him to produce the rate; and the defendant here stands in the situation of such an assistant overseer.

Selwyn, contra. The defendant was not a churchwarden or overseer, or a person authorized to take care of the poor within the statute 17 G. 2, c. 3. The guardians were the persons authorized; he was only their clerk, and held *694] the rate-book, and acted in the *management of the poor, as their servant. The second count, which charges him as a clerk, who had custody of the rates, is bad in arrest of judgment, for the act does not make such a person liable. In *Bennett v. Edwards*, 7 B. & C. 586, the defendant was an overseer, and the act expressly makes the churchwardens and overseers liable.

Lord TENTERDEN, C. J. No persons are subject to the penalty imposed by the stat. 17 G. 2, c. 3, s. 3, but churchwardens, overseers, or persons authorized to take care of the poor. The defendant was neither a churchwarden, an overseer, nor a person authorized to take care of the poor. The guardians were the persons so authorized. In *Bennett v. Edwards*, 7 B. & C. 586, the defendant was an assistant overseer, the case, therefore, fell within the words of the act; and he appeared to be the only person who had possession of the rate.

LITTLEDALE, J. In *Bennett v. Edwards*, 7 B. & C. 586, the defendant, who had the custody of the rate, was a person authorized to take care of the poor. Here, by the local act, the clerk of the guardians is to have the custody of the poor rate, but the guardians are the persons authorized to take care of the poor, and the demand of inspection ought to have been made on them.

PARKE and TAUNTON, Js., concurred.

Rule absolute.

*WILLIAMS, Clerk, v. PRICE. June 1.

[*695]

Where a defendant in trespass pleads that he tendered the plaintiff a certain sum, being a sufficient amends, the plaintiff should reply that the defendant did not tender the sum named, or that that sum was insufficient, and not that he did not tender sufficient amends.

Where cattle are distrained damage feasant, and put into a sufficient pound, and escape *without default or neglect of the distrainer*, he may bring trespass for the damage. And although the defendants plead that the cattle were taken damage feasant, and impounded, and escaped without *his* default, a replication stating that the distress was put into a proper pound, and escaped without neglect or default of the plaintiff is a sufficient answer.

TRESPASS for breaking and entering plaintiff's closes, and depasturing the grass with cattle, &c. Pleas, the general issue, and six special pleas, on the first three of which the plaintiff took issue. The defendant pleaded, fourthly, (with a disclaimer of title), that the cattle escaped into the plaintiff's closes without the knowledge and against the will of the defendant, and that he afterwards, and before action brought, tendered and offered to pay to the plaintiff *a certain sum, to wit, 1l. 5s.*, the same being sufficient amends, in satisfaction of the trespasses, but that the plaintiff would not accept it. Fifthly, as to one of the supposed trespasses, that the cattle broke and entered and damaged the plaintiff's closes, and were there continuing to do damage, until the plaintiff afterwards, to wit, on, &c., seized and took the said cattle there as a distress for such damage, the said trespass, and the supposed trespass in the declaration mentioned, being the same, and having been one continuing trespass; and that the plaintiff afterwards impounded the said cattle as a distress for such damage, and kept and detained the same so impounded until the said cattle, then and there being of great value, to wit, &c., and exceeding the amount of the damages sustained by the plaintiff by reason of the said trespass, afterwards, to wit, on, &c., without the knowledge or consent, or default or neglect of the said defendant, escaped from and out of the said pound in which they had been so impounded as aforesaid. The sixth plea was the same in substance with the fifth.

*Replication, to the fourth plea, that the defendant did not tender, [*696 or offer to pay to the plaintiff, *the said sum of money in that plea mentioned*, in satisfaction of the said several trespasses, in manner and form, &c.: to the fifth, that the said pound in which the said cattle were impounded was a common, open, and public pound, and at the said time of the said cattle being impounded therein, and during all the time of their being so impounded, was in a secure and proper condition for the impounding of cattle; and that the said cattle being impounded in such secure and proper pound as aforesaid, afterwards and before the exhibiting of this bill, to wit, on, &c., *without the knowledge or consent, or default or neglect of the plaintiff*, escaped out of the said pound. To the sixth plea there was a similar replication. The replication to the fourth plea was demurred to as raising an immaterial issue; those to the fifth and sixth pleas were demurred to generally. The plaintiff joined in demurrer.

Talfourd in support of the demurrers. The replication to the fourth plea is bad, because it attempts to put in issue the precise sum said to have been tendered, which is not material. According to the general rules of pleading, the plaintiff should have traversed the tender of any amends, or the sufficiency of the amends; and by the express direction of 21 Jac. 1, c. 16, s. 5, where the defendant disclaims title, and the trespass was involuntary, the defendant shall be admitted to plead such disclaimer, and that the trespass was involuntary, and a *tender of sufficient amends* before the action brought, *whereupon, or upon some of them*, the plaintiff shall be enforced to join issue. This repli-

*697] cation does *not take any of the issues prescribed by the statute. [PARKE, J. Does not this plea sufficiently deny the tender?] It denies the tender of 1*l.* 5*s.*, but not the tender of sufficient amends. A tender, pleaded to a declaration in assumpsit, or to an avowry for rent, is pleaded in bar of a particular amount, and the tender must be of that sum, or else it is no answer; the precise amount, therefore, in those cases, is material; but here the question is, not whether a certain sum, but whether a sufficient amends was tendered. It is true there is a dictum in *Henly v. Walsh*, 2 Salk., 686, that in trespass, if the defendant pleads a tender of amends, he must show what he tendered, for he must tender a certain sum; but this was only said by way of illustration, and was not the point in question in the case; and the reason afterwards given is not satisfactory. [Lord TENTERDEN, C. J. Does not a justice of peace, in pleading a tender of amends, state a precise sum?] In *Burley v. Bethune*, 1 Marsh, 220, a magistrate pleaded tender of 2*d.* as amends, and 20*s.* for expenses of notice; and the plaintiff replied that the sum of 2*d.* was insufficient, upon which issue was joined. That only shows that a plaintiff, in such a case, may reply either that no tender was made, or that there was no sufficient tender. [LITLEDALE, J. In *Com. D. Pleader*, 3 M. 36, it is stated, from Thompson's Entries, 304, (a) that to an involuntary trespass the defendant *698] may plead *a tender of sufficient amends, and the plaintiff may reply quod non obtulit, or that the amends were not sufficient. Lord TENTERDEN, C. J. If it were not so, the jury at Nisi Prius would have to inquire, upon one issue, how much was tendered; and whether that sum was a sufficient amends. The issue must be brought to a single point.]

Then as to the general demurrers. It appears on the pleadings, that the plaintiff took the defendant's cattle for the trespass now complained of, and they escaped without his knowledge or default, but it was also without any default of the defendant, and he therefore ought not both to lose the pledge, and pay damages for the trespass. *Vasper v. Eddowes*, 1 Ld. Ray. 719; 1 Salk. 248; 11 Mod. 21; 12 Mod. 658; is an authority to show that if a distress be taken and escape, the distrainer loses his remedy, unless he can show some special matter to throw the loss upon the other party. The Judgments of Turton, J., and Holt, C. J., as reported in 12 Mod. 663, go this length. In the present case, no consent to the escape, or even default in respect of it, is ascribed to the defendant. It is indeed said in *Vasper v. Eddowes*, that if the distress die in pound, the action of trespass is revived; but the animal's death is the act of God, and may be the fault of the owner, if the distress be kept in a pound overt, where he might feed it. But a loss by escape, whether through the defect of the pound or other causes, must be the consequence of the distress; it cannot be presumed that the animal would have been lost if it had continued in the owner's field. [PARKE, J. In the report in 11 Mod., Gould, J., says, that if the distress be destroyed or *eloigned* without the plaintiff's default, his *699] *action is revived.] It is undoubtedly true, as laid down in *Lear v. Edmonds*, 1 B. & A. 157, that the mere taking of a distress by the plaintiff, does not form an answer to his action; but here sufficient matter is pleaded to make the distress operate as a satisfaction. A levy by distress suspends other remedies; the pound is the pound of the distrainer, and is so considered by Holt, C. J., in 12 Mod. 664; he may sue for the breach of it; and the loss must be his if the cattle escape without fault of the party distrained upon.

Butt, contra. The judgment of Holt, C. J., in *Vasper v. Eddowes* (which is

(a) Also called *Liber Placitandi*. The plea of tender in p. 304, states that the defendant, before, &c., offered the plaintiff 2*s.* 6*d.*, being sufficient amends for the trespass, in full satisfaction, &c., which the plaintiff refused. The replication is (protesting that 2*s.* 6*d.* are not sufficient amends), that the defendant, before, &c., did not offer to pay the plaintiff the said 2*s.* 6*d.* in full satisfaction, &c. In p. 361, to a similar plea of 12*d.* tendered, there is a replication that the 12*d.* tendered as aforesaid was not a sufficient compensation, &c.

best reported in 12 Mod. 663, and very imperfectly in 1 Ld. Raym. 719), is clearly with the plaintiff in this case. In the report first cited (p. 665), the Lord Chief Justice lays it down, that if a distress escape from the pound without neglect or other default of the distrainer, the action of trespass shall revive; otherwise not. Gould, J., expresses a like opinion: and Powys, J., observes, that "it would be of dangerous consequence, if the cattle taken damage-feasant should escape out of pound without default of him who did distrain, and that he thereby should become remediless." In that case, the plaintiff failed, because he only pleaded that the escape happened without his *consent* and *will*, which (as Holt, C. J., observed) it might have been, and yet through his neglect; and if so, the action not revived. But here it is expressly stated, that the cattle were lost to the plaintiff without default or neglect in him. The doctrine of the judges in *Vasper v. Eddowes*, as stated in 12 Mod., is adopted in 9 Vin. Abr. *Distress*, Q. 4, Bac. Abr. **Trespass*, F. 1, p. 675, (7th ed.) There is no sufficient authority for saying that the pound is to all [*700 purposes the distrainer's. If he puts the distress into a secure pound-overt, his duty respecting it is at an end. He may indeed sue for pound-breach, but he is not bound to take care of the distress, and if it escape without his default, his action of trespass is not barred.

LORD TENTERDEN, C. J. The manner in which Mr. Butt has put this case, appears to me satisfactory. If the plaintiff, under the present circumstances, cannot maintain his action of trespass, he is left without remedy for the damage he has sustained. He has lost his pledge, and that without any default of his own. I think the replication is sufficient.

LITLEDAL, J. I think the action is maintainable, because otherwise the plaintiff can have no satisfaction for the injury sustained: and he has shown in his pleading, that he put the distress into a proper pound, and that the escape happened by no fault of his.

PARKE, J. I am of the same opinion. The judgment of Holt, C. J., in 12 Mod. 663, is decisive.

TAUNTON, J., concurred.

Judgment for the plaintiff.

*CARTWRIGHT, Administrator of JOHN COOKE v. GEORGE [*701
COOKE, Clerk. June 1.

A. and B., brothers, were principal and surety in an annuity bond. By an agreement afterwards executed between them and a third brother, for the settlement of their affairs and the determination of their mutual claims, an apportionment of property and of debts was made among the three, and the annuity bond was declared to be B.'s (the surety's) debt:

Held, that this agreement (whether subsequently acted upon or not) was a binding accord between A. and B., and that B.'s administrator, having been obliged to pay arrears of the annuity, could not recover them from A.

ASSUMPSIT for money paid by the Plaintiff, as administrator, to the use of the Defendant. Plea, the general issue. At the trial before Vaughan, B., at the York Summer Assizes, 1831, a verdict was found for the Plaintiff for 200*l.*, subject to the opinion of this Court on the following case:—

The defendant as principal, and the intestate as surety, executed an annuity bond, bearing date the 19th of December, 1816, to J. H. Clay. The annuity being unpaid, the Plaintiff as administrator of John Cooke, the surety, was obliged, out of his assets, to pay arrears amounting to 85*l.*; and for this sum the present action was brought. The answer was, that the Defendant was discharged from liability by an instrument, not under seal, dated November 2, 1819, and purporting to be a settlement of the affairs, and a determination of the respective claims, of John Cooke the intestate, George Cooke the defendant,

and their brother Sunderland Cooke, upon each other. This document began as follows:—"We, W. B. C. and G. T., having been requested by John, Sunderland, and George Cooke, to consider the state of their affairs for the purpose of arranging a settlement of them, and determining their respective claims, do recommend the following appropriation." They then proceeded to dispose of various portions of property, and to make them applicable to particular debts and charges. Among other things, they directed a conveyance to Sunderland Cooke *702] a certain house, farm, and cottages for several purposes, one of which of was to raise a fund for the exigencies of certain alum works. They gave the sole management of the accounts of these alum works to Sunderland Cooke, but directed that John and George Cooke should be considered joint proprietors of the fee-simple; and that they should grant a lease to the then present renters, viz., John Cooke, George Cooke, in his son's name, Sunderland Cooke, and George Cooke, jun., whose shares were then apportioned, and who were to pay ground-rent to John and George, and to divide their profits and losses, in proportion to their respective shares. The instrument also directed that, for the benefit of the alum works, certain property in their neighbourhood belonging to John Cooke should not be disposed of; but that the renters of the works should make him a compensation on that account. It then ordered as follows: "That all debts now delivered in, and amounting to 34,100*l.*, specified as under, shall be paid by John Cooke, and that he shall be holder of all property of every kind not specified above; but any debts not included in the annexed statement shall be divided and paid jointly by John Cooke and Sunderland Cooke, viz.: one moiety by John, and the other by Sunderland and George between them. Then followed a schedule of the property as disposed of among the parties, and of the debts. Among these was Clay's bond, which was declared to be a debt of John Cooke. The whole was subscribed:—

"We agree and approve of the above arrangement, and pledge ourselves to observe the same,

GEORGE COOKE,
JOHN COOKE,
SUNDERLAND COOKE."

*703] *Blackburne*, for the defendant. The agreement is a good defence to this action. Considering it merely as an arrangement between John Cooke and the defendant, it is a contract by which John was on the one hand to receive certain property, and on the other, was bound to pay debts, including that in question. John, therefore, having pledged himself to such a contract, and taken property under it, his representative cannot, upon paying one of the debts, set up a claim on that account against the other contracting party. But the case is still stronger, inasmuch as the contract bound not the intestate only, but a third person, who agreed to compound his own debt on the faith that the others would do the same, and who would be defrauded if the agreement could be set aside as between the other two. A party to such an engagement cannot withdraw from it and sue the debtor. *Wood v. Roberts*, 2 Stark. 417; *Good v. Cheeseman*, 2 B. & Ad. 328. The presumption is here, that the composition was actually carried into effect; but even if it was not, the parties had mutually bound themselves by an undertaking which might have been enforced at any time, and this was a sufficient consideration for the promise of each to abide by the agreement.

Per Curiam.(a) This was a good accord as between the parties to the instrument, and binds the plaintiff. The promise of one was a consideration for that of another. Each had an immediate remedy upon it against the other; and in this respect it falls within the rule in *Com. Dig. Accord*, B. 4, that "an accord, with mutual promises to perform, is good, though the thing be not *704] performed at the time of action; for the party has a remedy to compel the performance."

Judgment for the defendant.

Knowles was to have argued for the plaintiff.

(a) Lord Tenterden, C. J., Littledale, J., Parke, J., and Taunton, J.

Ex parte BECKE. June 1.

The appellant against an order of filiation, moved the court of quarter sessions for a postponement of the appeal, on account of the absence of material witnesses. They rejected the application, upon which the appellant declined going into his case, and the order was confirmed. On motion for a mandamus to the justices to hear the appeal, and affidavits tending to show that they had acted unjustly in not granting the postponement, this Court refused to interfere, the matter being one peculiarly within the discretion of the magistrates.

CAMPBELL moved on behalf of the above party, for a rule to show cause why a mandamus should not issue to the justices of Middlesex, to hear an appeal preferred by him against an order of filiation. It appeared that at the April sessions, 1832, this appeal came on to be heard, and the appellant then moved that it might be postponed till the following sessions, on affidavits, stating that a material witness for the appellant was absent; that the appellant had made various endeavours to meet with him, but believed that he kept out of the way to avoid being subpoenaed; that the appellant proposed to advertise for his discovery, and believed that, if time were granted, he should be able to find him. It appeared also that another material witness, who had been subpoenaed for the appellant, was called on her subpoena, and did not appear; and in the affidavit afterwards made in support of the application to this Court, the appellant stated his belief that the witnesses acted in collusion with the woman who filiated the child. The magistrates, after hearing counsel for and against the adjournment, came to a vote, and decided against it; upon which, by advice of the appellant's counsel, *no attempt was made to go into the merits of the appeal, and the order was confirmed. [*705]

Campbell now contended, that although the matter was one in which the sessions had a discretionary power, yet if they had exercised it with manifest injustice, this Court was not precluded from interfering; and he cited *Rex v. The Justices of Wiltshire*, 10 East, 404; *Rex v. The Justices of Essex*, 2 Chitt. Rep. 385; *Rex v. The Inhabitants of Lambeth*, 8 Dow. & Ry. 340; and *Rex v. The Justices of Lancashire*, 7 B. & C. 691.

LORD TENTERDEN, C. J. The cases cited are very different from this. It is true that, in some instances, as where the sessions have established a rule, which, in its operation, has been found manifestly inconvenient for the purposes of justice, this Court has interfered to control their discretion, but it is going a great length. Here the application was to postpone the hearing of an appeal upon certain grounds laid before the court of quarter sessions, and they did not think fit to postpone it. If we granted a mandamus under these circumstances, it would be taking upon us to say, in each individual case, whether or not it is right for the sessions to comply with such an application.

LITLEDAL, J. It was a question peculiarly for the sessions. This Court ought not to interfere.

PARKE, J., and TAUNTON, J., concurred.

Rule refused.

*The KING v. The Inhabitants of BANBURY. June 2.

[*706]

G. S. was bound apprentice to a corkcutter in parish B., to serve him for seven years. After serving for seven weeks in that parish, the apprentice having a weakness in his eyes, his master told him to go back to his father, and it was afterwards agreed that the master should give the pauper two gross of corks per week, of the value of 2s., to maintain him; he went and lived with his father in parish K. for two years, during which time he received the corks from his master and sold them, and slept more than forty nights at his father's house in K., but did no work for his master. At the expiration of two years, in consequence of the master's giving him bad corks, he was

taken back to the master in B., with whom he lived ten days, and during that time he went out hawking corks for sale for his master. He then went home again, his master agreeing to let him have a gross of the best corks per week, which he did, and the apprentice disposed of them as before, doing no work for the master, and residing in K. with his father till his indentures were discharged by an order of two justices: Held, that the apprentice being maintained by his master in K. in pursuance of the indenture, resided there as apprentice, and gained a settlement.

On appeal against an order of two justices, whereby George Stanton and his wife were removed from the parish of Banbury, Oxfordshire, to the parish of Kingsutton, Northamptonshire, the sessions quashed the order, subject to the opinion of this Court on the following case:—

The pauper, George Stanton, was, by indenture of apprenticeship dated the 7th April, 1825, bound apprentice to W. Kimbury of Banbury, cork-cutter, for the term of seven years. The consideration money paid to the master was 21*l.*; and the master covenanted to teach the apprentice his trade, and find him sufficient meat, drink, clothing, lodging, washing, and all other necessities during the term. The pauper, upon the execution of the indenture, entered into the service of his master at Banbury, in which service he remained seven weeks, working at cutting corks; after which, the pauper having a weakness in his eyes, his master told him that he must go back to his father, as he could not see to work at his trade. The pauper accordingly went home to his father's house at Kingsutton, on the Saturday following, where he stayed till the next Monday morning. The pauper and his father then went again to the master, *707] who refused to receive the pauper; upon *which all the parties went before a magistrate, and the father made a complaint against the master, for refusing to receive the pauper. The magistrate informed the master, that he must return the premium or maintain the apprentice. The master stated that he could do that; and the pauper, his father, and the master, then went to the master's house, where it was agreed, that the master should give the pauper two gross of corks per week, to be of the value of 2*s.* per gross, to maintain him. The pauper then went home and lived with his father (who was a labourer and receiving parish relief), at Kingsutton, for two years, during which time the pauper received the corks from his master, according to the agreement between them. He sold the corks, and did anything he could get to do, working for any one who would employ him. During those two years, the pauper did no work for his master, unless hawking the corks so furnished to him could be considered as a service under the indenture. The pauper did not account with his master for the corks so furnished to him, or their proceeds, and the pauper's father sometimes sold the corks.

At the expiration of two years, in consequence of the master giving the pauper bad and valueless corks, the pauper was taken back by the father to his master, with whom he (the pauper) lived about ten days; and during that time he went out hawking corks for sale for his master. He slept on the night of the last of those ten days at his master's house in Banbury. At the end of the ten days the master told the pauper, that he must go home again on account *708] of the badness of his sight; and he agreed to let the pauper have a *gross of the best corks per week. Accordingly, the pauper went back to his father's at Kingsutton, and lived with him again till his indentures were discharged as hereinafter stated; and, during such period, the master furnished the pauper with the corks according to the last-mentioned agreement, which corks the pauper sold, and received the proceeds; doing no work for his master, but getting employment as he could. The pauper, during his apprenticeship, slept more than forty nights at Banbury, and more than forty nights at Kingsutton; but he slept in his father's house at Kingsutton on the night of the 5th of July, 1829; and on the 6th of July, 1829 he was discharged from his apprenticeship by an order of two justices.

Cooper and Jordan, in support of the order of sessions. The stat. 3 W. &

ject. But this principle may be collected from them all, that where the residence in a parish different from that of the master is unconnected with the apprenticeship, no settlement is gained. The cases where paupers have removed to other parishes, on account of illness, or for the purpose of visiting friends, neither receiving maintenance nor performing service, are illustrations of this part of the rule. On the other hand, if, during the residence in a parish different from that of the master, the apprentice performs service for his master there, his residence is then considered referable to and connected with the apprenticeship, and he gains a settlement. There is also a third case, where the master assents to the residence of his apprentice in a different parish, and maintains him there, though no service be performed. The master covenants by the indenture to teach the pauper and also to maintain him. Here he certainly did not teach the apprentice while he resided in Kingsutton, but he did maintain him. That was one of the objects of the apprenticeship, and it was satisfied; *712] and I think it is sufficient to *connect the residence of the apprentice in Kingsutton with the indenture, and that the safer course will be to hold that such residence was referable to the apprenticeship, by reason of the maintenance of the pauper in that parish.

LITLEDALE, J. I am of the same opinion. The master here, in consequence of what passed before the justice, agreed to allow the pauper, while residing at his father's house, a quantity of corks per week to maintain him. The residence of the apprentice in his father's parish of Kingsutton is therefore accounted for by his master's maintaining him there according to that agreement. The cases upon this subject turn upon very refined distinctions; but I think here the residence in Kingsutton is referable to the apprenticeship, by reason of the maintenance.

PARKE, J. I am of the same opinion. It may be collected from the decisions, that the residence in a parish different from that of the master must be connected with the indenture, or, as is laid down in *Rex v. Ilkeston*, 4 B. & C. 64, in furtherance of the object of the apprenticeship. Now, that object is twofold: maintenance and instruction. The one is as much the object of the indenture as the other. *Rex v. Charles*, Burr. S. C. 706, and *Rex v. Linkinhorne*, ante, 413, show that actual service in the parish where the apprentice resides is not necessary to give a settlement. If the pauper be permanently *713] maintained by the master during the residence, one of the objects *of the apprenticeship is attained; and it is immaterial in what parish the maintenance is afforded. The cases run very near to each other. *Rex v. Broton*, 4 B. & A. 84, is like this case in some respects, but there an express stipulation was made in the indenture, by which the master dispensed with the services of the apprentice during the winter, the time of the residence upon which the question of settlement arose.

TAUNTON, J. In the cases which have been referred to, and in which the residence was held not to have taken place under the apprenticeship, the pauper was not under the control of the master, and there was no other circumstance from which it could be said that the residence was in pursuance of the contract. But here the relation of master and apprentice clearly continued until the indenture was discharged. The agreement of the master to allow the apprentice corks, by the sale of which he was to maintain himself in Kingsutton, shows that the residence there was in pursuance of the contract of apprenticeship; and, therefore, without breaking in upon any decided case, I think we may hold here that the settlement was in Kingsutton. The order of sessions must be quashed.

Order of sessions quashed.

M. c. 11, s. 8, enacts, "that if any person shall be bound an apprentice by indenture, and inhabit in any town or parish, such binding and inhabitation shall be adjudged a good settlement." In *Rex v. Ilkeston*, 4 B. & C. 64, Lord Tenterden said, "The true construction of that provision appears to be, that the inhabitation must be in the character of an apprentice, and, in some way, or other, in furtherance of the object of the apprenticeship." Here, the inhabitation of the pauper in Kingsutton was not in the character of an apprentice, or in furtherance of the objects of the contract. He never rendered any service to the master. The distinction between an inhabitation during the existence of the indenture, and an inhabitation in furtherance of its *objects, is pointed out in *Rex v. Stratford on Avon*, 11 East, 176. Lord Ellen- [*709] borough there dwells on the service to the master, and although that is to be considered only one of the means of determining the character of the inhabitation, yet it is a very material one, and indeed is the only one which could be relied on in this case on the other side. Now it is clear, that if the master had given the pauper 2s. a week in money, instead of corks of that value, which it was necessary to convert into money, there would be no pretence for saying that there was any service in Kingsutton, or that his residence there was in the character of an apprentice. It is not sufficient that the relation of master and apprentice continues; that was so in almost all the cases; nor that the residence of the pauper with his father was with his master's consent. This was so in *Rex v. Barnby in the Marsh*, 7 East, 381; *Rex v. St. Mary, Bredin*, 2 B. & A. 382; *Rex v. Brotton*, 4 B. & A. 84; and *Rex v. Ilkeston*, 4 B. & C. 64, where no settlement was gained. In no case has the residence of an apprentice in a *third* parish been considered an inhabitation to confer a settlement without some strong circumstance to show that the residence was in furtherance of the object of the apprenticeship. Where the residence has been in the master's parish, the natural abode of the apprentice, such strong evidence of the residence being in the character of an apprentice has not been required; as in *Rex v. Charles, Burr*. S. C. 706; *Rex v. Foulness*, 6 M. & S. 351; *Rex v. Linkinhorne*, antd, 413. There he is presumed to reside as an apprentice, but when he goes to *a parish different from that of his master, it becomes material to in- [*710] quire strictly whether he goes there in his character of apprentice or not. This case is very like *Rex v. Brotton*, 4 B. & A. 84. There the master was to provide meat, &c., during the term, except in the winter season, when the ship to which the apprentice belonged should be laid by unrigged; during which time the apprentice was to be maintained by himself or his friends, the master paying a compensation; and a residence of the apprentice with his parents during the winter, according to this agreement, was held not to be a residence under the indenture.

Chilton and Cooke, contra. If the residence of the pauper in Kingsutton was not wholly foreign to the purposes of the indenture, it is sufficient to confer a settlement. That was the rule laid down by Bayley, J., in *Rex v. Chelmsford*, 3 B. & A. 411. In *Rex v. Barnby in the Marsh*, 7 East, 381, it was held that the inhabitation must be referable in *some way* to the apprenticeship. There the apprentice had resided with his grandmother in a different parish from his master's, solely on account of illness. In the late case of *Rex v. Linkinhorne*, antd, 413, service was held to be merely a criterion, but not the only one, whereby to determine the character of the residence. Now, here the pauper during his residence in Kingsutton served his master, for he sold corks there, which it was the master's trade to prepare and sell, and the proceeds were applied to the maintenance of the pauper, whom *the master was [*711] bound by the indenture to support. In *Rex v. Charles, Burr*. S. C. 706, the mere maintenance of the pauper by the master was considered as connecting the residence with the indenture.

Lord TENTERDEN, C. J. I am of opinion that the pauper gained a settlement in the parish of Kingsutton, under the circumstances stated in this case. It is not easy, and perhaps not possible, to reconcile all the cases on this sub-

ject. But this principle may be collected from them all, that where the residence in a parish different from that of the master is unconnected with the apprenticeship, no settlement is gained. The cases where paupers have removed to other parishes, on account of illness, or for the purpose of visiting friends, neither receiving maintenance nor performing service, are illustrations of this part of the rule. On the other hand, if, during the residence in a parish different from that of the master, the apprentice performs service for his master there, his residence is then considered referable to and connected with the apprenticeship, and he gains a settlement. There is also a third case, where the master assents to the residence of his apprentice in a different parish, and maintains him there, though no service be performed. The master covenants by the indenture to teach the pauper and also to maintain him. Here he certainly did not teach the apprentice while he resided in Kingsutton, but he did maintain him. That was one of the objects of the apprenticeship, and it was satisfied; *712] and I think it is sufficient to *connect the residence of the apprentice in Kingsutton with the indenture, and that the safer course will be to hold that such residence was referable to the apprenticeship, by reason of the maintenance of the pauper in that parish.

LITTLEDALE, J. I am of the same opinion. The master here, in consequence of what passed before the justice, agreed to allow the pauper, while residing at his father's house, a quantity of corks per week to maintain him. The residence of the apprentice in his father's parish of Kingsutton is therefore accounted for by his master's maintaining him there according to that agreement. The cases upon this subject turn upon very refined distinctions; but I think here the residence in Kingsutton is referable to the apprenticeship, by reason of the maintenance.

PARKE, J. I am of the same opinion. It may be collected from the decisions, that the residence in a parish different from that of the master must be connected with the indenture, or, as is laid down in *Rex v. Ilkeston*, 4 B. & C. 64, in furtherance of the object of the apprenticeship. Now, that object is twofold: maintenance and instruction. The one is as much the object of the indenture as the other. *Rex v. Charles*, Burr. S. C. 706, and *Rex v. Linkinhorne*, ante, 413, show that actual service in the parish where the apprentice resides is not necessary to give a settlement. If the pauper be permanently *713] maintained by the master during the residence, one of the objects *of the apprenticeship is attained; and it is immaterial in what parish the maintenance is afforded. The cases run very near to each other. *Rex v. Broton*, 4 B. & A. 84, is like this case in some respects, but there an express stipulation was made in the indenture, by which the master dispensed with the services of the apprentice during the winter, the time of the residence upon which the question of settlement arose.

TAUNTON, J. In the cases which have been referred to, and in which the residence was held not to have taken place under the apprenticeship, the pauper was not under the control of the master, and there was no other circumstance from which it could be said that the residence was in pursuance of the contract. But here the relation of master and apprentice clearly continued until the indenture was discharged. The agreement of the master to allow the apprentice corks, by the sale of which he was to maintain himself in Kingsutton, shows that the residence there was in pursuance of the contract of apprenticeship; and, therefore, without breaking in upon any decided case, I think we may hold here that the settlement was in Kingsutton. The order of sessions must be quashed.

Order of sessions quashed.

*The KING v. The Inhabitants of SHERRINGTON. June 2. [*714

A real estate was devised to C. B., who on the death of the testator was sixteen years old. Her father, considering himself her guardian, resided with her on the estate:

Held, that, as the estate came to the daughter by devise and not by descent, and she was above fourteen years of age, the father was not a guardian in socage, but natural guardian only, and that, having as such no interest in the land, he gained no settlement by residing on it.

ON an appeal against an order of two justices for the removal of Mary Bailey from the parish of Olney, in the county of Bucks, to the parish of Sherrington in the same county, the sessions confirmed the order, subject to the opinion of this court, on the following case:

Sarah Whiting by her will, duly executed and attested, dated the 9th of October, 1821, devised her real estate unto, and to the use of, her niece Catherine Bailey, the pauper's sister, her heirs and assigns, and appointed John Bailey, the father of Catherine and of the pauper, executor. The testatrix, at the time of the execution of her will, and thenceforward till her death, was seised in fee simple of a real estate in the respondent parish, consisting of two cottages or tenements. On the testatrix's death, Catherine was in the sixteenth year of her age; and her father immediately took possession of the two tenements, considering himself her guardian, and resided in one of them for five or six years; both his daughters living with him, and forming part of his family during the whole of that time. He let the other cottage to a tenant, and applied the rent to his own use, considering it a compensation for the expense of bringing up his daughter Catherine. The pauper had gained no settlement in her own right. The question for the opinion of this court was, whether John Bailey gained a settlement in the respondent parish, by residing under *such circumstances on the tenement devised by Sarah Whiting's [*715 will.

Campbell and J. S. Taylor, in support of the order of sessions. To acquire a settlement by estate, the father of the pauper must have had some legal or beneficial interest in the land, but here he had none. If the estate had come to his daughter by descent, when she was under the age of fourteen years, then he would have been guardian in socage, and, as such, would have had an interest in the land, *Rex v. Oakley*, 10 East, 491, *Rex v. Wilby*, 2 M. & S. 504. But here the daughter was above the age of fourteen years, and she took by devise. The father was not, therefore, guardian in socage. A guardian appointed pursuant to the stat. 12 Car. 2, c. 24, s. 8, by the father of a child under the age of twenty-one years, would have had an interest in the land, being entitled to take the profits. But the father of the pauper was not such a guardian. He was merely a natural guardian, and as such had no interest in the land.

J. B. Monro, contra. Undoubtedly the father of the pauper was neither a guardian in socage nor one appointed in pursuance of the stat. 12 Car. 2, c. 24, s. 8, but he was the natural guardian of his child, and, as such, had a right to reside with her; and as she was irremovable, *Rex v. Hatfield*, Burr. S. C. 147, he was so too.

Lord TENTERDEN, C. J. The father of the pauper was not guardian in socage, because the land did not come to his daughter by descent, nor was she under *fourteen years of age. Neither was he a guardian appointed by [*716 the parent of a child under the age of twenty-one years, pursuant to the stat. 12 Car. 2, c. 24, s. 8, who, as such, would be entitled to take the profits of the land. Then he was only the natural guardian, and had not, in that capacity, any title to a control over the land belonging to his child. To give a settlement there must be an interest in the land.

LITTLEDALE, J. In *Quadring v. Downs*, 2 Mod. 176, it was held, that there can be no wardship without a descent. The land, therefore, having come to the daughter by devise, and not by descent, the father was not guardian in socage. Nor was he a guardian appointed pursuant to the statute. He had, therefore, no legal or beneficial interest in the land, and consequently gained no settlement by residing on it.

PARKE, J. The father here was only the *natural* guardian; and it is clear that, as such, he had no interest in the land, for that guardianship extends no further than the custody of the infant's person, Hargrave's note to Co. Litt. 88 b, note 66.

TAUNTON, J., concurred.

Order of sessions confirmed.

*717] *The **KING v. The Inhabitants of HALESWORTH**, Appellants.
June 2.

The **KING v. The Same**, Respondents.

Lands were devised for the relief of the poor of H., one half of the revenue to be employed for the relief of widows, the other half towards binding out apprentices. The rents were received by the churchwardens, and not mixed with the poor's-rates, but kept in a distinct account. A parishioner of H., not receiving parish relief, applied to the churchwardens to provide him with means of apprenticing his son. The son was apprenticed, and the churchwardens paid the premium, costs of indenture, and expense of clothing the apprentice, out of the charity fund:

Held, that this was not an indenture by which an expense was incurred by *public parochial funds*, within 56 G. 3, c. 189, s. 11, and therefore not void for want of the approval of two justices, according to that statute.

And in a similar case, where lands were devised to the churchwardens and overseers of L. and their successors, upon trust to apply the rents towards educating twenty poor children, and a part thereof yearly towards apprenticing eight of such children, to be chosen out and allowed by the said churchwardens and overseers, and the principal inhabitants:

Held, that this also was not a public parochial fund within the meaning of the act.

On an appeal against an order for the removal of John Carter, his wife and child, from the parish of St. Michael at Thorn, in Norwich, to the parish of Halesworth, in Suffolk, the sessions confirmed the order, subject to the opinion of this Court upon the following case: A *prima facie* settlement in Halesworth was admitted; but the appellants relied upon a subsequent settlement by apprenticeship in St. Michael at Thorn. It appeared, that in 1652, John Keble devised certain lands in Holton for the relief of the poor of Halesworth; half the revenue to be employed for the relief of widows, and the other half towards binding out apprentices. The rents of these lands were received by the churchwardens of Halesworth, and were kept in a distinct account, and not mixed with the moneys arising from the poor's rates. The father of the pauper, who was a settled inhabitant of Halesworth, but residing at Norwich, and not at that time receiving parish relief, being unable from poverty to bind out his son, and

*718] having heard of Keble's charity, applied to the *churchwardens of Halesworth to provide him with the means of putting his son apprentice. They agreed to do so; and by indenture of apprenticeship duly stamped, the pauper, with the consent of his father, bound himself apprentice to George Holl of Norwich, for seven years, at a premium of 10*l.*, which was stated in the indenture to have been paid by the churchwardens of Halesworth. The premium, the costs of the indenture, and the expenses of providing the pauper with proper clothes, were paid by the churchwardens, out of the moneys of Keble's charity. The indenture was executed by the pauper, his father, and Holl; and the pauper served under it more than forty days in the respondent parish; but none of the directions contained in any section of 56 Geo. 3, c. 189, had been complied

with, either in the binding of the apprentice, or the form or execution of the indenture. The court of quarter sessions were of opinion that Keble's charity must be considered as a public parochial fund; and that the indenture, not having been duly approved of under the 11th section of the 56 Geo. 3, c. 139(a), the pauper gained no settlement by serving under it.

**Kelly and Palmer*, in support of the order of sessions. Keble's [*719] charity is part of a public parochial fund within the statute. For the sake of convenience, it is kept separate in the parish accounts; but the receipt and distribution of it operate in relief of the parish: it is under the control of the parish officers, and if they did not employ this money in binding out apprentices, they must use the poor's rate. The object of 56 Geo. 3, c. 139, s. 11, is to prevent the parish officers from clandestinely providing the premium of apprenticeship, and thus evading the statute 43 Eliz., c. 2, s. 5, by binding out poor children without the sanction of two justices. But both these statutes might be defeated, where there was a charity like this, if it were held not be a "public parochial fund;" for the parish officers would merely have to take the premium out of this money, instead of drawing it from the poor's rates. This is clearly a case within the mischief of the act; and the order of sessions can only be opposed by contending, that the words "public parochial fund" signify a poor's rate, and nothing else. The statute 7 Jac. 1, c. 3, appears to place all charitable donations like this upon the footing of parochial and public funds. [Lord TENTERDEN, C. J. The provisions of that act are very special; and they seem applicable to the case of funds which may become exhausted, not to revenues continually accruing as in this case.] Besides, it is to be assumed, unless the contrary be apparent, that the expenses are provided out of the public parochial funds, where the binding out is effected by the parish officers, *Rex v. Mattishall*, 8 B. & C. 733; or by their procurement, *Rex v. St. Peter, Hereford*, 1 B. & Ad. 916, and where they furnish the money.

**B. Andrews and Austin*, *contrd.* This is not a devise for the general [*720] benefit of the parish: it is given partly for the relief of widows, whom the parish is not of course bound to maintain, though they may be objects of the charity, and partly towards binding out apprentices, which it is not to be assumed the parish would necessarily have to do in every instance where the charity is so applied. If this were a public parochial fund, it would be under the direction of the churchwardens and overseers; but the churchwardens alone have the management of it, and that not as parish officers, but as trustees. They would not be liable, as parish officers, to commitment, if they refused to account for it, nor could their account be appealed against. The fund could not be diverted to the general occasions of the parish, however urgent. The recital in 56 G. 3, c. 139, s. 11, refers to the funds to be raised under the statute of Elizabeth, from which this is quite distinct. The presumption relied upon by Bayley, J., in *Rex v. Mattishall*, 8 B. & C. 735, is, that the advance was made by the parish officers "out of funds belonging to them in *that character*." The act of 56 G. 3, c. 139, s. 11, applies to cases where the parish officers exercise a compulsory power in binding out; or at least where the binding is directly or indirectly by their procurement, *Rex v. St. Peter, Hereford*, 1 B. & Adol. 916. Here it is apparent on the case, that the binding was voluntary,

(a) Which, after reciting that "the salutary provisions of the 43 Eliz., c. 2, are frequently evaded in the binding out of poor children, and the premium of apprenticeship or a part thereof, is clandestinely provided by parish officers, who are thus enabled to bind out many poor children, without the sanction of justices of the peace," enacts, "that no indenture of apprenticeship, by reason of which any expense whatever shall at any time be incurred by the public parochial funds, shall be valid and effectual, unless approved of by two justices of the peace, under their hands and seals, according to the provisions of the said act and of this act." The act 43 Eliz., c. 2, s. 5, empowers the churchwardens and overseers, or the greater part of them, by the assent of any two justices of the peace there mentioned, to bind our poor children apprentices, where they shall see convenient, &c.

and not by their procurement. In *Rex v. St. Paul, Exeter*, 10 B. & C. 12, it is said by Bayley, J., that the eleventh section applies to cases where a premium is clandestinely provided; that is, where the parish officers furnish the money, *721] but are *not parties to the indenture. But the proceeding in this case cannot be termed clandestine. The omission of the churchwardens to join in the indenture does not make it so; for the terms of the devise do not require that they, exclusively, should be the persons by whom apprentices are put out. [Lord TENTERDEN, C. J. Suppose this were a question under one of the stamp acts, which exempt indentures from duty where the binding is by a public charity: should you say that the exemption applied?] The binding is by a public charity, and would therefore be exempt; but it does not follow that it is out of a "public parochial fund."

The Court then desired to hear the other case argued, before giving judgment in this.

The appeal in this case was against an order for the removal of William Clarke, from Halesworth to Laxfield, in Suffolk. The settlement relied upon by the appellants was by apprenticeship, under the following circumstances. John Smith, in 1718, devised to the churchwardens and overseers of the poor of the parish of Laxfield, and to their successors for the time being, for ever, certain freehold lands in that parish, upon trust that they should apply the rents for a certain period towards erecting a schoolhouse in the said parish, and afterwards, towards the payment of a schoolmaster, and towards the teaching and educating twenty poor boys of the said parish, in reading, writing, and accounts, to be chosen and approved of by the churchwardens, overseers and principal inhabitants for the time being: and further, that 40*l.* of the said rents should be by the said churchwardens and overseers yearly applied towards the putting out to apprentice eight of such twenty poor children to some good *722] handicraft trade, to be computed *at 5*l.* per head, and the said eight children to be chosen out and allowed likewise by the churchwardens and overseers and principal inhabitants of the said parish. By indenture of apprenticeship, dated 27th of March, 1826, the pauper voluntarily bound himself, with the approbation and consent of his father and the churchwardens of Laxfield, to Henry Tillney, of Halesworth, for three years. The consideration to the master was stated to be 15*l.* 15*s.*, gift of John Smith, of Laxfield, gentleman, deceased, one half to be paid by the churchwardens, or one of them, on the 9th of May next ensuing, the remainder on the 11th of October, 1827; and the churchwardens, one of whom executed the indenture, covenanted to pay him the same accordingly. The indenture was not stamped. The pauper served his time under it, in Halesworth. He had been educated at Smith's school, and the premium and costs of the indenture were paid to the master out of the moneys received by the parish officers as trustees under Smith's will. None of the directions of 56 G. 3, c. 139, were complied with, either in the binding or in the form and execution of the indenture. It appeared that the parish accounts for Laxfield, and the trust accounts, were kept distinct; and the Court of Quarter Sessions found that the charity was a public charity. The order was quashed, subject to the opinion of this Court upon the case.

B. Andrews and *Byles*, in support of the order of sessions. This is a stronger case than the preceding. The devise is to the churchwardens and overseers, but the duty of apprenticing the children is not entrusted to them alone, but is to be exercised by them in concurrence with the principal inhabitants. The *723] case, *therefore, is clearly not within the mischief of the act 56 G. 3, c. 139. The apprentices here are not "parish apprentices" within the intention of that statute. The parties who receive and manage the funds of this charity must be the churchwardens and overseers; they take the moneys, however, not as such officers but as trustees. Suppose there were an excess of funds beyond what could be applied to the purposes of the charity; they could not be diverted to parish purposes, but an application must be made to the

Court of Chancery to obtain the direction of that Court for the distribution of the funds; and the court would appoint such trustees as it thought proper for that purpose. It would then be as if the devise had been to A. or B. by name, to the same uses, in which case the fund could not have been considered public and parochial. Nor is there any more reason for considering it so here.

Kelly and Austin, contra. The statute of Elizabeth, to which the act 56 G. 3, c. 139, refers, does not point out any particular fund from which the expense of binding out children must necessarily be defrayed. The powers and duties of the parish officers in this respect are the same, from whatever lawful source the funds are obtained. The devise here is, in express terms, to the overseers and churchwardens; so that it appears here more clearly than in the former case, that the parish officers, as such, are the parties meant to be entrusted with the binding of these apprentices. There is, indeed, a direction that the principal inhabitants shall join in choosing and allowing the children to be apprenticed, but that only means that the parish officers, in executing their duty, are to advise with those inhabitants. It is *said that a distinct account is kept of these trust-moneys, but they are not the less an [*724 integral part of the parish funds; and the words "public parochial funds," in 56 G. 3, c. 139, s. 11, are sufficiently large and general to include them.

Lord TENTERDEN, C. J. There is some difference in the facts of the two cases, but it will be best to decide both on general principles. In one sense, according to some decisions, the funds in both these cases are funds of public charities, because the bequest is general, and does not designate the individuals to be benefitted. In another sense they are parochial also, because they are left for the benefit of persons belonging to the respective parishes. Still the question is, in each case, whether the money be that of a "public parochial fund" within the meaning of the statute 56 G. 3, c. 139, s. 11? The mischief recited by that section is, that the provisions of the statute 48 Eliz. c. 2, are evaded in the binding out of poor children, and the premium of apprenticeship, or a part thereof, clandestinely provided by parish officers, who are thus enabled to bind out such poor children without the sanction of justices of the peace. It is therefore enacted, that no indenture, by reason of which any expense shall be incurred by the public parochial funds, shall be valid, unless approved of by two justices according to the provisions of this act and the statute of Elizabeth. I think the present case is not within the mischief there contemplated. There is no clandestine appropriation of moneys of the parish. The funds in question cannot properly be so called, in respect of the purpose for which they are collected, or the manner in which they are raised *since [*725 they are not contributed by the inhabitants of the parish. I think a public parochial fund must be one so contributed, or which is applicable to the general purposes of the relief of the poor. Estates devised for the relief of the poor generally would come under this description; but in each of these cases there is a fund left by the bounty of an individual for a certain specified purpose, that is, for the benefit of a particular class of persons. It is not meant to go in relief of the general parish fund, or if so, only to a moderate extent. It does not appear that the intention was to relieve persons actually burdensome to the parish; there might be persons unable to bind out their own children, and therefore objects of this charity, who yet did not require parochial support; and in such cases the fund would be no relief to the parish. It appears to me also that the donors in these cases never intended the objects of their bounty to be under the control of the justices of peace; but that the charity should be, in the one case at the disposal of the churchwardens, in the other (as respects apprentices) at that of the parish officers and principal inhabitants. I am, therefore, of opinion that these are not public parochial funds within the eleventh section of 56 G. 3, c. 139, and that the order of sessions in the first case must be quashed, and that in the second confirmed.

LITTTLEDALE, J. I am of the same opinion. I think the term "public

parochial funds" does not apply where particular individuals, or a particular class are pointed out as the objects of their application. The eleventh section of the act 56 G. 3, c. 139, was intended to prevent the clandestine appropriation of parish money *by the officers of the parish, in evasion of the *726] statute of Elizabeth: it is an enactment for the general regulation of parish funds, not for that of particular charities. And I also think it was not contemplated in these charities that the application of the moneys should be interfered with by justices of the peace.

PARKE, J. The words "public parochial funds," in the eleventh section, do not mean the poor rate merely, or else that probably would have been the term used. Other receipts applicable to the relief of the poor, as penalties, or funds expressly given in aid of the poor rate, may also be included. But the denomination of "public parochial funds" certainly cannot be applied to lands given for such a special and limited purpose, as is pointed out in these cases. One material consideration is, that if this construction were to prevail, it would defeat the intentions of the testators, who did not mean to give the justices a power of overruling the discretion of the parish-officers in one case, or of the parish-officers and principal inhabitants in the other. And it has been very well pointed out in argument, that these are not cases within the mischief of the act 56 G. 3, c. 139.

TAUNTON, J. This is a question of very great importance; for if revenues like these were held to be public parochial funds, it would be of serious consequence to many excellent institutions, established for the purpose of bringing up and apprenticing the children of the poor. Such establishments might be entirely perverted from their proper ends, if the children placed out by them were to be considered parish apprentices. But it is not necessary to proceed *727] on grounds of public *policy, because, on the strict, technical, legal application of 56 G. 3, c. 139, s. 11, it is clear that such a construction cannot prevail. That section speaks of indentures by reason of which expense is incurred by the public parochial funds; and certainly those in question are, in one sense, public, and in another parochial; but on looking to the preamble as well as the enacting part of this section, it is clear that the legislature did not mean every fund which in some sense was public or parochial. They contemplated such funds as before the passing of the statute were applicable to the binding out of poor children, according to the directions of the statute of Elizabeth; but if the churchwardens in one of these cases, and the parish-officers and principal inhabitants in the other, had applied these moneys to the general purposes of the statute of Elizabeth, it is clear they would have misapplied them. There is great force in the observation made by Mr. Andrews, that if it had become necessary, the Court of Chancery would, on application, have appointed trustees for the management of this charity, and in that case it could not have been said, that these moneys came under the denomination in the statute, of "public parochial funds." Now, although that has not been done, the trusts and objects of the devise in each of these cases are still the same; and the churchwardens and overseers are trustees of the same description as private persons would be if appointed by the Court of Chancery. I am therefore of opinion, that the proceeds of these charities, though in some sense public funds, must yet, with reference to the enactment in 56 G. 3, c. 139, s. 11, be considered private.

Order of sessions in the first case quashed, that in the second confirmed.

*728] *SMITH and Another v. WILSON. June 4.

In a lease, *inter alia*, of a rabbit warren, lessee covenanted that, at the expiration of the term, he would leave on the warren 10,000 rabbits, the lessor paying for them 60*l.* per thousand:

Held, in an action by the lessee against the lessor for refusing to pay for the rabbits left at the end of the term, that parol evidence was admissible to show that, by the custom of the country where the lease was made, the word *thousand*, as applied to rabbits, denoted *twelve hundred*.

THIS was an action for the breach of the following covenant in a lease, whereby the defendant demised to the plaintiffs, *inter alia*, a warren; "That at the expiration of the term, they, the plaintiffs, would leave on the warren 10,000 rabbits or conies, the defendant paying 60*l*. per thousand for the same; and for any more than that number at that rate, the number to be estimated by two indifferent persons, one to be chosen by each party." Averment that, at the expiration of the term, the plaintiff left more than 10,000, to wit, 19,200 rabbits upon the warren, but that the defendant would not pay for the same. Plea, *non est factum*. At the trial before Garrow, B., at the Summer assizes for Suffolk, 1831, it appeared that, at the expiration of the term, the number of rabbits on the warren was estimated by two indifferent persons chosen by the parties, to be 1600 dozen. It was contended for the defendant, that, according to the custom of the country, the 1600 dozen should be computed at 100 dozen to the thousand; and, therefore, that the defendant was liable to pay but for 16,000 rabbits. On the other hand, it was insisted for the plaintiffs, that the words *per thousand* must be understood in the ordinary sense, and that the defendant ought to pay for 19,200 rabbits, being 1600 dozen. The defendant paid into Court a sufficient sum to pay for 16,000 rabbits. Evidence was offered by the defendant to show that the term *thousand*, as applied to rabbits, meant, in that part of the country, 100 dozen. This *evidence was ob- [729] jected to, but received by the learned Judge: and he directed the jury to find for the defendant, if they thought it was proved that the word *thousand*, as applied to rabbits, meant 100 dozen. A verdict having been found for the defendant, a rule *nisi* was obtained for a new trial, on the ground that the evidence had been improperly received.

Biggs Andrews now showed cause. The evidence was admissible. The word *thousand* does not, either in law or practice, denote a precise number of units. A thousand may, more generally than otherwise, denote ten hundred, of five score to the hundred; but there are many instances where, as applied to a particular article, it denotes six score to the hundred, as nails, herrings (by the statute of 31 Ed. 3, st. 2, c. 2), deal boards. As, therefore, the word has more than one meaning, its import in any particular instrument depends on the subject-matter to which it is applied. But even if, in its ordinary and popular sense, it means ten hundred, yet if it has acquired (in respect to the subject-matter to which it is applied), a peculiar sense distinct from the popular one, then in all contracts relating to that particular subject-matter, the acquired meaning must be put upon it, *Robertson v. French*, per Lord Ellenborough, 4 East, 135. The object of the evidence is not to add to, vary, or contradict the deed, but to explain the meaning which a party to a contract must have put upon a particular word used in it, and that must be ascertained by evidence dehors the deed. Wherever parol evidence has been rejected in cases of this kind, it was because the effect of it was to show, that the parties meant something different from what they have said; but here, that *was not the effect of the evidence, and it was admissible according to the rule laid [730] down in *Starkie on Evidence*, p. 1033. In *Uhde v. Walters*, 3 Campb. 16, where an insurance was to any port in the Baltic, evidence was admitted to show that the gulf of Finland was considered, in mercantile contracts, within the Baltic, although the two seas are treated as distinct by geographers. So in *Baker v. Payne*, 1 Ves. 459, where the captain of an India ship sold all his chinaware and merchandise which he brought home in his last voyage, and covenanted to deduct all due *allowances*, &c., he was permitted to adduce proof of a custom, to show that such allowances were to be limited by the price which he was to receive. In *Wigglesworth v. Dallison*, 1 Doug. 201, it was held that

parol evidence was admissible to show, that, according to the custom of the country, where a lease for a term of years expired on the 1st of May, the tenant was entitled to take the way-going crop after the expiration of the term, though this was not mentioned in the deed executed between the parties. (a) Doe dem. Spicer v. Lea, 11 East, 312, may be relied upon on the other side. There, a lease was made after the alteration of the style by act of parliament, and extrinsic evidence to show that the parties meant Michaelmas according to the old style, was held to be inadmissible; but that proceeded on the ground that the parties must be taken to have used the term in conformity with the statute, which expressly regulated the reckoning of time.

Kelly and Austin, contrd. The general rule is, that parol evidence is not admissible to explain a written *instrument, and in *Anderson v. Pitcher*, *731] 2 B. & P. 168, Lord Eldon regretted, that the practice had obtained of receiving such evidence, even as to policies of insurance. In the herring trade a precise meaning is given to the word *thousand*, as applied to that particular subject-matter, by act of parliament. Here the words of the covenant must be construed in their ordinary sense. The ambiguity, if any, is at all events latent. It is produced by something extrinsic or collateral to the instrument. The covenant, however, will have an operation if the parol evidence is not received; and then, according to Doe dem. Chichester v. Oxenden, 3 Taunt. 147, such evidence is not admissible. To say, in the present case, that a *thousand* means *twelve hundred*, is not to explain but to contradict the deed. In *Hockin v. Cooke*, 4 T. R. 314, proof that the defendant agreed to sell so many bushels of corn according to a particular measure, was held not to support an allegation in a declaration that he undertook to sell so many bushels, because "*bushels*," without any other explanation, meant a bushel by statute measure. So, a reddendum in an old renewed lease of so many quarters of corn, was held to mean *Winchester*, and not the customary bushel; *The Master, &c., of St. Cross v. Lord Howard de Walden*, 6 T. R. 338; and in *Wing v. Erle*, Cro. Eliz. 267, Gaudy, J., said, "that if one sells land, and is obliged that it contain twenty acres, this shall be according to the law, and not according to the custom of the country."

Lord TENTERDEN, C. J. I am of opinion that the evidence was properly *732] received. Where there is used *in any written instrument a word denoting quantity, to which an act of parliament has given a definite meaning, I agree it must be considered to have been used in that sense. But there is no act of parliament which says 1000 rabbits shall denote ten hundred, each hundred consisting of five score; and that being so, we must suppose the term *thousand* to have been used by the parties in the sense in which it is usually understood in the place where the contract was made, when applied to the subject of rabbits, and parol evidence was admissible to show what that sense was.

LITLEDALE, J. I am of the same opinion. Words denoting quantity are undoubtedly to be understood in their ordinary sense, where no specific meaning is given to them by statute or custom. But here the ordinary meaning of the word *thousand*, as applied to rabbits, in the place where the contract was made, was one hundred dozen. The word *hundred* does not necessarily denote that number of units, for one hundred and twelve pounds is called a *hundred weight*; so, where that term is used with reference to ling or cod, it denotes *six score*: and there being therefore no precise meaning affixed by the legislature to the word *thousand* as applied to rabbits, I think that parol evidence was admissible to show, that in the country where the contract was made the word *thousand* meant one hundred dozen.

PARKE, J. The only question is, whether the evidence has been properly received. Assuming that it has, the jury have found that, according to the

(a) See other instances cited in *Cross v. Eglin*, 2 B. & Ad. 106.

custom of the country, there was an understanding between the parties to this contract that the defendant should pay *for the rabbits, computing them [733 at the rate of 100 dozen to the thousand. The rule deducible from the authorities on this subject is correctly laid down in 3 Starkie on Evidence, 1033. "Where terms are used which are known and understood by a particular class of persons, in a certain special and peculiar sense, evidence to that effect is admissible for the purpose of *applying* the instrument to its proper subject-matter; and the case seems to fall within the same consideration as if the parties in framing their contract had made use of a foreign language, which the courts are not bound to understand. Such an instrument is not, on that account, void; it is certain and definite for all legal purposes, because it can be made so in evidence through the medium of an interpreter. Conformably with these principles, the courts have long allowed mercantile instruments to be expounded according to the custom of merchants, who have a style and language peculiar to themselves, of which usage and custom are the legitimate interpreters." Although that principle has been more frequently applied to mercantile instruments than to others, it is not confined to them; and, if the word *thousand*, as applied to the particular subject-matter of rabbits, had, in the place where this contract was made, a peculiar sense, I think that parol evidence was admissible to show it. In an action upon a contract for the sale of 1000 deals, it would, I think, be competent to show that the word *thousand* meant more than it would in its ordinary sense. I agree that where a word is defined by act of parliament to mean a precise quantity, the parties using that word in a contract, must be presumed to use it in the sense given to it by the *legislature, unless it appear from other parts of the contract that they [734 used it differently. But that is not the present case. No specific meaning has been given by the legislature to the word *thousand* as applied to rabbits, and, therefore, it must be understood according to the custom of the country: and evidence was admissible to show what that was.

TAUNTON, J. Words denoting weight, or measure, or number, must undoubtedly be understood in their ordinary sense, unless some specific meaning be prescribed to them by statute, or given by custom. Mercantile instruments have long been expounded according to the usage and custom of merchants, ascertained by parol evidence, and I think, on the same principle, the term *thousand*, which, in this lease, is applied to the subject of rabbits, may be explained, by the custom of the country, to mean twelve hundred, and that parol evidence was admissible for this purpose. (a) Rule discharged.

(a) See stat. 15 Car. 2, c. 7, s. 17.

*DREWELL v. TOWLER. June 4.

[735

In trespass for cutting lines of the plaintiff and throwing down linen thereon hanging; defendant pleaded, that he was possessed of a close, and because the linen was wrongfully in and upon the close he removed it. Replication, that J. G. being seized in fee of the close and of a messuage with the appurtenances contiguous to it, by lease and release conveyed to W. H., the messuage and all the easements, liberties, privileges, &c., to the said messuage belonging, or therewith then or late used, &c.; that before and at the time of such conveyance, the tenants and occupiers of the messuage used the easement, &c., of fastening ropes to the said messuage, and across the close, to a wall in the said close, in order to hang linen thereon, and of hanging linen thereon to dry, as often as they had occasion so to do, at their free will and pleasure, and that the plaintiff, being tenant to W. H. of the said messuage, did put up the lines, &c. Rejoinder took issue on the right as alleged in the replication: Held, that proof of a privilege for the tenants to hang lines across the yard, for the purpose of drying the linen of their own families only, did not support the alleged right.

TRESPASS for cutting and throwing down lines, ropes, and cords, of the plaintiff, and throwing down linen and clothes thereon hanging, whereby the

linen and clothes were soiled and damaged. Plea, that the defendant was possessed of a close, or yard, called the yard, to wit, at, &c.; and because the goods and chattels, in the declaration mentioned before and at the said time, when, &c., were wrongfully in and upon, and encumbering the said close, he removed the same, &c. Replication, that one J. G., being seised in fee, as well of and in the said close as of and in a certain messuage, with the appurtenances contiguous, and next adjoining to, the said close, in March 1809, by lease and release, conveyed and released to W. Hayton the said messuage, and also all and every the easements, liberties, privileges, ways, paths, passages, rights, members, and appurtenances whatsoever, to the said messuage belonging, or therewith then or late used, occupied or enjoyed; and that before, and at the time of making the said lease and release, the tenants and occupiers of the said messuage used, occupied, and enjoyed the easement, liberty, and privilege of fastening lines, ropes, and cords to the said messuage, and of hanging the same *736] over and across the said close (of which J. G. was so as aforesaid at the *time of making the said indenture seised), and of fastening the same to a certain wall in the said close, in order to hang linen and clothes thereon to dry, and of hanging linen and clothes thereon to dry, as often as they had occasion so to do, at their free will and pleasure: that the plaintiff before, and at the time when, &c., being tenant of the said messuage, with the appurtenances, to Hayton, and in the occupation of the same, and entitled to the easement aforesaid, did fasten the lines to the said messuage, and hang them across the yard, and fastened the same to the wall with hooks, and did hang linen and clothes thereon to dry. Rejoinder took issue on the right, as alleged in the replication. At the trial before Lord Lyndhurst, C. B., at the Norwich Summer assizes, 1831, the jury found that at the time of the conveyance in 1809, and long before, the tenants and occupiers of the plaintiff's house enjoyed the privilege of fastening lines across the yard in question, and of hanging their linen to dry, as stated in the replication. They added, that the yard was used by the occupiers of the house only for drying the linen of their own families. A verdict was entered for the plaintiff, with liberty to the defendant to move to enter a nonsuit if the Court should be of opinion that the right claimed by the plaintiff was more extensive than that found by the jury. A rule nisi having been obtained for that purpose,

Kelly and Gunning showed cause. The right claimed by the plaintiff, being confined to the tenants and occupiers, must mean for their private and domestic linen, construing the words by a reasonable intendment, and according to the subject-matter, as was done in *Brook v. *Willet*, 2 H. Black. 224. *737] If the right here claimed were construed to mean a right of hanging the clothes of others, it would not be a mere easement, but a right to make a profit. Supposing, however, that the claim is stated too largely, there is a difference (which was recognised in *Ricketts v. Salwey*, 2 B. & A. 360), between a possessory action and cases where the claim rests on prescription. In the first case it is enough to prove the same ground of action as alleged in the declaration, though not to the extent there stated; but in the latter, the prescription, being one entire thing, must be proved as laid. This is an action, in substance, for an injury done to the plaintiff in his possession, and this replication supposes that possessory right. Besides, the facts here found by the jury would have warranted them in giving a verdict in favour of the right claimed in the replication: they would not, in so doing, have taken a greater latitude than was allowed in *Manifold v. Pennington*, 4 B. & C. 161; *Moore v. The Mayor of Hastings*, Str. 1070; and *Piggott v. Bailey*, 6 B. & C. 16. At all events, this being a technical objection, and the right having been proved in substance, the Court will grant a new trial on payment of costs, and give the plaintiff leave to amend, *Griffin v. Blandford*, Cowp. 62.

Biggs Andrews, contra, was stopped by the Court.

Lord TENTERDEN, C. J. There is no doubt that the right claimed by the

plaintiff is larger than that proved. My only doubt has been whether we ought to allow the plaintiff to amend on payment of costs; but inasmuch as *he will not be precluded by the judgment in this case from bringing an- [*738 other action if he is interrupted in the enjoyment of the limited right, we think such amendment ought not to be allowed. The rule for entering a nonsuit must consequently be made absolute.

LITLEDALE, PARKE, and TAUNTON, Js., concurred.

Rule absolute.

DOE dem. SMITH v. PIKE and Another.(a)

Heir in tail brought ejectment against a defendant who had been in receipt of the rents thirty years during the life of the ancestor in tail, and seven years after his death: The ancestor had had seisin:

Held, that such possession by the defendant was no bar to the action, and that the lessor of the plaintiff was not bound to rebut the presumption arising from such possession, by showing that the ancestor had not conveyed by fine and recovery.

EJECTMENT for a cottage and garden at Burbage, in the county of Wilts, tried before Taunton, J., at the Spring assizes, 1830, for that county. The lessor of the plaintiff proved a settlement in 1749, on the marriage of John Smith and Mary Elton, by which the premises in question were settled upon John Smith for his life; remainder to the said Mary Elton for her life; remainder to the issue of the said marriage in tail; and the reversion to John Smith's right heirs. It was then proved that John Smith the settlor had seisin of the premises, that he had an only son named John, who also had seisin, and had been dead about seven years, leaving the lessor of the plaintiff his son and heir at law. The first tenant in tail was proved to have received the rents and profits about thirty-five or thirty-six years ago, but since that time they had been taken by the Pikes, through whom the defendants claimed. Upon this it was contended for the defendants, that the lessor of the plaintiff must prove the possession of the Pikes not to have been *adverse, and upon [*739 his failing to do so otherwise than as above, the learned Judge directed a nonsuit. Erskine, in Easter term, 1830, obtained a rule nisi to set aside the nonsuit, and for a new trial, on the ground that the defendant must be presumed to have held under a conveyance which the tenant in tail might grant without discontinuing the estate tail; and if so, the possession would not be adverse. Against this rule,

F. Pollock and Bingham showed cause. The father in this case was barred by an adverse possession, and so is his son. The statute of limitations, 21 Jac. 1, c. 16, s. 1, enacts, "that all writs of *formedon in descender*, *formedon in remainder*, and *formedon in reverter*, shall be sued and taken within twenty years next after the title and cause of action first descended or fallen, and at no time after the said twenty years; and that no person or persons shall, at any time thereafter, make any entry into any land, &c., but within twenty years next after his or their right or title which shall thereafter first descend or accrue to the same; and in default thereof, such persons so not entering and *their heirs* shall be utterly excluded and disabled from such entry after to be made." That statute, as it mentions actions of formedon, applies to the heir of a tenant in tail, when that tenant himself was barred. If the ancestor had never entered, there is no doubt the heir would be barred, *Tolson v. Kaye*, 3 B. & B. 217. But as the defendant has been so long in possession, the law will presume that his possession, even since the death of the ancestor, *in [*740 tail, has been rightful, as it may have been under a fine and recovery, which is the lawful and appropriate conveyance by a tenant in tail. Now,

(a) This case was argued and determined in Hilary term.

where the law presumes the affirmative of a proposition, it is for the party who contests it to prove the negative, *Williams v. The East India Company*, 3 East, 192. The lessor of the plaintiff, therefore, should have commenced his case by showing that his master had *not* conveyed by fine and recovery, which would have imposed no hardship on him; for, as those instruments are matters of record, the search is open to all. The lessor of the plaintiff is bound to make out a case exempt from doubt. Here he has shown only a case of conflicting presumptions: on one side the presumption arising from his being heir in tail; on the other, the presumption arising from the defendant's possession of thirty-seven years: and the latter is the stronger presumption, because possession is to be deemed legal till the contrary is proved. The lessor of the plaintiff, therefore, was bound to show that no recovery had been suffered.

Manning and Follett, contra. The lessor of the plaintiff ought not to be called upon to disprove the defendants' title. He cannot know it, nor has he any means of ascertaining it. It is assumed that the only means of defeating the estate tail was by a fine or recovery, and the plaintiff ought to show that no such conveyance was executed. But an estate tail may be defeated by a feoffment with warranty, and the defendant has full knowledge of his title. The lessor of the plaintiff having made out his own title, it lay on the defendants *741] to make out that there was a possession adverse to that title; but they proved only that they received the rents for thirty-five years. That showed a possession, but there was nothing to show it was adverse. It is quite consistent with the defendants' possession, that they had some interest which a tenant in tail can convey, as a tenancy during his life, or under an innocent conveyance, and a lease and release, which would not work a discontinuance, and the law will more readily presume that the defendant had been holding rightfully than tortiously. For it is observable that this is the case of a tenant in tail, not of one claiming through an ancestor seised in fee; in which case, if the latter be barred, his heir will be so of course. In *Hall v. Doe dem. Surtees*, 5 B. & A. 687, this Court held, that they would not presume that a mortgagor had been holding adversely to the mortgagee, though the mortgage deed contained a proviso for repayment of principal and interest at a date more than twenty years back, and the principal had not been paid; nor was it found that any interest had been paid for more than twenty years: and they considered the holding to have been with the mortgagee's consent and permission. So here the receipt of the rents and profits is quite consistent with some agreement which was to end with the life of the then tenant in tail, and there has not been a sufficient time since his death to bar the right of the present claimant. It may be questioned also, whether the statute of limitations which bars the ancestor, does defeat the claim of the heir. There was a writ of error *742] brought on the judgment of the Court of *Common Pleas in the case of *Tolson v. Kaye*, 3 Br. & B. 217, and the point is not considered as settled. *Cur. adv. vult.*

On a subsequent day Lord TENTERDEN, C. J., delivered the judgment of the Court.

It appeared that the land now claimed by the lessor of the plaintiff has been in the possession of the Pikes for a period of thirty years before the death of the plaintiff's father, and for seven years after. It was contended at the trial, that this possession must be taken to be adverse to the title of the father, and that the heir in tail is barred where there has been an adverse possession against his ancestor for twenty years. But here, also, the father had entered and enjoyed the estate, so that the case does not fall within the express terms of the statute of limitations, which bars all persons and their heirs not *entering* within twenty years after their right or title shall first accrue. He did enter within twenty years after his right accrued. It may, indeed, be questionable, whether the lessor of the plaintiff has, in fact, been barred or not, inasmuch as one of the witnesses dropped an expression, by which it would seem there had been a sale

of the land by the father. But, though he might have conveyed by fine and recovery, and so have barred the lessor of the plaintiff, he might also have conveyed by lease and release, which would have made a good title against himself only, and would not have barred his son, the next tenant in tail. We think the long possession by the defendants may be *referable to such a state of [*743 things; and if so, there would have been no possession adverse to the title of the issue in tail, and the son is not barred. Under these circumstances, it could not be necessary that the lessor of the plaintiff should explain the possession of the defendants, or show that his ancestor in tail did not convey by fine and recovery. There must be a new trial. Rule absolute.

WILSON, Administrator de bonis non of FRANCIS WILSON, v. JOHN MUSHETT. June 5.

Defendant gave a bond to A., and B. conditioned for the payment of an annuity to his wife, unless she should at any time molest him on account of her debts, or for living apart from her. By indenture of the same date between the above parties and the wife, reciting that defendant and his wife had agreed to live separate during their lives, and that, for the wife's maintenance, defendant had agreed to assign certain premises, &c. to A. and B., and had given them an annuity bond as above mentioned; it was witnessed that defendant assigned the premises, &c., to them, in trust for the wife, and he covenanted to A. and B. to live separate from her, and not molest her or interfere with her property; and power was given to her to dispose of the same by will, and to sell the assigned premises, &c., and buy estates or annuities with the proceeds. The wife covenanted with the defendant to maintain herself during her life, out of the above property, unless she and the defendant should afterwards agree to live together again; and that he should be indemnified from her debts. The indenture (except as to the assignment), and also the bond, were to become void if the wife should sue the defendant for alimony, or to enforce cohabitation. And it was provided, *that if defendant and his wife should thereafter agree to live together again, such cohabitation should in no way alter the trusts created by the indenture.* There was no express covenant on the part of the trustees. The defendant and his wife separated, and afterwards lived together again for a time, and this fact was pleaded to an action by the trustees upon the annuity bond, as avoiding that security:

Held, on demurrer to the plea, that the reconciliation was no bar to an action on this bond, since it did not appear that the bond, and the indenture of even date with it, were not really executed with a view to immediate separation; and although there might be parts of the indenture which a court of equity would not enforce under the circumstances, yet there was nothing, on a view of the whole instrument, to prevent this Court from giving effect to the clause which provided for a continuance of the trusts notwithstanding a reconciliation.

DEBT on a bond given by the defendant to Francis Wilson and William Roberts, since deceased, conditioned for payment of an annuity by the defendant to Jane his wife, unless she should at any time molest him on account of her debts, or for not living or cohabiting *with her. The defendant pleaded, [*744 among other pleas, that by indenture executed on the same day as the above bond (21st of January, 1799), between the defendant of the first part, the said Jane of the second part, and the intestate and the said William Roberts of the third part (of which profert was made), after reciting that the defendant and the said Jane had been four years married, and had cohabited as man and wife, but that, differences having arisen between them, they had mutually agreed and did thereby agree to live sole, separate, and apart from each other from thenceforth during the term of their respective natural lives, on the conditions and terms in that indenture mentioned; and that in order to enable the said Jane to provide for, maintain, and support herself during her natural life, the defendant had proposed and agreed to assign a certain lease, and the premises thereby demised, and certain household goods, &c. (mentioned in a

schedule to this indenture), to the said Francis Wilson and W. R., upon the trusts in the indenture mentioned, and also to pay the said Jane an annuity of 26*l.* 5*s.*, for the payment of which during her natural life, except in the cases above mentioned, he had bound himself by his writing obligatory of even date with the said indenture to the said Francis Wilson and W. R. : it was witnessed that the defendant assigned to the said Francis Wilson and W. R. the premises demised by the lease, to hold the same for the remainder of the term, upon trust nevertheless to permit the said Jane to hold and enjoy the same during the term, and the household goods, &c., to hold as their own for ever, upon trust also to permit the said Jane to have, hold, use, and enjoy the same from thence-
 *745] forth for ever. The plea went on to aver *that the last-mentioned writing obligatory was the same with that mentioned in the declaration, and was given in pursuance of the proposal and agreement made as recited in the indenture, and for the purpose there mentioned; and that the defendant and the said Jane did, on the said 21st of January, 1799, separate and live apart by mutual consent; that they continued so to live apart for three weeks then next following; and that after the making of the said writing obligatory and the said indenture, and long before the time during which the sum of money in the declaration mentioned, or any part thereof, was therein alleged to have accrued, to wit, on the 11th of February, 1799, the defendant and the said Jane became and were reconciled, and lived and cohabited together, and continued so to do for a long time, to wit, six years then next ensuing, wherefore the said supposed writing obligatory in the declaration mentioned became and was and is void in law.

The plaintiff craved oyer of the indenture. It was, in substance, as set out in the plea, as far as the assignment of the term and conveyance of the goods in trust, which were stated to be made in consideration of the premises before set forth, and in further performance of the said proposal and agreement. Then (after covenants respecting title) followed a covenant by the defendant to the trustees to live separate from the said Jane from thenceforth for and during his natural life; and to permit her from thenceforth, and at all times during her then present coverture, to live separate from him, and not to molest her in so doing, or come to her habitation to see her without her consent in writing, or intermeddle with or attempt to recover any property *which she might
 *746] afterwards acquire, but to permit her to enjoy as well the property by this deed assigned as all other her property to be afterwards acquired, to her sole and separate use; and that she should have power to dispose of the property so settled to her use, or of her after-acquired property, by will. The said Jane then covenanted with the defendant to maintain herself during her life by and out of the assigned premises, and the annuity, and her own separate estate, "*unless she and the said John Mushett*" (the defendant) "*should thereafter mutually agree to live together again*;" and that he should be indemnified from her debts, &c., and should not be molested for living separately. There followed a proviso avoiding the indenture (except as to the assignment above mentioned) and also the bond, if the said Jane should proceed against the defendant to enforce cohabitation or payment of alimony, &c., while they should be separate. It was also provided, nevertheless, and by the said indenture declared and agreed: "That in case it shall happen that the said John Mushett and Jane his wife shall hereafter mutually agree to live, reside, and cohabit together again, such cohabitation shall in no way alter or change the trusts hereby created; but it is hereby declared and agreed that they shall stand valid and of as full effect to all intents and purposes from time to time and at all times thereafter, as well during such cohabitation as in case they shall again live separate and apart." Then came a proviso enabling the wife to sell the premises, goods, &c., and purchase estates on the same trusts, or annuities, with the money; and clauses for the security of the trustees. The plaintiff demurred generally to the plea. Joinder in demurrer.

**R. Bayly*, in support of the demurrer. The question is, whether the annuity-bond given to the trustees, as stated in these pleadings, [747 became void by the subsequent reconciliation and cohabitation of the defendant and his wife. There is no stipulation of this kind in the deed of separation, the provisions of which are framed to continue during the natural lives of the two principal parties. [PARKE, J. There is no agreement that the deed shall become void on their reconciliation; on the contrary, it is expressly provided that the trusts shall continue even though the parties cohabit again.] This court gave effect to a similar deed in *Jee v. Thurlow*, 2 B. & C. 547, and cannot decide in favour of the defendant here, consistently with that case.

He was then stopped by the court, who called upon

Tomlinson, in support of the plea. The obligation of the bond was discharged by the subsequent reconciliation. The proviso in the deed of separation, that if the parties agree to live together again the trusts shall nevertheless continue, is no answer to this defence. It clearly cannot have been intended that in that case the trusts should in all respects be kept alive. For instance, the husband covenants with the trustees to live separate from his wife. The trustees make no covenant with him. Could it have been meant that if the husband and wife agreed to cohabit again, the trustees should have a right of action against him as long as such cohabitation continued? The wife covenants with her husband (no covenant being entered into by the trustees) that she will maintain herself out of the property settled, *unless she and the defendant should thereafter mutually agree to live together [748 again. But if the trusts are all to continue in force notwithstanding such an event, the husband will be still bound, and compellable by the trustees, to provide the funds for the wife's maintenance, though she is no longer bound to maintain herself separately from him. The clause for continuance of the trusts in case of reconciliation is therefore inconsistent with the other parts of the deed, at least with several of those which, at the time of such reconciliation, continued executory. Its real object probably was, to remove any difficulty that might arise on such an event, in the disposal of funds which might have been already raised upon the property assigned for the wife's benefit. At all events, it makes no express reference to the bond: the trusts referred to are those which concern the property conveyed by the deed itself. Then, as to the effect of the reconciliation in discharging the prior engagement. Deeds of separation are considered as a substitute for proceedings in the ecclesiastical courts, and the rules applicable to such proceedings have been engrafted upon this substituted remedy. One of those rules is, that a separation of husband and wife by decree of an ecclesiastical court for any cause of complaint, is done away by subsequent condonation. The application of that principle to deeds of separation was recognised in *Hindley v. The Marquis of Westmeath*, 6 B. & C. 200. In *Fletcher v. Fletcher*, 2 Cox's Equity Ca. 105, Buller, J., expressly laid it down that an agreement of this kind was completely done away by a subsequent reconciliation. The same doctrine is stated by Lord Eldon in *Lord St. John v. Lady St. John*, 11 Ves. 526, and **Bateman v. The Countess of Ross*, 1 Dow. 245. *Durant v. Titley*, 7 Price, 577, is an authority to [749 the same effect. It is true that case turned in a great measure upon the nature of the deed, which provided for a separation to commence at a future time; but in *Hindley v. The Marquis of Westmeath*, 6 B. & C. 200, where a similar deed was in question, and the parties had cohabited for some time after its execution, Mr. Justice Alderson, then at the bar, and before whom the case came on an arbitration, was of opinion not only that the deed was void because no immediate separation was intended, but also, that if it was valid at first, the subsequent conduct of the parties amounted to a reconciliation and avoided it. And in an earlier case, *The Earl of Westmeath v. The Countess of Westmeath*, Jac. Rep. 140, in Chancery, Lord Eldon, speaking of a previous deed between the same parties, said, "This is not only a deed contemplating a separation to

commence at a future time, but it also endeavours to avoid the effect of that doctrine by which it has been held that a deed of separation, supposing it to be good at law or in equity, shall be rendered void by any future reconciliation." The same doctrine seems also admitted by Lord Lyndhurst and Lord Eldon in *The Marquis of Westmeath v. The Marchioness of Westmeath*, 1 Dow. & Clark, 519, in the House of Lords. [PARKE, J. The deed in question there, and in *Hindley v. The Marquis of Westmeath*, though legal upon the face of it, was made with an illegal object, a future, not a present separation.] But it was also considered there that the circumstances under which the parties lived together after the deed was executed, put an end to the *deed; and Lord *750] Eldon (who refers to the judgments of Sir Christopher Robinson and Sir John Nicholl in *The Earl of Westmeath v. The Countess of Westmeath*, 2 Hagg. Eccl. Rep. Supplement, in the Consistory and Arohes Courts) manifestly regards the law in this respect as grounded upon the doctrine of the ecclesiastical courts as to condonation.

It is also an objection to the deed of separation in this case, that it contains no covenant by the trustees to indemnify the husband. This is the usual consideration for the husband's covenants in such a deed, and upon this the legality of such deeds has been mainly grounded. Lord Eldon says, in *Lord St. John v. Lady St. John*, 11 Ves. 582, "The question" (whether the husband is, according to the policy of the law, capable of making such a contract), "has never been put upon the contract of the husband and wife: the Court has always put it upon the contract between the husband and the trustees: from the covenant of the trustees to indemnify the husband against her debts." The same doctrine is found in *Legard v. Johnson*, 3 Ves. 359; *Worrall v. Jacob*, 3 Mer. 268; *Elworthy v. Bird*, 2 Sim. & Stu. 381; and *The Earl of Westmeath v. The Countess of Westmeath*, Jac. Rep. 138. *Lord Rodney v. Chambers*, 2 East, 283, is not an authority to the contrary. The deed there was of a different nature, and, as appears in the report of *Chambers v. Caulfield*, 6 East, 244, it did contain a covenant of indemnity to the husband on the part of the trustees.

Lord TENTERDEN, C. J. I think it is impossible for us, sitting in a court of *751] law, to say that this deed, and *the bond on which the action is brought, were avoided by the reconciliation alleged in the plea. The argument for the defendant must be, that if the husband and wife had agreed to live together again, even for a few hours, and afterwards separated, all the provisions of the deed were put an end to by condonation. I think, that upon this deed we cannot come to such a conclusion. Whether a court of equity would enforce all the trusts or not, is a question with which we have nothing to do. One proviso of the deed is, that if the defendant and his wife shall thereafter agree to cohabit again, such cohabitation shall in no way alter the trusts thereby created, but they shall stand valid, and of as full effect to all intents and purposes, as well during such cohabitation, as in case they again live separate; and it is said, that this is inconsistent with other parts of the instrument of separation. But I do not see the objection. The settlement made on the wife may have been intended to continue, at all events, as an allowance in the nature of pin-money. At least I cannot say that a deed like this becomes altogether void on a reconciliation. It would be contrary to the express provision of the deed, inserted, perhaps, in contemplation that the wife might, under some circumstances, choose rather to live with her husband again, enjoying the annuity settled upon her, than to continue separate.

LITLEDALE, J. I am of opinion that this deed of separation is valid, and that the deed and bond were not avoided by the subsequent cohabitation. There may be some covenants in the deed which a court of equity would not enforce, but I cannot say that that destroys the effect of the whole. The proviso *752] that the trust *shall continue, though the parties live together again, only means that the husband intends to secure to the wife, for her sepa-

rate use, the property settled by that deed, as he might have done originally on their marriage.

PARKE, J. The question is, whether or not the bond on which this action is brought be void? There is nothing to show that it is so. If it had appeared that the true object of the bond was not to provide for an immediate separation, *Hindley v. The Marquis of Westmeath*, 6 B. & C. 200, would be applicable, and the instrument would be as valid as if an intention had been expressly stated inconsistent with law. The intention of the parties was the ground of Lord Lyndhurst's judgment in *The Marquis of Westmeath v. The Marchioness of Westmeath*, 1 Dow. & Clark, 519. There is no similar ground shown for holding the bond invalid in the present case, and it therefore falls within the decision in *Jee v. Thurlow*, 2 B. & C. 547. Then the question is, whether it was intended that the deed of the same date should operate as a defeasance of the bond if the parties should, during any space of time live together again? That, in the case as it comes before us, is merely a matter of construction; how a court of equity would act is immaterial. Did the parties, then, intend that the trusts should be avoided, as to this bond, in case of their again cohabiting? There is nothing stated in the deed to show such an intention; and on looking to the whole instrument, the contrary is rather to be collected. The judgment must therefore be for the plaintiff.

*TAUNTON, J. I am of the same opinion. It appears to me that the deed and bond are both valid; and the deed, executed at the same time with the bond, does not show any intention that it should be avoided on the event stated in the plea. Judgment for the plaintiff. [*753]

DOE dem. THORN v. PHILLIPS. June 5.

J. C. devised a dwelling-house to his brother and sister, for their lives and the life of the survivor, and after their decease to John H., E. C., and S. H. (their children), share and share alike, they paying out of the same unto four persons therein named, the sum of 10*l.*, to be paid to them when they should attain their several ages of twenty-one years by the testator's executrixes, and he appointed E. C. and J. H. two of the devisees in remainder, his executrixes: Held, that the 10*l.* was a charge on the devisees in remainder in respect of the estate, and that they took a fee.

The survivor of the devisees for life died in 1777, and S. H., one of the devisees in remainder, continued afterwards to reside on the premises devised. John H., another of the devisees in remainder, died in November, 1790, having devised his freehold estates to his wife for life, and after her decease to his three daughters.

By indentures made in the year 1791 and 1792, James H., described as heir at law of John H., his brother, deceased, and the two other devisees in remainder named in the will of J. C., covenanted to levy a fine of the devised premises, to enure to such person as they should by deed appoint; and afterwards, by indenture, reciting that a fine had been levied, appointed the premises to P. in fee, who in 1792 entered thereupon, and continued from thenceforth in undisturbed possession of the whole:

Held, in ejectment brought against P. by the heir at law of one of John H.'s daughters, (which daughter, on the death of her mother, the tenant for life under the will of John H., was under coverture), that the deeds of 1791 and 1792, under which P. claimed, were, as against him, evidence of the seisin of John H. at the time of making his will and of his death; and that, independently of those deeds, the seisin of S. H., the cotenant in common, being the seisin of John H., there was no ground for presuming an ouster of John H.

EJECTMENT brought before Hilary term, 1831, to recover the possession of one-ninth part of certain premises situate in the parish of St. Clement, in the town and port of Hastings, Sussex. At the trial before Gaselee, J., at the Sussex Summer assizes, 1831, the jury found a verdict for the plaintiff, subject to the opinion of this Court on the following case:—

John Curtis, being seised in fee of the premises in question, devised (inter alia) all that his then dwelling-house, and all the appurtenances thereunto be-

*754] longing, to *his brother and sister, James and Elizabeth Hutchinson, for their lives, and the life of the survivor; and after their decease, to his kinsman and kinswomen John Hutchinson, Elizabeth Carby, and Susannah Hutchinson, share and share alike, they paying out of the same to four children of Thomas Page, who married a daughter of his said sister Elizabeth, the sum of 10*l.*, to be paid to them by the testator's executrixes, when they should attain their several ages of twenty-one years; and the testator appointed Elizabeth Carby and Susannah Hutchinson executrixes of his will, which was proved in 1772.

John Curtis having died so seised, upon his death James and Elizabeth Hutchinson entered into possession of the premises, and continued in the occupation of part, and in the receipt of the rents and profits of the other part until their deaths. Elizabeth Hutchinson died in 1774, and James Hutchinson in 1777. John Hutchinson, Elizabeth Carby, and Susannah Hutchinson (the devisees in remainder named in the will of John Curtis), were the children of James and Elizabeth Hutchinson; and Susannah Hutchinson, who had lived with her parents previous to and at the times of their respective deaths, continued afterwards to reside in that part of the premises which had been occupied by them.

John Hutchinson, by his will, dated the 24th of October, 1790, and wherein he is described of St. Mary Magdalen, Bermondsey, Surrey, but late of Cliffe, in the county of Kent, devised to his wife Mary the rents, issues, and profits of all his freehold estates for her life; and from and after her decease, to his three daughters Elizabeth Chamberlain Hutchinson, Mary Hutchinson, and Lucy Ann Hutchinson, their respective heirs and assigns, in equal shares, to *755] hold as tenants in common, and not *as joint tenants. He died in November, 1790. No evidence was given at the trial whether or not the said John Hutchinson was seised or possessed of any other freehold property than that devised by John Curtis.

Mary Hutchinson, the widow of John, died in April, 1805. Her three daughters by John Hutchinson survived her. Lucy Ann, the youngest, married, in 1803, Joseph Thorn; Lucy Ann died in 1822, leaving the lessor of the plaintiff her only son and heir at law. Joseph Thorn is since dead.

By indenture of the 18th of November, 1791, and made between James Hutchinson, therein described as eldest brother and *heir at law* of John Hutchinson deceased, and Mary, the wife of James, the said Elizabeth Carby, widow, and the said Susannah Hutchinson, of the one part, and Richard Bridger of the other part, reciting the will of the said John Curtis, and that the said John Hutchinson had some time since departed this life, leaving the said James Hutchinson, his eldest brother and *heir at law*, him surviving, it was witnessed, that for the docking, barring, cutting off, and destroying all estates tail, and all reversions and remainders thereupon expectant, and also the dower of the said Mary the wife of James Hutchinson, and for settling the same, the said James Hutchinson for himself and Mary his wife, and the said Elizabeth Kirby, and Susannah Hutchinson, covenanted with the said Richard Bridger, that they, the said James Hutchinson and Mary his wife, Elizabeth Kirby and Susannah Hutchinson, would within one month acknowledge in the court of record in Hastings, before the mayor and jurats there, to Richard Bridger and his heirs, a fine sur consuance de droit come ceo, &c., of the premises contained *756] in the will of the said John Curtis, *being the premises in question; and it was thereby agreed that the said fine should enure to the use of such person and persons, and for such estates and interests, as they should afterwards by deed or will appoint. A fine was accordingly levied without proclamations.

By lease and release, bearing date respectively the 22d and 23d of May, 1792 (the release being made between the said James Hutchinson and Mary his wife, Elizabeth Kirby and Susannah Hutchinson of the one part, and the

defendant of the other part), reciting the above-mentioned indenture of the 18th of November, 1791, and the fine levied in pursuance thereof, the said James Hutchinson and Mary his wife, Elizabeth Kirby and Susannah Hutchinson, conveyed and appointed the premises in question to the defendant in fee, who thereupon entered in the year 1792, and has continued in the undisturbed possession of the whole of the premises from that time until the ejectment, and still continues in the actual occupation thereof.

These deeds were put in to prove the seisin of John Hutchinson; and the defendant objected that they did not afford sufficient evidence to warrant the jury in finding a seisin. The learned Judge held otherwise, but reserved the point for the opinion of the Court. If the Court should be of opinion that the jury might presume a seisin in John Hutchinson, the question then was, whether or not the lessor of the plaintiff was entitled to recover? The case was now argued by

Hutchinson, for the lessor of the plaintiff. The lessor of the plaintiff is entitled to the ninth part in question as the only surviving son of Lucy Anne, the third daughter of John Hutchinson, which John was devisee of one-third of the premises left by John Curtis's will. And, first, there was sufficient evidence for the jury to presume a seisin by John Hutchinson- [*757] son of one-third of the property devised by Curtis. The deeds of 1791 and 1792 were evidence of such seisin as against the defendant, for in them James Hutchinson describes himself (untruly) as heir at law of John Hutchinson. Now, as such, he could have no title unless John Hutchinson died seised. The defendant, therefore, whose title is founded on those deeds, is thereby estopped from saying that John Hutchinson did not die seised. But, independently of the deeds, the possession of one tenant in common is the possession of all. It appears, that after the deaths of James and Elizabeth Hutchinson, Susannah Hutchinson, one of the tenants in common, continued to reside on part of the premises, and it must be taken that she so continued down to the year 1792, she being a party to the conveyance of that date. That being so, her seisin was the seisin of John Hutchinson, and there is no ground whatever for presuming any ouster of him. Assuming that John Hutchinson was seised at the time of making his will and of his death, the only remaining question is, whether he and the other devisees in remainder took a fee under John Curtis's will? Now it is a general rule, that where there is a gift of land with a direction that the devisee shall pay *thereout* a given sum, a fee passes, *Doe d. Palmer v. Richards*, 3 T. R. 356; *Doe d. Stevens v. Snelling*, 5 East, 87. Here the devise is of a dwelling-house and its appurtenances, the devisees paying, out of that property, to four persons named, the sum of 10*l*. It is quite clear that if the devise had stopped there a fee *would have [*758] passed. The testator afterwards says that that sum is to be paid to the four persons by his executrixes, and those executrixes are two of the devisees before named. That being so, the subsequent words do not show that the payment is to be made out of the personal estate, but merely that the sum previously directed to be paid by the devisees out of the real estate, is to be paid by those two devisees who are appointed executrixes. The lessor of the plaintiff is not barred by lapse of time, for John Hutchinson's widow died in 1805, and Lucy Anne, the mother of the lessor of the plaintiff, was then under coverture, and she died in 1822.

W. Rogers, contrd. In *Doe v. Richards*, 3 T. R. 356, it was decided, that a gift of land, legacies and funeral expenses being thereout paid, passed a fee; but the authority of that case has been questioned, because, there, the charge was not thrown on the devisee. The older cases on this subject proceeded on the principle, that unless the devisee took a fee, he might be a loser by the devise, since he might die before he reimbursed himself; but that reason does not seem applicable to a case like the present, where the payment is to be made out of the land devised, because, there, he cannot possibly be damnified. The

later decisions, which establish that if the sum be payable by the devisee, though charged on the land, he takes a fee, proceed on the ground, not that he might otherwise sustain a loss, but that he has imposed on him a duty the execution of which requires that he should take the fee. That principle, however, is fallacious, for if there be *a devise of land, with a direction to the devisee, to pay debts and legacies out of it, a court of equity would compel him to make such payments. There is no necessity, therefore, in such case for enlarging the estate of the devisee into a fee. Assuming it, however, to be generally established, that if there be a sum payable by the devisee, though charged on the land, he takes a fee, it does not apply to the present case, because by the latter part of the devising clause, the payment is to be made by the executrixes, and that imports that it is to be paid out of the personal and not out of the real estate. In *Parker v. Fearnley*, 2 Sim. & Stu. 592, where a testatrix directed her legacies to be paid by her executor, to whom she afterwards gave all her real estates, and the residue of her personal estate, after payment of her debts and funeral expenses, it was held that the legacies were not charged on the real estate. In *Willan v. Lancaster*, 3 Russ. 108, the will began as follows:—"In the first place I will that all my debts and funeral charges be paid and discharged by my executors hereinafter named. Then I give and bequeath unto my eldest son Richard Willan, my estate at Shap, on condition that he make up the deficiency in the payment of the two legacies which I have left to my younger son and daughter;" and it was held that the testator's debts were not charged on the estate at Shap. Here the latter part of the clause is so inconsistent with the first, that they cannot possibly stand together, and then that which comes last must prevail, *Doe d. Leicester v. Biggs*, 2 Taunt. 109.

But secondly, to render the devise by John Hutchinson effectual, it was necessary he should be seised both *at the time of making his will, and until his death. Here there was no evidence to raise a presumption that he was so seised. The lessor of the plaintiff and the defendant both claim under him. The former claims in right of his mother, as devisee; the latter, as the grantee of John Hutchinson's heir at law. Now John Hutchinson, on the 24th of October, 1790, had no seisin; and an adverse possession held against him will prevent the devise from operating. The circumstances here lead to a presumption, that an ouster of John Hutchinson took place before the date of his will: for Susannah Hutchinson, who was in possession of part of the devised property from 1777, does not appear to have accounted to John Hutchinson and to Elizabeth Carby for the profits. In *Doe v. Prosser*, Cowp. 217, thirty-six years' sole and uninterrupted possession by one tenant in common, without any account to or claim made by his companion, was held sufficient ground for a jury to presume an actual ouster of the co-tenant. A strong presumption also arises, from the fact of the heir-at-law having conveyed immediately after the death of John Hutchinson, that the latter was not seised at the time of his making his will.

Lord TENTERDEN, C. J. I am of opinion that the lessor of the plaintiff is entitled to recover one-third of the third devised by John Curtis to John Hutchinson. The conveyance to the defendant is strong evidence against him that John Hutchinson was seised at the time of making his will; but, independently of that, the possession of one tenant in common being the possession *of all, and Susannah Hutchinson having entered into possession in 1777, and there being nothing to show that her possession ceased before the deed of 1792, John Hutchinson must be presumed to have been seised at the time of making his will, and of his death. It is said that we ought to presume an ouster of John, but by whom? not by his brother James, for it appears by the deeds of 1791 and 1792, that soon after John's death, James describes himself, and professes to convey, as heir at law to John, that share of the premises which the latter was entitled to as devisee by Curtis's will; nor

by the other two tenants in common, for they thereby claim only to convey the shares to which they were also entitled as devisees. Doe v. Prosser, Cowp. 217, is a very different case. There there had been a deed of partition between Mary Taylor, one of the tenants in common, and the husband of the other, for his wife, and the husband enjoyed under that for twenty-nine years; his widow, the other co-tenant, after his death, enjoyed for nearly forty years. That was considered an adverse holding, equivalent to an actual ouster. Here there is nothing to show that the possession of the other tenants in common was adverse to that of John Hutchinson. That being so, John's interest passed by his will, and the lessor of the plaintiff, who is the son of one daughter of John Hutchinson, is now entitled to recover, provided the devisees in remainder named in the will of John Curtis took a fee; and I am of opinion they did, because the 10*l*. was a charge on those devisees in respect of the property devised. They are to pay that sum out of the property devised; it is true that the payment is afterwards directed to be made to the legatees by the two executrixes, but they are two of the devisees before *named. I cannot infer from that, that the testator meant the sum to be charged on his [*762 personal estate, which he had before, in express terms, said was to be paid out of his real estate.

LITTLEDALE, J. It is a general rule that where there is a charge on the devisee in respect of the land devised, a fee passes. Now here I think, taking the whole of the clause together, there is such a charge, for the direction is express, that the devisees shall pay out of the land the sum mentioned; and the subsequent words, "*to be paid by my executrixes,*" though they cause some obscurity, are not sufficient to do away with the previous direction, which is plain and explicit. It seems to me also there was evidence for the jury to presume, that John Hutchinson, at the time of making his will and of his death, was seised, and that there was no ground for presuming any ouster of him by his brother or the two co-tenants in common; for James Hutchinson, in the deed of 1791 and 1792, professes to convey his brother's share as his heir at law, and the other two tenants in common their own shares; the three covenanting, by the deed of November, 1791 (which recites Curtis's will), to levy a fine of the premises contained in that will, James Hutchinson, as the heir at law of one devisee, and the other two as devisees. Then there being no ground to presume any ouster of John Hutchinson, the property passed by his will; and the lessor of the plaintiff, one of the three daughters of John Hutchinson, is entitled to recover a third of his share, or one-ninth of the whole.

PARKE, J. I am clearly of opinion that the devisees in remainder under the will of John Curtis took a fee. *The devise is to them, they paying out of the property devised, to the persons therein named, the sum [*763 of 10*l*., that sum to be paid by his executrixes. The payment of the 10*l*. was a charge on the devisees in respect of the estate, and therefore it is clear, according to the authorities, that they took a fee. The latter words do not import that the payment is to be out of the personal estate, but that it is to be made to the legatees by and through the executrixes. Then the next question is, whether there was any evidence of the seisin of John Hutchinson at the time of making his will, and at his death. Now, the deed of 1792, to which the defendant was a party, recites that of 1791, wherein James Hutchinson, described as heir at law of John, and two of the devisees in remainder under the will of John Curtis, covenant to levy a fine, and afterwards the three join in a conveyance to the defendant. That is evidence as against the defendant, who claims under their deed, that John Hutchinson was seised, for otherwise James could have no title to convey to him. There was no evidence of any actual ouster of John. Then he being seised at the time of making his will, and until his death, and the devisees in remainder under the will of John Curtis having taken a fee, it follows that the lessor of the plaintiff, in right of his mother, is

entitled to recover one-third of the property which belonged to John Hutchinson, or one-ninth of the whole.

TAUNTON, J. The devisees in remainder took an estate in fee under the will of John Curtis, because the payment of the 10*l.* is a charge on them in respect of the premises devised. It is said that though the 10*l.* is directed to *764] be paid by the devisees out of the land, there is a *subsequent direction that it is to be paid by the executrixes, and thence it is to be inferred that it is to be paid out of the personal estate. But I think that the latter words "to be paid to the legatees by the executrixes" only, import that they, who are two of the devisees previously named, are to be the persons through whose hands the money is to pass to the legatees. It is to be understood in the same sense as if the words had been "to be paid to the legatees by my banker." Upon the other point I agree, for the reasons already given, that there are no circumstances here to warrant a presumption of an ouster of John Hutchinson, and therefore he must be taken to have been seised at the time of making his will and at his death. Judgment for the plaintiff.

DOE dem. JONES v. HARRISON. June 6.

A fine with proclamations, was levied in the great sessions for the county of Denbigh. The proclamations endorsed on the fine were headed with the words "according to the form of the statute." The second proclamation was stated to be made at Ruthin, in the county of Denbigh, without stating that it was made at the great sessions, as required by the 34 & 35 Hen. 8, c. 26, s. 41:

Held, that that was sufficient, and that from the previous words, the proclamation must be understood to have been made at the great sessions.

EJECTMENT for a messuage and land in the county of Denbigh. At the trial before Bolland, B., at the Ruthin Summer assizes, 1831, an examined copy of a fine with proclamations relating to the property in question was produced by the defendant's attorney. It was levied at the great sessions of the county of Denbigh on the 26th of March, 1824. It appeared from the cross-examination of the defendant's attorney, that the proclamations endorsed on the fine were not in the same state as they were when they *765] were produced at a trial at Shrewsbury in 1827, but had *been altered by the prothonotary at the request of the defendant's attorney. The endorsement, as it originally stood, was as follows:—

"According to the form of the statute.

"The first proclamation was made the day, year, place, and session within mentioned.

• "The second proclamation was made at Ruthin, in the county of Denbigh, on Saturday the 9th day of August, in the fourth year of the reign of the lord the king, within specified.

"The third proclamation was made at Ruthin, in the county of Denbigh, on Wednesday the 31st day of March, in the fifth year of the reign of the said lord the king."

No alteration was made in the first proclamation, but in the second, the alteration made was as follows:—

"The second proclamation was made in the great session of the county within written, holden at Ruthin in the said county, on Saturday, that is to say, the 9th day of August, in the fourth year of the reign of the lord the king within specified."

There was a similar alteration as to the third proclamation. The lessor of the plaintiff having been nonsuited, a rule nisi had been obtained for a new

trial, on the ground that the proclamations of the fine, having been altered without any proper authority, were no bar to the ejectment.

Campbell and *Temple* now showed cause. First, the proclamations being matter of record, *Dyer*, 234, the plaintiff cannot aver against them. The parol evidence was not therefore admissible. Secondly, as the Court would direct the proclamations to be amended, **Ragg v. Bowley*, 3 Leon, 106, it must be presumed that the alterations were made by the authority of the Court. But, thirdly, the record of the proclamations, in its original form, was sufficient. It purports that they were made according to the form of the statute; and if they were, they must have been made in the great sessions; and the form is that given in the Appendix to 2 Bla. Comm. [766]

Carrington and *J. H. Lloyd*, *contrà*. Undoubtedly, where a record is pleaded as an estoppel, a party cannot aver against it; but where it is not so, the jury are to find according to the truth of the facts. There is no ground here for presuming that the alteration was made by the authority of the Court. The statute 34 & 35 H. 8, c. 28, s. 41, requires that the proclamations be made in the great sessions; but it does not appear from the record, as it originally stood, that they were made at those sessions; it is merely stated that they were made at Ruthin, which does not necessarily import that they were made in the great sessions.

LORD TENTERDEN, C. J. I am of opinion that the proclamations endorsed on the fine are right as they originally stood. The words "according to the form of the statute," which are at the head of the proclamations, import that the fine was proclaimed as required by the statute. That is the form in which a fine with proclamations is pleaded in *Took v. Glascock*, 1 Saund. 258, and it is the form given in the Appendix to 2 Black. Comm.

*LITTLEDALE, J. The entry that the proclamations were made according to the form of the statute, signifies that they were made, as required by the statute, in the great sessions. [767]

PARKE and TAUNTON, Js., concurred.

Rule discharged.

KENNEDY and Another, surviving Executors of TYSER, v. WITHERS.

June 6.

In assumpsit for use and occupation 4*l.* were paid into Court on the account stated.

The plaintiffs proved that the defendant being indebted to them as surviving executors of T., and having no other account with them, was called upon by them for payment, and refused, saying that he had a cross demand on the funds of the testator. The plaintiffs gave evidence of a debt exceeding 4*l.*, and contended that these facts, with the admission implied by the payment into Court, entitled them to recover the larger sum on the account stated, the other counts proving inapplicable:

Held, that they could not so recover, for that the averment of an account stated could only refer to a single occasion; and the above-mentioned answer of the defendant, with the subsequent payment into Court, merely showed that upon accounting which alone was in question, the defendant was found indebted 4*l.*

ASSUMPSIT for use and occupation, and on an account stated with the plaintiffs as surviving executors, upon which count 4*l.* were paid into court; and as to another part of the demand there was a set-off. This cause was tried before Patteson J., at the sittings in Middlesex, during the present term. The plaintiffs gave evidence of sums due, exceeding the 4*l.*, and not covered by the set-off, but it appeared that this part of the demand had accrued in the lifetime of a deceased executor, and none of the earlier counts were applicable to this proof. The plaintiffs therefore were obliged to rely upon the account stated, and they proved that on application made by them to the defendant for the amount claimed in the action, he answered that he had an account against Tyser (the testator), and should not pay it. *Kelly*, for the plaintiffs, con-

tended that as the defendant, by paying 4*l.* into court, had acknowledged an *768] *account stated with the plaintiffs as surviving executors, upon which something was due, and the plaintiffs had proved a claim to more than 4*l.*, which the defendant had given no evidence to rebut, the accounting must stand as undisputed, and the sum thereupon due must be that which the plaintiffs had proved. The learned Judge directed a nonsuit, giving leave to the plaintiffs to move to enter a verdict for 40*l.*

Kelly now moved accordingly. The defendant by paying 4*l.* into court admitted an account stated upon which he was found debtor to at least that extent. The plaintiffs proved that he was indebted, upon such accounting, to a larger amount; and he gave no evidence to limit it. [PARKE, J. A sum was demanded of him, and he refused to pay it. You cannot call that an accounting upon which the sum now demanded was found to be due from the defendant, according to the terms used in pleading an account stated.] The defendant did in fact account, and admitted that money was due (as the pleading states) from him to the plaintiffs. [LITLEDALE, J. But, if so, he added that he had a cross claim to an equal or greater amount. If his statement is an accounting, the whole of it must be taken together.] It has been held where a plaintiff declared upon a bill of exchange, and also on an account stated, and money was paid into court on this latter count (there being no demand in question but on the bill), that such payment was an answer to the action on all the counts, unless the plaintiff could show that something more was due, *Early v. Bowman*, 1 B. & Ad. 889. *Churchill v. Day*, 3 Mann. & Ry. 71, *769] which was an action *for work and labour, is to a similar effect. Now here there was no subject of account between these parties, but the demand now in question; the defendant admits a reckoning upon that account, and something due from him, but the plaintiffs show that more was due than he has admitted or paid. Those cases, therefore, are an authority in their favour. Besides, there is in this case a single cause of action accruing to the plaintiffs as surviving executors, and the only matter which has been in dispute between the defendant and them in that capacity. The defendant admits, by paying money into court on the account stated, that he has accounted with them as surviving executors, and been found indebted to them on that accounting. May not this be taken as a general admission that the defendant has accounted and been found indebted, without reference to any proof of an actual accounting on one specific occasion, or to any circumstances which then took place?

LITLEDALE, J. (a) The defendant by paying 4*l.* into Court on the account stated admits that there has been an accounting upon which he was found indebted in that amount. He does not admit the cause of action, but only the account and the result. By the form of the count, the plaintiffs cannot give evidence of more than one accounting. It is not like a count for goods sold, which may have been at several different times. The plaintiff cannot apply that accounting upon which the defendant was found debtor in 4*l.* to one occasion, *770] and then say there was another accounting at a different *time. The account must be taken to be not only of the sum in which the defendant is thereby found indebted, but of the plaintiff's other claims in the cause. Referring to all that occurred, I think it does not constitute such an acknowledgment as entitles the plaintiffs to recover more than the sum paid in. There will therefore be no rule.

PARKE, J. To give a ground of action on the account stated, there must be an accounting and a sum found due, which the defendant admits himself liable to pay; but in this case there was no acknowledgment of liability, on the account stated, for the sum claimed by the plaintiffs.

TAUNTON, J., concurred.

Rule refused.

(a) Lord Tenterden, C. J., had left the court.

The KING v. The Sheriffs of the City of YORK. *June 7.*

In the city of York, which was incorporated before the time of memory, there had been a court from very ancient times, held first before the mayor and bailiffs, and, after a charter of Ric. 2, before the mayor and sheriffs. By a by-law made in the 3 & 4 Philip and Mary, by a select body of the corporation, who had immemorially made rules and regulations as to the practice of the Court, and who had at their discretion selected the persons admitted to practise as attorneys there, it was ordered, that from thenceforth there should be no more than four persons admitted to be attorneys in the sheriffs' court; and from that time it did not appear that any more than that number had ever been allowed to practise:

Held, that the by-law was reasonable, and that the usage limiting the number of attorneys to four was sufficiently ancient to satisfy the statute 2 G. 2, c. 23, s. 11.

Semble, that a mandamus cannot issue to the Judges of an inferior court, commanding them, in the first instance, to admit an attorney of K. B. to practise there; but that the mandamus, if any lies, must be to examine whether he is capable and qualified to be admitted, according to the statutes 2 G. 2, c. 23, and 6 G. 2, c. 27.

A RULE nisi had been obtained for a mandamus, directed to the sheriffs of the city of York, and the prothonotary of the court of the sheriffs, commanding them to admit William Smith, one of the attorneys of *this court, and a freeman of the said city, to practise as an attorney in the sheriffs' [*771 court. The rule was obtained on an affidavit of Smith, that he was duly admitted an attorney of this court, and had taken out his certificate for the year; and that he had applied to the sheriffs and prothonotary at a court held before them, to be admitted an attorney of their court, and produced the certificate of his admission, &c., and they refused to admit him.

It appeared by the affidavits in answer to the rule, that the city of York was incorporated before the time of memory; that from time immemorial there has been a court of record held in the city of York, before certain members of the corporate body, called the court of our lord the king, held at the hall of pleas upon the Ouse Bridge in the city aforesaid, for hearing and determining all pleas arising within the city and its precincts; and that before and at the time of granting the charter of Richard II., after mentioned, such court was held before the mayor and bailiffs of the city; that by a charter of King Henry III., that king had granted to the citizens of York, that they should not be sued without the said city, but should complain before the mayor and bailiffs; that, by charter of Richard II., making the city of York a county, the right of holding pleas, which was before vested in the mayor and bailiffs, was transferred to the mayor and the sheriffs, who were substituted for the bailiffs; that from time immemorial there had been within the said body corporate a select body called The Upper House, who had exercised the power of making by-laws; that, before the charter of Richard II., it consisted of the mayor, aldermen, bailiffs, and twenty-four citizens, and now of the mayor, *aldermen, sheriffs, and [*772 those who have been sheriffs; that the upper house had, from time immemorial, made rules for regulating the practice of the court; that they had exercised the selection of persons admitted to practise as attorneys there, and had from time to time removed them; that it did not appear that the number of attorneys admitted at one and the same time had ever exceeded four; that the appointment and removal rested with the upper house alone, and that there was no instance of any person having been admitted to practise as an attorney without their appointment or permission, they having control over all the officers of the court except the prothonotary, who was appointed by the mayor and commonalty; and that there was no instance of any attorney having been admitted or allowed to practise in the court, by the appointment of the sheriffs and prothonotary: that by a by-law, made the 3 & 4 Phil. & M., by the said upper house, it was ordered, that from thenceforth there should be no more attorneys admitted to be attorneys in the sheriffs' court, but only four, which should be

honest, expert, and learned persons, both for the weal of the king's subjects and worship of this city, and of the sheriffs' court; that, from that time, there had never been more than four attorneys admitted to practise in the court; and that, at the time when Smith applied to the sheriffs and prothonotary, there were four attorneys who had been duly admitted, and actually practised there.

F. Pollock, Cresswell, and Wood now showed cause. The party applying must establish three points; first, that he is entitled as a matter of right to
 *773] practise in this court; *secondly, that he cannot do so without being admitted; thirdly, that he has applied to the proper persons in order to be admitted. Now, first, he has no right by common law to be admitted to practise in this court. As to authorities; in *Hastings's case*, 1 Mod. 23, Sid. 410, the question undoubtedly arose, whether an attorney sworn and admitted in K. B. had a right to practise in a court lately erected by letters patent, whereby a certain number of attorneys were appointed, and *Kelynge, C. J.*, there intimated an opinion that the attorneys of the superior courts could not be excluded. But it appears from the report of the same case in 2 Keble, 584, that *Twisden* doubted, and that the matter was adjourned, and no decision took place. In *Gillman v. Wright*, Sid. 410, 1 Ventr. 11, which was a motion for a mandamus to the steward of *Havering Court* in *Essex* to admit *Gillman*, an attorney of this court, to appear for a man in an action brought against him there, it being alleged to be the usage to admit none but their own attorneys, this Court, though they seemed to incline that they ought not by law refuse others, yet said they would be advised until the next term, and no decision was ultimately pronounced. And in the first of those cases the opinion in favour of the right appears to have been founded on the circumstance, that the court in question had been newly created. Here it has existed from time immemorial. Now, the king might by law grant to certain persons a right to hold a court, and the power to regulate its proceedings, and to fix what number of persons should practise in it as attorneys. It must be
 *774] presumed in favour of this by-law, that the *corporation had authority by the charter to make it, for the practice of the court has, in other respects, been always regulated by the upper house. Moreover, there is nothing to show that the by-law was not in conformity with that which had been the usage from time immemorial. It does not appear that, at any period, more than four attorneys were admitted to practise in this court. A by-law to restrain the number is not unreasonable, for the number of practising attorneys in the palace court is limited by the charter of *King Charles I.* to six; in the *Mayor's Court*, in *London*, the number of barristers is limited to four, and that of attorneys has been varied from time to time by by-laws; and the customs of *London* are confirmed by act of parliament. If, then, the right claimed did not exist at common law, it has not been conferred by statute. The 2 G. 2, c. 23, may be relied on, but s. 11 enacts, that nothing in that act shall extend either to require or authorize any judge of any court of record, to swear, admit, or enrol any more or greater number of persons to be attorneys of such court than by ancient usage and custom hath heretofore been allowed. The 6 G. 2, c. 27, s. 2, enacts, that any person who hath been by virtue of the act 2 G. 2, c. 23 admitted an attorney in any of his Majesty's courts of record at *Westminster*, shall be capable of being admitted to practise in any inferior court of record, provided such person be in all other respects *capable and qualified* to be admitted an attorney according to the usage and custom of such inferior court. *Smith* was not capable and qualified according to the usage and custom of the court at *York*, for there was no vacancy at the time when he applied to
 *775] be admitted. It is laid down by Lord **Ellenborough* in *Rex v. Ashwell*, 12 East, 28, that to avoid a by-law on the ground of its being unreasonable because of some inconvenience which may result from it, it should appear to be a probable inconvenience; and that the long continuance of a by-law, though it will not legalize it if it were itself illegal, is fair evi-

dence to show that there is no intrinsic inconvenience in it. Secondly, assuming that Smith had a right by law to practise in this court, admittance was unnecessary. Thirdly, if it was, he ought to have applied to the upper house, and not to the sheriffs and prothonotary.

Campbell and Alexander, contrâ. This is a question of great importance as affecting the right of attorneys to be admitted to practise in inferior courts. Every attorney of the superior courts has, by law, a right to be admitted to practise in an inferior court, unless prevented by act of parliament or immemorial usage, 2 G. 2, c. 23, s. 2. There is certainly no express decision on the point, but, in *Hastings's case*, 1 Mod. 23, Sid. 410, Kelynge, C. J., intimated a strong opinion that the attorneys of the superior courts had a right to be admitted to practise in inferior courts; and in *Gillman v. Wright*, Sid. 410, 1 Vent. 11, the Court inclined to the same opinion. In an Anonymous case, *March's Reports*, 141, the Court said that an attorney, at common law, is an attorney of every inferior court, and therefore ought not to be refused admittance. In *Hurst's case*, 1 Lev. 75, T. Raymond, 56, 94, Sid. 94, 152, a mandamus was granted to restore an attorney of the court of Canterbury, it being held a public office. The question as to the right of attorneys to practise in *inferior courts, arose in *Daubeny v. Cooper*, 10 B. & C. 237, but was not decided. Assuming that this court existed before the time of legal [*776 memory, it is quite clear that the practice of limiting the number of attorneys to four is not immemorial. On the contrary, it may fairly be inferred from the word *henceforth* in the by-law of the 3 & 4 Ph. & M. that, before that time, more than four attorneys had practised there. Besides, the appointment of attorneys in causes is not the subject of immemorial custom, *Beecher's case*, 8 Rep. 586. The earliest statute authorizing their appointment was that of Merton, 20 Hen. 3, c. 10. The practice of the palace court is not in point, because the number of attorneys was limited by the king's charter; nor is the practice in the Mayor's court of London, because the customs of London are confirmed by statute. But, assuming that it is not necessary for the custom limiting the number to four to be immemorial, and that the practice which has prevailed from the 3 & 4 Ph. & M. would be sufficient usage to warrant such limitation, the by-law itself is bad, because it is unreasonable. It is injurious to suitors as well as to the members of the profession. If the number may be limited to four, why not to two? It is also bad, because it is in restraint of trade, *Mitchell v. Reynolds*, 1 P. Wms. 184, *Clarke v. Le Cren*, 9 B. & C. 52.

Lord TENTERDEN, C. J. I am of opinion that this rule ought to be discharged. It appears by the affidavits that the court in question is undoubtedly very ancient, and probably existed before the time of legal memory. Whether before the by-law the number of persons *allowed to practise as attor- [*777 neys was limited or not appears to be doubtful. It is probable the number had not been so limited. One question then is, whether that was a reasonable by-law? It is extremely difficult to say that a by-law limiting the number of attorneys allowed to practise in the court at York is unreasonable, when a similar regulation prevails in the mayor's court in London, which is confirmed by act of parliament. It is said that, by the common law, every attorney of a superior court has a right to practise in an inferior court. If that be so, all the acts of parliament giving such right were unnecessary. The stat. 2 G. 2, c. 23, which was passed long after all the dicta in the several cases which have been cited in argument, is entitled "An Act for the better Regulation of Attorneys." It requires many things to be done by those who are to be admitted to practise as attorneys, the object being, that improper persons should be prevented from practising, and that persons of integrity and ability only should be intrusted with the conduct of causes. The eleventh section makes this special proviso: "That nothing in this act contained shall extend either to require or authorize any judge of any court of record to swear, admit, or enrol any more or greater number of persons to be attorneys of such court

than by the ancient usage and custom of such court hath been heretofore allowed." Now the words *ancient usage and custom*, as there used, cannot be understood to import *immemorial usage* or custom, because there could be no such immemorial usage as applicable to the admission of attorneys; for before the statute of Merton no person could appear by attorney. Then we must understand those words to mean usage and custom of such considerable antiquity *778] that the time during which it has prevailed may be evidence of its being reasonable. If that be so, assuming this usage limiting the number to four to have commenced with the by-law passed in the 3 & 4 Ph. & M., it appears to me that it is a usage and custom of sufficient antiquity to satisfy the words of the statute. For these reasons, I am of opinion that this rule ought to be discharged. I have not adverted to the particular terms of the rule. We certainly could not make it absolute in the terms prayed: but I have chosen rather to give my opinion on general grounds than on any narrower view of the case, which might lead to further applications to the Court.

LITTLEDALE, J. I am of the same opinion. It is probable that this is an immemorial court; but assuming it to be so, it would be extremely difficult to say that a custom limiting the number of attorneys allowed to practise in it to four, has existed from time immemorial, for the practice of attorneys appearing for suitors, as now known, does not seem to be the subject of immemorial custom. Beecher's case, 8 Rep. 586, shows, that at common law, when any one was commanded by the king's writ to appear, it was always taken that he should appear in person, and could not appear by attorney; but after he had appeared, the Courts of King's Bench, &c., and all Judges who held plea by writ, might admit him by attorney. The first statute applicable to this subject, is the statute of Merton, 20 Hen. 3, c. 10, whereby it is provided that every freeman which oweth suit to the county, tithing, hundred, and wapentake, or *779] to the court of his lord, may freely make attorney to do those suits for him. That, however, only applies to the courts therein mentioned.

It may therefore be taken, that attorneys constituted as they are now, and appearing in the first instance for suitors, are not the subject of immemorial custom: and that being so, the question is, whether the by-law made in the reign of Philip and Mary, and of which the attorneys of the court in question are the subject, be a reasonable by-law. It seems to me that it is so, because it is conformable to the principles adopted by the legislature in other cases, and sanctioned by usage in other courts; for the statute 33 H. 6, c. 7, enacts, that there shall be but six common attorneys in Norfolk, six in Suffolk, and two in Norwich, to be admitted by the two chief justices. In the courts of the city of London, the number of practising attorneys is limited. So it was till lately on the plea side of the Court of Exchequer. There were four sworn attorneys, each of them had four clerks, called side clerks, who practised as attorneys in the names of the four sworn attorneys. That must be a reasonable by-law which is founded on a principle adopted by the legislature, and sanctioned by usage which has prevailed notoriously in the courts of Westminster Hall, as well as inferior courts. There can be no doubt that, by the 6 G. 2, c. 27, s. 2, a person who has been admitted an attorney of a superior court may be admitted an attorney of an inferior court, provided he be capable and qualified to be admitted an attorney according to the usage and custom of such inferior court; but not otherwise. And the statute 2 G. 2, c. 23, s. 11, is decisive, because it is thereby enacted that no greater number of persons shall *780] be admitted to be attorneys of any court of record, than by the ancient usage and custom of such court hath been heretofore allowed. Here, by the usage, four attorneys were admitted to practise in the court, and there were four such attorneys actually admitted and practising in the court when Smith applied. I am of opinion that this is not a by-law in restraint of trade, but one made to regulate the practice of a court, and not unreasonable.

PARKER, J. I am of the same opinion. No person has a right to be admit-

ted an attorney of an inferior court, unless he brings himself within the terms of the statute 2 G. 2, c. 23, s. 11, or of the 6 G. 2, c. 27, s. 2. The first of these statutes, by section 1, provides that no person shall be admitted to practise as an attorney in any of the superior courts, or in any other court of record in England, unless he shall be sworn, admitted, and enrolled as thereby required; and then, in ss. 2 and 6, it directs, that the judges of the inferior as well as the superior courts shall be authorized, before they shall admit such person, to examine him touching his fitness and capacity to act as an attorney, and if they shall be satisfied that such person is duly qualified to be admitted to act as an attorney, then, and not otherwise, they are to admit him: and by s. 5, it is further provided, that no person shall be permitted to act as an attorney, unless he shall have served a clerkship of five years. The 6 G. 2, c. 27, s. 2, enacts, "That any person admitted an attorney in any of his majesty's courts of record, at Westminster, shall be capable of being admitted to practise as an attorney in any inferior court of record, provided such person be in all other respects capable and qualified to be admitted an attorney according to the usage and *custom of such inferior court." Now it seems to me there is an ob- [*781
jection to the form in which this mandamus is prayed, viz.: that it is to admit the party to practise as an attorney in the court. The utmost that he can have a right to is to be examined by the judges of the inferior court, for they have the power to refuse to admit him, if upon examination he is found not to be skilful and honest. But, supposing that objection to be got over, the question is, whether this Court has any power to issue a mandamus to the sheriffs and prothonotary to admit a person to practise as an attorney who, according to the ancient usage and custom of their court, is not admissible. The usage, since 3 & 4 Ph. & M., has been to admit four attorneys only to practise in this court. The by-law then made is not bad as being in restriction of trade, for it cannot be shown that this person had, at common law, any right to be admitted to practise as an attorney in this court, whereas all persons have, by common law, a right to exercise their industry in carrying on trade; and a corporation cannot restrain the common law right to trade, unless there be an immemorial usage warranting that restriction. Those who had the power of regulating the proceedings of this court, had a right to impose any reasonable conditions on persons applying to practise there, and it appears to me impossible to say that the limitation here imposed was unreasonable, since it is one allowed in other courts, and which has been recognised by the legislature.

TAUNTON, J. I am of the same opinion. Every court of justice has a right to regulate its own proceedings, and it is in respect of that power, that the courts of quarter sessions exclude attorneys from being *heard where [*782
barristers are present. And so this court, in *Collier v. Hicks*, 2 B. & Ad. 663, where a party, being an attorney, entered a police office with an informer, for the avowed purpose of acting as his attorney and advocate, held, that the magistrate had a right to exclude him from the room in consequence of his persisting so to act. The by-law, which was made so far back as the reign of Philip and Mary, is not contrary to any rule of law, for attorneys of this court have not, by common law, any right to practise in the inferior courts; and by the statute 6 G. 2, c. 27, s. 2, they have not a general, but a limited right only, that is, provided that they be capable and qualified to be admitted according to the usage and custom of such inferior court. The usage and custom of this particular court since the 3 & 4 Ph. & M., has been, that there shall not be more than four attorneys admitted to practise in it. Smith, therefore, according to that usage, was not capable and qualified to be admitted. For these reasons, I think, that the rule for a mandamus should be discharged.

Rule discharged.

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*DOE dem. FISHER v. SAUNDERS. June 7.

A verdict was taken for the plaintiff at the assizes March 31st, subject to a reference, the award to be made on or before the first day of Easter term, April 16th. The attorney for the plaintiff left the assize town for his own residence, having first directed his agents at the assize town to obtain the order of reference, and send it him. On the 4th of April, having again written to his agents respecting the order, he left home on business, and returned on the 14th, when he found that the order of reference had not been sent, and, in consequence, he was not able to obtain it till the time for making the award had expired. The defendant having declined submitting to a new order of reference on the former terms, this court refused to grant a rule enabling the plaintiff to proceed upon his verdict in default of such submission.

TALFOURD had obtained a rule to show cause why the lessor of the plaintiff should not be at liberty to proceed on the verdict obtained by him in this case, unless the defendant should consent to a new order of reference, to be drawn up at the expense of the lessor of the plaintiff, on the same terms as had been agreed upon at the assizes. This was an action of ejectment, grounded on an alleged breach of a covenant to repair. At the last Spring assizes at Gloucester, on the 31st of March, the cause came on for trial, and a verdict was taken for the plaintiff, subject to the award of a barrister, who was to determine all matters in difference, and particularly whether or not the premises were in repair on the day of the demise; if they were, the verdict was to be entered for the defendant, with costs; if not, the arbitrator was to direct what repairs should be done, and by what time, and if they were completed in time, the defendant was to have a verdict, but pay the costs; otherwise, the plaintiff to have judgment, and a writ of possession. Immediately after the verdict was taken, the attorney for the lessor of the plaintiff left Gloucester, and returned to Bristol, where he resided, having given instructions to his agents at Gloucester to obtain the order of reference from the associate, and send it to Bristol; and he afterwards wrote to the agents to the same effect. On the 4th of April (the Gloucester assizes not being then over), *784] he left Bristol on business, *and did not return till the 14th. On the 16th (having found that the order of reference had not been sent over according to his desire), he wrote to the agents at Gloucester, but learned by their answer, received on the 19th, that they had not obtained the order. On the same day he wrote to his agents in London to procure it. He received it on the 28th, and he then found that the award was to have been made on or before the first day of Easter term, April 16th. Immediately on receiving the order of reference, he wrote to the defendant's attorney, stating the facts, and offering to consent to a rule for a new reference; but this was not agreed to.

F. Pollock now showed cause, and distinguished this case from *Woolley v. Kelly* (1 B. & C. 68; see *Taylor v. Gregory*, 2 B. & Ad. 774), where the reference had gone off without any fault of the plaintiff, the arbitrator having declined to proceed, on finding that he had been consulted in the cause. [Lord TENTERDEN, C. J. Here it was the plaintiff's own fault.]

Talfourd, *contra*, contended, that as the term had followed so closely upon the time of making the order of *nisi prius*, the lessor of the plaintiff might reasonably claim the assistance of the Court.

Per Curiam. (a) It was the plaintiff's fault that the arbitration did not proceed; the attorney went away and deserted the cause. The rule must be discharged, and the plaintiff may take the cause down again for trial. Rule discharged.

(a) Lord Tenterden, C. J., Littledale, Parke, and Taunton, Js.

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*DOE dem. DAVIES v. EYTON. June 7.

A party retained attorneys to prosecute an ejectment for D., and showed them as his warrant for so doing, a power of attorney purporting to be executed by D. The

attorneys, believing it genuine, took the cause to the assizes, but were obliged to withdraw the record. D., who had been made lessor of the plaintiff, and was abroad during these proceedings, disavowed them on his return, alleging the power of attorney to be a forgery; and the Court, on motion by him, ordered the attorneys to pay the costs, D. giving security to repay them the amount if they should succeed in an issue which the Court directed, and in which the attorneys were to be plaintiffs and D. defendant, to try whether or not the ejectment was commenced or carried on with the privity of D.

CAMPBELL, in a former term, obtained a rule on behalf of the lessor of the plaintiff, calling on Messrs. Shearman and Freeman, attorneys of this court, to show cause why they should not pay the defendant 215*l.* (costs on withdrawing the record in this cause at the assizes), and why they should not deposit in the hands of the Master a power of attorney mentioned in the rule, and supposed to have been forged. It appeared that the attorneys had been employed to prosecute this action (which was for the recovery of some freehold property) by a person named Collier, who told them that he was authorized so to retain them by the lessor of the plaintiff, an officer in the army, then in the Mauritius. Collier afterwards left with them a power of attorney, purporting to be signed by the lessor of the plaintiff, and to authorize Collier to institute the proceedings on his behalf. The attorneys took the cause to the assizes for trial, but, by the advice of counsel on a consultation, withdrew the record, on which occasion the defendant's costs were as above stated. Davies, the lessor of the plaintiff, afterwards returned to England, and denied having given any authority to Collier, or executed any power of attorney; and it was stated in his affidavit and others, in support of the rule, that the signature to this instrument, and the attestation, were forged. The rule had been enlarged to give Messrs. Shearman and Freeman time to find Collier, from whom they expected to gain information respecting his *supposed authority to institute proceedings; [*786 but he had not been met with.

Sir *James Scarlett* and *Kelly* now showed cause on behalf of the attorneys, and contended that they were not liable, at least upon this summary application; and they relied upon the dictum of Holt, C. J., in an Anonymous case, 1 Salk. 86, and see 1 Keb. 89, pl. 65, that "where an attorney takes upon him to appear, the court looks no further, but proceeds as if the attorney had sufficient authority, and leaves the party to his action against him."

Campbell, for the lessor of the plaintiff, insisted that the attorneys were bound to pay the costs, and might have their action against Davies for the amount, if they should, at any time, be in a condition to prove him liable.

Whateley, for the defendant (contending, however, that that party was not under the necessity of appearing), cited *Robson v. Eaton*, 1 T. R. 62, as an authority to show that the attorneys were liable, even if they had been deceived by a forged power of attorney.

The Court(a) said there was strong reason to believe that the action had been carried on without authority, but they would not absolutely exclude Messrs. Shearman and Freeman from proving the contrary if they should be able to do so. They, therefore, ordered that Messrs. Shearman and Freeman should pay the defendant 215*l.*, and costs of his appearance, to be taxed by *the Master, upon the lessor of the plaintiff giving security, to the satisfaction of the Master, to refund the money in case they should succeed on the trial of an issue in which they were to be plaintiffs, and the lessor of the plaintiff defendant, on the question, whether or not this action was commenced or carried on with the authority or privity, directly or indirectly, of the lessor of the plaintiff; the plaintiffs in such feigned issue to proceed to trial without delay; the power of attorney to remain in the hands of Messrs. Shearman and Freeman, the lessor of the plaintiff being at liberty to inspect and take a copy

(a) Lord Tenterden, C. J., Littledale, Parke, and Taunton, Ja.

of it; and that until the said feigned issue should be determined, the first-mentioned rule should stand enlarged. (a)

(a) The lessor of the plaintiff gave the security required, and the defendant taxed his costs of appearing on the motion. Messrs. Shearman and Freeman did not pay the money, or proceed to try the feigned issue. In Hilary term, 1833, *Whateley*, on behalf of the defendant, obtained a rule nisi for an attachment against them for nonpayment of the costs of the ejectment, and of appearing on the motion, and that rule was in the same term made absolute.

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*EDWARDS v. BUCHANAN.

By 7 G. 4, c. 46, empowering certain corporations or copartnerships to carry on the business of banking, it is enacted that before any such corporation, &c., shall issue bills or notes, or take up money on such bills, &c., an account shall be made out by the secretary or other person being one of the public officers next mentioned, containing, among other things, the names and places of abode of two or more members of such corporation, &c., who shall have been appointed public officers thereof, and in whose names the corporation shall sue and be sued; such account to be annually returned to the stamp-office between certain days, and a copy thereof to be evidence of the appointment of such officers. In an action brought by such officer on behalf of a banking company, the return to the stamp-office is not the only admissible evidence of his being one of the public officers, but it may be proved aliunde.

ASSUMPSIT by the plaintiff as manager of the Manchester and Liverpool district banking company, established by virtue of the act 7 G. 4, c. 46, on a promissory note. Plea, general issue. At the trial before Bolland, B., at the Summer assizes for Chester, 1831, the plaintiff gave in evidence a copy of the return made to the stamp-office by the company, pursuant to s. 4 of the act, to show that the names, places of abode, and titles of office of two public officers of the copartnership, had been duly delivered to the commissioners of stamps, as required by that section. In that return, the plaintiff was described as "general manager" of the company. The return bore date on the 14th of April, 1831. The present action was commenced in Michaelmas term, 1830. It was objected, on behalf of the defendant, that the return made in 1831, did not prove the plaintiff to have been manager in 1830. The plaintiff's counsel then offered parol evidence of the appointment, but the learned judge was of *789] opinion, that by the 4th and 5th sections of the act, (a) no evidence *of that fact was admissible, except the return; and the plaintiff was non-

(a) The material parts of the act are as follows:

Sect. 1 enables copartnerships of more than six persons to carry on business as bankers, at the distance of more than sixty-five miles from London, on certain conditions.

Sect. 4 enacts, that before any such corporation or copartnership, exceeding the number of six persons, in England, shall begin to issue any bills or notes, or borrow, owe, or take up any money on their bills or notes, an account or return shall be made out, according to the form contained in the schedule marked (A) to this act annexed, wherein shall be set forth the true names, title, or firm of such intended or existing corporation or copartnership, and also the names and places of abode of all the members of such corporation, or of all the partners concerned or engaged in such copartnership, as the same respectively shall appear on the books of such corporation or copartnership, and the name or firm of every bank or banks established, or to be established, by such corporation or copartnership, and also the names and places of abode of two or more persons, being members of such corporation or copartnership, and being resident in England, who shall have been appointed public officers of such corporation or copartnership, together with the title of office or other description of every such public officer respectively, in the name of any one of whom such corporation shall sue and be sued as hereinafter provided, &c. "And every such account or return shall be delivered to the commissioners of stamps, at the stamp-office in London, who shall cause the same to be filed and kept in the stamp-office, and an entry and registry thereof to be made in a book or books to be there kept for that purpose," &c.

Sect. 5 enacts, "That such account or return shall be made out by the secretary or

sued. A rule nisi was obtained in the following term, for setting aside the nonsuit, and for a new trial.

**J. H. Lloyd* in this term showed cause. Parol evidence of the appointment was properly rejected. By sect. 9 of the statute, all actions are, from [790] and after the passing of the act, to be commenced and prosecuted in the name of one of the public officers *nominated as aforesaid*. That must allude to the enumeration of members and officers made out and returned to the stamp-office, as required by sect. 4: no other nomination is mentioned in the act. Parol evidence, even if admitted, that the party was appointed, and acted as an officer, would not be sufficient, for to be duly appointed an officer he must be a member, and that could only be shown by his name and place of abode appearing on the return. The mere appointment of an officer at some time before the commencement of the action, would not prove that he continued so at that period, for the officers may be changed; and sect. 8 provides for the making of additional returns in that event. The act is very particular in its limitations, and one of its main objects is perfect *publicity with respect to the com- [791] position of these new copartnerships.

J. Jervis, contra. The provisions of sect. 4 refer entirely to the power which these companies were to exercise of issuing notes, or borrowing, owing, or taking up money on their bills or notes. That clause imposes no restriction with regard to the bringing of actions. [Lord TENTERDEN, C. J. Actions can only be brought by the public officers there mentioned.] The words in sect. 9, that all proceedings at law shall and may be instituted "in the name of any one of the public officers *nominated as aforesaid* for the time being of such copartnership," are not connected with the fourth section. Probably they referred to some intermediate clause, which was afterwards struck out. But, assuming the return to have been the proper evidence that the plaintiff was a public officer entitled to sue, it is not the only evidence. The affidavit filed at the stamp-office by the proprietor of a newspaper, under 38 G. 3, c. 78 (or a

other person, being one of the public officers appointed as aforesaid, and shall be verified by the oath of such secretary, or other public officer, taken before any justice of the peace, &c., and that such account or return shall between the 28th day of February and the 25th day of March in every year, after such corporation or copartnership shall be formed, be in like manner delivered by such secretary, or other public officer as aforesaid, to the commissioners of stamps, to be filed and kept in the manner and for the purposes as hereinbefore mentioned."

Sect. 6 enacts, "That a copy of any such account or return so filed or kept, and registered at the stamp office, as by this act is directed, and which copy shall be certified to be a true copy, under the hand or hands of one or more of the commissioners of stamps for the time being, upon proof made that such certificate has been signed with the handwriting of the person or persons making the same, and whom it shall not be necessary to prove to be a commissioner or commissioners, shall in all proceedings, civil or criminal, and in all cases whatsoever, be received in evidence as proof of the appointment and authority of the public officers named in such account or return, and also of the fact, that all persons named therein as members of such corporation or copartnership were members thereof at the date of such account or return."

Sect. 9 enacts, "That all actions and suits, and also all petitions to found any commission of bankruptcy against any person or persons who may be at any time indebted to any such copartnership, carrying on business under the provisions of this act, and all proceedings at law or in equity under any commission of bankruptcy, and all other proceedings at law or in equity to be commenced or instituted, for or on behalf of any such copartnership, against any person or persons, bodies politic or corporate, or others, whether members of such copartnership or otherwise, for recovering any debts, or enforcing any claims or demands due to such copartnership, or for any other matter relating to the concerns of such copartnership, shall and lawfully may, from and after the passing of this act, be commenced or instituted, and prosecuted in the name of any one of the public officers nominated as aforesaid, for the time being, of such copartnership, as the nominal plaintiff or petitioner for and on behalf of such copartnership." And such officer shall in like manner be made defendant in actions, &c., against such copartnership.

certified copy of it), is made evidence of proprietorship, by s. 9 of that statute, which in some degree resembles s. 6 of the present act; but there is no doubt that such proprietorship may be proved aliunde.

LORD TENTERDEN, C. J. It appears that in this case the copy of the return to the stamp-office made pursuant to the statute, would not answer the purpose for which it was produced, of showing that the action was commenced by a public officer of the company; and parol evidence of the plaintiff's appointment was then offered, to prove that he was a public officer at the time of bringing the action. The learned Judge rejected that proof, supposing that *792] the reception of it was *precluded by the fourth and sixth sections of the statute; and the question is, whether or not he was right in so doing. We are all of opinion that the act does not make the return the only admissible evidence, and that the parol testimony ought to have been received. The rule will therefore be absolute.

PARKE, J. The fourth section, in speaking of the account to be made out according to the form there prescribed, treats only of the requisites which are to be fulfilled before the company shall issue or take up money upon their bills or notes. The ninth directs that actions and suits shall be prosecuted and defended by one of the public officers "nominated as aforesaid." That must mean appointed; and in an intervening section between this and the fourth (sect. 5), it is enacted that the return to the stamp-office, directed in the latter part of sect. 4, shall be made by the secretary or other person, "being one of the public officers appointed as aforesaid." By this section, therefore, it is clear that the officer may be appointed, and act, previously to the return, for the officer himself is to make the return. And the act evidently contemplates that these companies, when formed, may sue or be sued, although the time may not have come for making the returns.

TAUNTON, J. It appears to me that the object of sect. 4 is, that the companies may enable themselves to issue notes, by making out the accounts there directed; but that this clause presumes the appointment of officers to be already made: and I think that appointment may be proved by other evidence *793] than the certified copy of the return. Sect. 9 enacts, that all actions *shall be brought by the public officers "nominated as aforesaid;" that is, appointed, as it is previously taken for granted they will have been. I think it is not essential for companies, under this act, to prove the return to the stamp-office in any actions but those brought by them upon bills issued by themselves, within the fourth section; but it is unnecessary to pronounce an opinion on that point now. At all events, the return was not the only medium of proof in the present case.

Rule absolute.

ARMITAGE v. HAMER. June 8.

To entitle a banking company to sue by its public officer pursuant to 7 G. 4, c. 46, it is sufficient if, in the return made to the stamp-office, he be described as A. B. Esq., of, &c., a "public officer" of the copartnership: at least in the absence of proof that he had any specific office, it will not be presumed that he was more than an officer appointed for the purpose of suing and being sued.

The right of such company to sue by its public officer is not defeated if it appear that, in the return to the stamp office, the places of abode of one or more partners are omitted, there being no evidence that the return varies in this respect from the company's books. And if such proof were given, *semble* that the return, if correct as to the public officers, would still be sufficient to maintain the action.

ASSUMPSIT by the plaintiff as one of the public officers of the Huddersfield Banking Company, according to the form of the statute, &c., against the defendant as drawer and endorser of a bill of exchange. Plea, the general issue. This cause was first tried before Lord Tenterden, C. J., at the London sittings

after Trinity term, 1831, and again (a new trial having been granted on affidavit) before the Lord Chief Justice, at the sittings after the following Michaelmas term. By the Lord Chief Justice's note of the former trial (which was read on this by order of the Court), it appeared that, on the former occasion, a return to the stamp-office, pursuant to the act 7 G. 4, c. 46, (a), was *produced, to show the title of the plaintiff to sue as the public officer of the company. [*794] The return, as to the public officers, was as follows:—"Names and descriptions of the public officers of the said copartnership. Joseph Walker, Esq., of Lascelles Hall, Joseph Armitage, Esq., of Milns Bridge House, both in the county of York." No other public officers were mentioned. Under the head of "names and places of abode of the partners," were some names to which the places of abode were not added. The company's books were not produced or called for at either trial. It was contended, on the second trial, that the return was not such as the act required, and that the plaintiff ought to be non-suited, but the objections taken were overruled by Lord Tenterden, and the plaintiff had a verdict. A rule nisi was afterwards obtained for a new trial, on the grounds that the return did not state what particular offices Mr. Walker and Mr. Armitage held in the company; and that, in some instances, it did not mention the places of abode of the partners.

Sir *James Scarlett* and *Cresswell* now showed cause. The defendants have, in this return, all the information that the statute renders necessary. Sect. 4, requires that the return shall set forth the names and places of abode of two or more members of the copartnership, who shall have been appointed public officers of such copartnership, together with the title of office or other description of every such public officer respectively, in the name of any one of whom such copartnership shall sue and be sued, as provided in sect. 9: and that section directs that actions, &c., on behalf of and against such copartnerships, shall be brought by and against any one of *the public officers, nominated as aforesaid, for the time being, of such copartnership, as the nominal [*795] plaintiff or defendant, on their behalf. The description required in sect. 4, is with reference to the object there pointed out, of suing or being sued: "public officer" means a public representative for those purposes; and it is sufficient that he be described as such, unless he holds any other specific office, in which case he is to be designated by that. But it is not necessary that he should hold any other office, nor is it to be assumed that he does. If it had been expressly stated that the plaintiff was appointed a public officer of the company for the purposes of suing and being sued, that would have been sufficient; and the same is to be inferred when the description is "public officer" and nothing more.

Rotch, contra. It has been decided in *Edwards v. Buchanan*, ante, p. 789, that if the return be not sufficient, the appointment of a party as public officer of a banking company may be proved by parol; but here, no parol evidence was given. Then was the return sufficient? Unless made according to the statute it is no return. Now, by the statute, the places of abode of all the partners are to be returned; and this is of importance, because every individual is liable for the partnership debts. [PARKE, J. If this objection had been pressed at the trial, the company's books might have been referred to, to see whether the return corresponded with them. The act requires the names and places of abode to be returned only, "as the same respectively shall appear on the books of such corporation or copartnership."] The plaintiff should have shown that they were. As to the other objection, *sect. 4 directs, that the return shall contain the names and places of abode of two or more [*796] members who shall have been appointed public officers, "together with the title of office or other description of every such public officer respectively." This evidently contemplates something additional to the mere mention of the parties as public officers. Besides, the return here only names two persons as public officers, and none as bearing any specific office; yet there must be some persons

of this latter description in such a company. The act mentions several, as the cashier or accountant, and the secretary. [Lord TENTERDEN, C. J. The company may not think it expedient to name those as officers to sue and be sued.] By sect. 10, an action brought by one public officer and tried, may be pleaded in bar of another action brought for the same cause by any other public officer of the same company. The plaintiff ought to describe himself so as to enable the defendant to plead this with precision.

Lord TENTERDEN, C. J. With regard to the objection, that in some instances the places of abode of the partners are not specified in the return, I think all the act requires is, that the names and places of abode be specified as they appear on the books. Non constat, in this case, that they were not: and if it were otherwise, I think it would be going a great way to say that the omission, in any one instance, of a partner's place of abode would make the return void. Then it is said that in this return no character is given to Mr. Walker and Mr. Armitage but that of "public officers of the copartnership." The act requires that the return shall contain the names and places of abode of two or more *persons, being members of such copartnership, who shall have been appointed public officers, together with the title of office, or other description of every such public officer respectively. But it does not appear that these parties had any other title than that of public officers; if so, no other "title of office" could be added to their names: and the "other description" of each is given. I am therefore of opinion, that the return was sufficient.

LITTLEDALE, J. I am of the same opinion. I think the entry of each partner's place of abode is not a condition precedent to the right of the officers to recover in the name of the company. As to the description of the officers, it appears to me that the general designation of them in this return is no ground of objection. If more were required, it might sometimes be difficult to express, without many lines of description, the functions exercised by a particular officer. All that is required by sect. 9 is, that actions be commenced and prosecuted in the name of "any one of the public officers nominated as aforesaid for the time being;" I think, therefore, that the return, as proved on the trial, was sufficient.

PARKE, J. I am of the same opinion. I do not mean to say, that even if it had been proved that the return, in omitting the places of abode of some members, had not corresponded with the books, that would have been a valid objection to the plaintiff's right to recover: my present opinion is, that it would not; and I think it would be very inconvenient if a company like this, suing by its public officer, were on every occasion obliged to produce its books to show *that the return was correct. *It appears to me, that the certified copy produced from the stamp-office in this case, contained sufficient proof of the authority of the public officers to sue under the statute; and that the action, therefore, was maintainable.

TAUNTON, J., concurred.

Rule discharged.

FOX v. GAUNT. June 8.

Suspicion that a party has, on a former occasion, committed a misdemeanour, is no justification for giving him in charge to a constable, without a justice's warrant; and there is no distinction in this respect between one kind of misdemeanour and another, as breach of the peace and fraud.

TRESPASS for an assault and false imprisonment. The defendant pleaded the general issue, and several other pleas, in justification: one of which was, that an evil-disposed person and common cheat, to the defendant unknown, had obtained goods from him on false pretences (the particulars of which offence were set out in the plea); that the plaintiff afterwards, and just before the time

when, &c., passed by the defendant's shop, and was pointed out to him by the defendant's servant as the person who had so obtained the goods, whereupon the defendant having good and probable cause of suspicion, and vehemently suspecting and believing that the plaintiff was the person who had committed the offence, for the purpose of having him apprehended and examined touching the same, at the time when, &c., gave charge of him to a peace officer, and requested such officer to take and keep him in custody till he should be carried before a justice, and to carry him before such justice, to be examined touching the premises, and dealt *with according to law; on which occasion the peace officer, at the defendant's request, did so take him, &c., and [*799 brought him before a justice to be examined, &c.; and the justice, not being satisfied of the plaintiff's identity, discharged him out of custody, &c. Replication, de injuria. At the trial before Lord Tenterden, C. J., at the Middlesex sittings after Michaelmas term, 1831, the defendant had a verdict on the above special plea. A rule nisi was obtained in the following term for judgment non obstante veredicto, on the ground that a private person could not justify giving another into custody on suspicion of a misdemeanour.

Hutchinson and *Heaton* now showed cause. It is true, the books which treat of arrests by private persons, make a distinction between misdemeanour and felony, but that seems applicable to misdemeanours which merely constitute a breach of the peace, where it is clear that, after the offence is over, the arrest cannot be justified; but offences partaking of the nature of felony (as a fraud, which borders upon theft), may come under a different rule. [Lord TENTERDEN, C. J. The distinction between felony and misdemeanour is well known and recognised, but is there any authority for distinguishing between one kind of misdemeanour and another?] There is no direct authority, but in *Hawk. P. C.*, book 2, c. 12, s. 20, it is said (after stating that "regularly no private person can, of his own authority, arrest another for a bare breach of the peace after it is over"), "Yet it is holden by some, that any private person may lawfully arrest a suspicious night-walker, and detain him till he make it appear that he is a person of good reputation. Also it hath been adjudged, that any one may *apprehend a common notorious cheat, going about the country with false dice, and being actually caught playing with them, in order to have [*800 him before a justice of peace; for the public good requires the utmost discouragement of all such persons; and the restraining of private persons from arresting them without a warrant from a magistrate would often give them an opportunity of escaping. And from the reason of this case, it seems to follow, that the arrest of any other offenders by private persons, for offences in like manner scandalous and prejudicial to the public, may be justified." The same doctrine may be inferred from *Hale's P. C.*, part 2, c. 10, and c. 11, p. 88, 89.

Lord TENTERDEN, C. J. The instances in *Hawkins* are where the party is caught in the fact, and the observation there added, assumes that the person arrested is guilty. Here, the case is only of suspicion. The instances in *Hale*, of arrest on suspicion after the fact is over, relate to felony. In cases of misdemeanour, it is much better that parties should apply to a justice of peace for a warrant, than take the law into their own hands, as they are too apt to do. The rule must be made absolute.

LITTLEDALE, PARKE, and TAUNTON, Js., concurred.

Rule absolute.

*CORPE v. GLYN, Esquire.

[*801

GLYN, Esquire, v. CORPE. June 8.

A dock company were authorized by statute to sue and be sued by their treasurer, but he was not to be liable in his own person or goods by reason of his being defendant in any such action: and all costs incurred by him in prosecuting or defending any

action for the company, were to be defrayed out of the moneys applicable to the purposes of the act. Two actions between the treasurer and G., in one of which the treasurer was plaintiff, and in the other defendant, were referred to an arbitrator, who awarded against the treasurer in both, with costs. The costs and damages being unpaid, and an attachment being moved for against the treasurer, the Court held that he had not rendered himself personally liable by submitting to an order of reference; and they refused an attachment, but ordered a mandamus to the treasurer and directors to pay the sums awarded.

Two actions were at issue between the above parties; the one by Corpe against Glyn as treasurer of the St. Katharine Dock Company, for work and labour done for the company under a contract; the other by Glyn as such treasurer against Corpe, for not duly executing such contract. Both causes were referred to an arbitrator, who awarded in favour of the plaintiff in the first, with 2560*l.* damages and costs; and for the defendant in the second, with costs. The costs having been taxed, and being, as well as the damages, unpaid, and the order of reference having been made a rule of Court,

Campbell, in this term, moved for a rule to show cause why an attachment should not issue against the defendant in the first cause and plaintiff in the second, for non-payment of the sums awarded; or, a mandamus to the treasurer and directors of the company to pay the same. He contended, that the act 6 G. 4, c. 105 (for making certain docks, &c., in the parish of St. Botolph without Aldgate, and in the parish or precinct of St. Katharine), by which the company was incorporated, though it exempted the body and goods of the treasurer from responsibility in actions wherein he was defendant, *gave no
[802] such protection when he was party to an award, or where he became liable to costs as a plaintiff.*(a)* A rule nisi having been granted,

Platt now showed cause. The Court will not grant a mandamus, there being another remedy by action on the award. Nor can there be an attachment, since the treasurer, by the express words of the statute (sect. 161), is only a nominal plaintiff and defendant; and his body and goods are protected by that clause. A distinction was taken, in moving, between the cases where he is plaintiff and where he is defendant; but the costs here are thrown into one entire sum, and the rights in which they are due cannot be distinguished. [Lord TENTERDEN, C. J. Does the act make any provision for recovering the money when a verdict goes against the treasurer?] None expressly; but it is clear, from sect. 161 and from sect. 165,*(b)* that neither a treasurer nor a

(a) By 6 G. 4, c. 105. s. 161, it is enacted, "That all actions and suits to be commenced or instituted by or on behalf of the said company shall and lawfully may be commenced, &c., in the name of the treasurer or any one of the directors for the time being, as the nominal plaintiff for and on behalf of the said company; and all actions, &c., against the said company shall be commenced, &c., against the treasurer, or any one of the directors of the said company for the time being, as the nominal defendant for and on behalf of the said company;" and that no action or suit so to be brought or commenced by or against the said treasurer or such director shall abate by his death, removal, &c. "Provided, nevertheless, that the body or goods, chattels, lands or tenements, of such treasurer or director, shall not by reason of his being defendant in any such action or suit be liable to be arrested, seised, detained, or taken in execution; and provided that all costs and expenses to be incurred by such treasurer or director in prosecuting or defending any action or suit for and on behalf of the said company shall be defrayed out of the moneys applicable to the purposes of this act;" and such treasurer or director may be a witness in any such action or suit.

(b) By sect. 165 of the statute it is enacted, "That none of the directors of the said company shall, by reason of his or their being parties or party to, or making, signing, or executing in their or his capacity of directors or director of the said company pursuant to this act, any contract, covenant, agreement, assignment, conveyance, or security, for and on behalf of the company, or otherwise lawfully executing any of the powers and authorities given to them, or any of them, by this act, be subject or liable to be sued, prosecuted, or impleaded, either collectively or individually, by any person or persons whomsoever, in any court of law or equity, or elsewhere; and that the body or bodies, goods, chattels, lands, or tenements of the said directors, or any of them, shall not by reason, on account, or in consequence of any such contract, &c., or any

director is *intended to be liable in his person or goods in actions against the company. [Lord TENTERDEN, C. J. Looking at that clause, the Court, whatever its power may be, would not be very likely to grant an attachment, though it might order a mandamus.]

Campbell, contrâ. We do not charge the treasurer here as defendant in an action, but as party to a rule of court, which he has broken. In this capacity he is liable like any other individual. The objection to a mandamus is the delay, which will be very injurious to the party making this application.

*Lord TENTERDEN, C. J. No treasurer would ever submit to a reference, if, by so doing, he incurred personal liability. You may have a mandamus returnable in eight days. Where an act of parliament so clearly shows the intention that a party shall not be personally answerable, we cannot grant an attachment.

Rule absolute for a mandamus, returnable in eight days.

other lawful act which shall be done by them, or any of them, in the execution of any of the powers and authorities given to them, or any of them, by this act, be liable to be arrested, seized, detained, or taken in execution, but that in every such case, any person or persons making any claim or demand upon the said company, or upon any director or directors thereof, under or by virtue of any such contract, &c., or other lawful act or acts, may sue and implead the said company in the name of their treasurer, or any one of the directors as provided by this act, in like manner as if such contract, &c., had been entered into and executed by such treasurer for and on behalf of the said company, or such other act or acts had been done by him, and the party or parties so suing or impleading shall be entitled to the same remedies as are provided by this act in cases where authority is hereby given to sue and implead the said company in the name of the treasurer, or any one of the directors thereof, but not to any further or other remedy whatsoever."

CLARK and Another, Assignees of LIVERSIDGE, a Bankrupt, v. CROWNSHAW.(a)

L. took a lease of a mill and iron-forge, and bought the fixed and movable implements, &c., but it was agreed that they should be delivered up at the end or other determination of the term, at a valuation, if the lessors should give fifteen months' notice of their desire to have them. L. afterwards conveyed all his interest in the premises, implements, &c., to a creditor, in trust, if default should be made by L. in paying certain instalments, to enter upon and sell the same, and satisfy himself out of the proceeds, re-assigning the residue: and if the lessor should require a resale of the implements, &c., the proceeds of such resale were to go in discharge of the debt, if unsatisfied. L. made default, and subsequently became bankrupt, after which, and during the term, the creditor, who had not before interfered, entered upon the property: Held on trespass brought by the assignees, that L. had at the time of his bankruptcy the reputed ownership of the movable goods, but not of the fixtures.

TRESPASS for breaking and entering the premises of the plaintiffs, and seizing, taking away, and converting their goods and fixtures. Plea, not guilty. At the trial before Tindal, C. J., at the York assizes, 1830, a verdict was found for the plaintiffs, subject to the opinion of this Court upon the following case, and to a reference as to the amount of damages:—

In 1824, Liversidge and the defendant, being in partnership as iron-masters, took a lease from Messrs. Walker of a mill and iron-forge, with a covenant that the lessees, their executors, &c., should, at the expiration or other sooner determination of the term, leave and *deliver up to the lessors, their executors, &c., all the mills, wheels, machinery, hearths, hammers, anvils, bellows, tools, utensils, and implements then used by the lessees, or which should be upon the premises, if the lessors should, by writing under their

(a) This case was argued and determined in Michaelmas term, 1831, but was accidentally omitted in its proper place.

hands, fifteen months before, signify their desire of having the same so left, at a valuation to be made at the end of the term. The machinery and effects belonged to Messrs. Walker, and were sold by them to Liversidge and the defendant before the execution of the lease. Messrs. Walker were themselves tenants of the premises under a lease containing a similar covenant as to the articles above-mentioned.

Liversidge and the defendant carried on the business together till the 1st of July, 1828, when they dissolved partnership, and the defendant assigned all his moiety of the partnership estate and effects (except such interest therein as was comprised in the deed next mentioned), to Liversidge, he agreeing to pay the defendant 500*l.*, and give security for the further payment to him of 5200*l.*, and to indemnify him against the partnership debts. By indenture of the same 1st of July, 1828 (after reciting the dissolution of partnership and the agreement above stated), it was witnessed, that in pursuance of the said agreement, and for securing payment to the defendant of 5200*l.* by instalments, and also for his indemnity against the partnership debts, Liversidge assigned to the defendant all his estate and interest in the lease of 1824, and in the messuages, mills, &c., comprised in such lease, and in the machinery and apparatus on the premises; habendum to the defendant, in trust, if default should be made in payment of *806] the 5200*l.*, or if the *defendant should be called upon to pay any of the partnership debts, and Liversidge should not repay the amount after ten days' notice, then to enter upon the said premises, machinery, &c., and sell and dispose of the same in satisfaction of what might be owing, and reassign the residue. There was also a provision, that if Messrs. Walker should wish to take the machinery, &c., at a valuation, and should give notice to that effect, the proceeds of the sale to them should go in satisfaction of the 5200*l.* A schedule of machinery was added, containing a number of fixed and movable articles.

From the time of the dissolution (which was advertised in the Gazette and country papers) till the 15th of July, 1829, Liversidge continued in possession of the premises and effects, carried on the business, repaired, altered, and added to the machinery, and contracted large debts. On the said 15th of July he committed an act of bankruptcy by leaving his home, to which he never returned. He had previously made default in paying the instalments and partnership debts. A few days after the act of bankruptcy, the defendant entered upon the premises and took possession of the machinery and effects, comprised in the assignment. A commission of bankrupt was afterward issued against Liversidge, under which the plaintiffs were appointed assignees, and the question now was, whether they, as such assignees, could recover in this action, for the fixtures as well as for the movable goods; or the latter only, or neither. This case was now argued by

Hoggins, for the plaintiff. The bankrupt here had the possession, order, and disposition both of the *fixtures and movables at the time of his bankruptcy. This case differs from *Storer v. Hunter*, 3 B. & C. 368. There the bankrupt was under an absolute covenant to deliver up the engines, &c., at the expiration of the term; and it was therefore held that he had only a qualified property in them during the term. But, in the present case, the bankrupt held possession of the effects subject to covenants for delivering them up in certain cases only, which would not necessarily occur: and nothing, in fact, had been done to put the covenants in force at the time of the bankruptcy. [PARKE, J. How is this case distinguishable, as to the fixtures, from *Horn v. Baker*? (9 East, 215.) The rest of the case is clear.] The fixtures there belonged to John Horn, and never were the property of the bankrupts; permission only was granted them by deed to use, occupy and enjoy those articles; but here the fixtures are treated by both parties, mortgagor and mortgagee, as goods and chattels severed from the realty, and as such are assigned by way of mortgage; and then, remaining in the order and disposition of the bankrupt, they pass

under the bankruptcy with the goods and chattels not affixed to the freehold. [PARKE, J. The ground of decision there was, that the stills were affixed to the freehold, and would not pass to the assignees as goods and chattels under the statute 21 Jac. 1, c. 19, s. 11, by reason of reputed ownership in the bankrupt. That case must govern the present as to the fixtures. Lord TENTERDEN, C. J., TAUNTON, and PATTESON, Js., concurred as to this point.] With respect to the movable property, the Court then called upon

**Milner*, for the defendant; who contended, on the authority of *Storer v. Hunter*, 3 B. & C. 368, that the bankrupt in this case had not the pos- [*808 session, order, and disposition of the movable chattels within the meaning of the statute of James, and of 6 G. 4, c. 16, s. 72, at the time of his bankruptcy. He held them subject to a right of the defendant to re-enter and take them in a certain event, and that had happened before *Liversidge* became bankrupt. The defendant by re-entering and taking possession after the bankruptcy did not render himself liable to an action of trespass, even admitting that he was answerable to *Liversidge's* assignees for the proceeds of the goods, or any part of them.

Lord TENTERDEN, C. J. Although a right of entry had accrued, the defendant suffered *Liversidge* to continue in possession till the bankruptcy. He was the reputed owner within the meaning of the bankrupt act, whatever might have been the rights of the defendant in other respects. As to the other part of the case (the machinery and things affixed to the freehold), we are bound by *Horn v. Baker*, 9 East, 215.

PARKE, J. On the default made by the bankrupt, the defendant should have given notice, and entered pursuant to the mortgage deed; but instead of doing so, he allowed *Liversidge* to retain the apparent ownership, and the right of the assignees by relation had attached before the defendant entered.

TAUNTON, J. In *Storer v. Hunter*, 3 B. & C. 368, the landlord retained an interest in the machinery and things *belonging to the colliery; the [*809 tenant never had any absolute ownership, but only a qualified property in them; and the landlord took possession of the premises to which they belonged, before the bankruptcy. I think the plaintiffs are entitled to judgment as to the movable property.

PATTESON, J., concurred.

Judgment for the plaintiffs as to the movable property.

The KING v. The Inhabitants of CHILD OKEFORD. June 9.

To gain a settlement by hiring and service, the whole forty days' residence need not be within the compass of a year from the time of the yearly hiring. A servant was hired for a year on the 17th of April, 1825, and served in parish A. till the 11th of April, 1826, when he made a fresh agreement with his master as a weekly servant, and continued to serve under that agreement for upwards of two months. He resided in parish A. from the 17th of April to the 8d of May, 1825, when he accompanied his master to and resided in another parish till the 6th of April, 1826. He then returned with his master to parish A., and resided there during the remainder of his service, viz., under the first agreement from the 6th to the 11th of April, and under the second for two months: Held, that he gained a settlement in A.

UPON appeal against an order of two justices, whereby E. Miller was removed from the parish of Child Okeford to the parish of Marnhull, both in the county of Dorset; the sessions quashed the order, subject to the opinion of this Court on the following case:—

On the 17th of April, 1825, the pauper was hired to serve Mr. J. Rossiter, in Child Okeford, as a servant in husbandry at five guineas a year. He served him under the agreement till the 11th of April, 1826, when the pauper made a fresh agreement with his master at 5s. a week as an out-door servant, and

*810] served him under this second agreement for upwards of two *months. The service was never discontinued, nor was the nature of it changed, except as to the pauper becoming an out-door servant, from the 11th of April, 1826.

The pauper resided from the 17th of April, 1825, till the 3d of May following in the parish of Child Okeford. On the 3d of May, 1825, he accompanied his master to and resided in that of Marnhull till the 6th of April, 1826, when he returned with his master to Child Okeford, and resided there during the remainder of his service, under the first agreement, from the 6th to the 11th of April, and, under the second agreement, upwards of two months.

Gambier and Lucena, in support of the order of sessions. It is not necessary for the purpose of gaining a settlement by hiring and service, that the whole forty days' residence should be under the yearly hiring. It is sufficient if part be under that hiring and part under a hiring for a less period. The authorities establish that if the pauper has the character of a yearly servant for any part of the forty days, however short, he gains a settlement. *Rex v. Apethorpe*, 2 B. & C. 892, shows only that some part of the service must be under a yearly hiring, and *Rex v. Adson*, 5 T. R. 98, decides that a settlement may be gained by serving a year under different hirings, provided one of those hirings be for a year, though there be less than forty days' service under that hiring. [Lord TENTERDEN, C. J. There all but ten days' service was antecedent to the yearly hiring.] It is not necessary here to go the whole length of

*811] that case. In *Rex v. *Brightwell*, 1 Sess. Ca. 92, 10 Mod. 287, Parker, C. J., says, "If a servant is hired during a whole year from week to week, and is then hired for a year, and serves one week, this is no settlement, for the want of continuance in the service for forty days *after the second hiring*." Here there has been a residence of forty days subsequent to the yearly hiring. The act 13 & 14 Car. 2, c. 12, s. 1, first required a residence of forty days in the capacity of a servant in order to give a settlement. The statute 1 Jac. 2, c. 17, s. 3, enacted, that the forty days' continuance in a parish intended by the former act to make a settlement, should be accounted from the delivery of a notice as there specified; and the 3 W. & M. c. 11, s. 7, substituted a yearly hiring for the notice. Then as it was necessary that the forty days' continuance in a parish should be subsequent to the notice, it may also be necessary that they should be subsequent to the yearly hiring, but they need not be *under it*; and that is consistent with the construction adopted by the Court in *Rex v. Apethorpe*, 2 B. & C. 892. The words in the 8 & 9 W. 3, c. 30, s. 4, "*continue and abide in the same service during the space of one whole year*," have been held, in several cases, to mean with the same master or some one in privity with him. The three requisites, hiring for a year, service for a year, and forty days' continuance, are independent of each other, but the place of residence must be that into which the pauper comes under the yearly hiring. Here the pauper resided forty days in Child Okeford after the yearly hiring. If it is necessary that the whole time should be *under the yearly hiring*, the case of *Rex v. Fillongley*, 1 B. & A. 319, cannot be supported. There it was

*812] assumed that a residence *for three or four days under a yearly hiring was sufficient.

Erle and Barstow, contra. No settlement was gained, because the forty days' residence was not completed within the compass of the same year with the hiring for a year and service for a year.* In *Rex v. Denham*, 1 M. & S. 222, it was said by Lord Ellenborough that the legislature by requiring a hiring for a year and a continuance and abiding in the same service during the space of one whole year, seem to have contemplated something that was to be complete within that period, and it was decided that no settlement could be gained unless there was a residence of forty days within the compass of a single year. In *Rex v. Apethorpe*, 2 B. & C. 892, it was merely decided that some part of the residence must be under the yearly hiring, and in *Rex v. Findon*,

4 B. & C. 91, that the whole forty days need not be under the last yearly hiring; but in the latter case, the whole forty days were comprised within a year of service (from the 2d of April, 1812, to the 2d of April, 1813), in which year, namely, in November, 1812, the last yearly hiring took place. This is consistent with the rule that the year's service need not all be under the yearly hiring, and which allows the forty days to be taken from any part of that year in which all the requisites of the statute are complied with. In the present case, the attempt is made to take one year for the service, beginning before the yearly hiring, and another year for the forty days' residence, beginning after the yearly hiring. But if the forty days' residence may be completed in a different *year from that in which [*813 the year's service is completed, may not the residence be so completed, although in such different year the party is in a different service, or in no service at all? The principle of the former statutes required forty days' continuous residence after notice, as the common law required forty days' continuous abiding to make a guest a resident within the jurisdiction of a town and view of frankpledge. When the requisites of a settlement were extended over a year, the forty days were no longer required to be continuous from a given event, but might be taken from any part of the year in which the party was performing that service, which dispenses with notice. If the settlement in the present case is established, the principle requiring a continuance for forty days will be further infringed without reason, and with increase of complexity; because a case may be put of a party residing in several parishes for thirty-nine days during the year of service, and completing the forty days in each of them after the end of that year, in which case his settlement would be varying from time to time by a mere residence for a night.

Lord TENTERDEN, C. J. The authorities establish that, in order to gain a settlement by hiring and service, some part of the forty days' residence must be while the party is serving under a yearly contract. It is now sought to add another term to that, namely, that the whole forty days' residence shall be within a year from the time of the yearly hiring. *Rex v. Denham*, 1 M. & S. 221, does not go so far. Nothing was said in that case as to the *time when [*814 the computation of the year was to commence. Lord Ellenborough there dwells upon the inconvenience which would result from picking out a few days' service in several years, and thus extending the inquiry in a case of settlement, through an unreasonable period of time; but all that is decided there is, that to give a settlement by hiring and service, there should be forty days' residence within the compass of one year. It is not said, that that year is to be computed from the time of making the yearly contract. There is no ground for holding that it must be so reckoned.

LITTTLEDALE, J. It is sufficient if the forty days' residence be within the compass of a year; it need not be within one year from the yearly hiring.

PARKE, J., having been present only during a part of the argument, declined giving any opinion.

TAUNTON, J., concurred.

Order of sessions confirmed.

*The KING v. The Inhabitants of PENSAX. June 9.

[*815

A. enclosed an acre of land from a common, and built a house upon it, for which the parish gave him materials. Fourteen years after, he gave by parol, part of the land so enclosed to B., who built a cottage on it, and afterwards enclosed a further portion of the common; and B. occupied the whole premises for about sixteen years. The copyholders (who were accustomed every seven years to break down the fences of encroachments on the common) twice broke down the fences between the common and the new land thus enclosed by B. (the fences between the new and the old enclosure having been previously removed), and passed over that part of the land which had been newly enclosed by B.: Held, that B. gained a settlement by estate.

UPON an appeal against an order of two justices, whereby Mary Radford,

widow, and her children, were removed from the chapelry of Pensax to the parish of Martley, both in the county of Worcester, the sessions quashed the order, subject to the opinion of this Court on the following case:—

Mary Radford was the widow of John Radford, who was the illegitimate child of Hannah Radford. After his birth, Hannah married William Yarnold, and they resided in Pensax, the child John Radford living with them. In the chapelry of Pensax there is much common or waste land, beneath which there is coal belonging to the lessees (under an old demise) of the Dean and Chapter of Worcester, who are the lords of the manor. Yarnold was often relieved by the officers of Pensax, and they furnished him with materials necessary for the erection of a cottage upon the common, which he accordingly erected, about thirty years ago, having for the purpose enclosed an acre of land of about 10*l.* in value. Sixteen years ago he gave part of the land which he had so enclosed to John Radford, upon his marriage with the pauper Mary, and Radford then built a cottage upon it. No deed was made between them. After John Radford had taken possession of the cottage and land, he enclosed a small piece of land immediately adjoining (about 5*l.* in value), from the common, and the whole was afterwards thrown* together by him. The copyholders (who
*816] are accustomed to break down the fences of encroachments once in seven years, to prevent persons enclosing from establishing a right) twice broke down the fences between the common and the new land thus enclosed by John Radford. The fence between the old and the new enclosure had been previously removed. The persons rode in at one side of the land, and out at the other side, but they did not pass over that part which had been given to Radford by William Yarnold. On one occasion, the lessees of the minerals under the dean and chapter sunk a coal-pit on the land last enclosed by Radford.

The question for the opinion of this Court was, whether John Radford ever had such an estate in the land given to him by William Yarnold, or enclosed by himself from the waste, as would give him a settlement in Pensax. The case was argued on a former day in this term by

Whitcomb, in support of the order of sessions. If Yarnold had held his estate till the present time, he would have had a good title by uninterrupted possession for twenty years, and would have gained a settlement. Then if Yarnold would have gained a settlement if he had remained in possession, the pauper's husband, who occupied by Yarnold's permission fifteen years, gained a settlement; for the possession of the pauper may be coupled with that of Yarnold, *Rex v. Calow*, 3 M. & S. 22. Yarnold was in under some title at the time when he gave the land
*817] to the pauper, and the possession of the two *has continued for thirty years. According to the expressions of Lord Ellenborough, in *Rex v. Calow*, the subsequent possession for the last sixteen years reflects light on the title under which Yarnold held. Then as to the act done by the copyholders; that was a mere entry, and, not being followed up by an action within a year (4 Ann. c. 16, s. 16), is no bar to the statute of limitations. Besides, the entry not having been made for the benefit of the lord, but of the copyholders, the former could not take advantage of it, *Rex v. Wooburn*, 10 B. & C. 846.

Godson, contra. *Rex v. Chew Magna*, 10 B. & C. 747, is precisely in point. There, A., being seised in fee of a close of land, gave a small piece by parol to B., who built a cottage on it, and resided in it fifteen years, when A. told him he had sold the land to C., and asked B. to give him possession, and to sell him his right. It was agreed that A. should give B. 3*l.* for giving possession, and that B. should take the materials. B. pulled down the cottage, and carried away the materials, and delivered possession to C.: and B.'s possession having been less than twenty years, it was held he did not gain a settlement. Here Yarnold, the original donor, had no right to give the land. The cottage was merely a parish house. The copyholders, according to the custom once in seven years, broke down the fences of the land as an encroachment; and at that time the old and the newly enclosed land had been thrown into one. There was never any adverse possession of either.

Cur. adv. vult.

*Lord TENTERDEN, C. J., now delivered the judgment of the Court. We think this case is not distinguishable from *Rex v. Wooburn*, 10 B. & C. 846, and the pauper's husband consequently gained a settlement by estate in Pensax. The order of sessions must therefore be confirmed. [*818]

Order of sessions confirmed.

The KING v. The Inhabitants of SPREYTON. June 9.

The master of a parish apprentice being resident abroad (where he had remained some years), his steward assigned the apprentice, by a written instrument, signed, Lord Viscount C. (the master), by J. P. his steward. J. P. had no special authority to assign this or any apprentice, but he had occasionally made such assignments during Lord C.'s absence, and been allowed the expenses in his account. The assignment was in other respects regular. The steward paid the new master 5*l.*, which was allowed in his account by Lord C., as usual:

Held (assuming that a master can delegate the power of assigning an apprentice, as to which, *quære*), that the master must at all events exercise his own discretion in the assignment, and give his express authority to it; that in this case there was no previous authority; and, consequently, that no settlement was gained by service under the assignment.

Quære, whether a parish apprentice can be bound to a person living abroad, though retaining property in the parish?

ON appeal against an order of two justices, removing Josiah Lee from the parish of Spreyton, in the county of Devon, to the parish of Powderham, in the same county, the sessions quashed the order, subject to the opinion of this Court on the following case:—

On the 2d of October, 1818, an order was made by two justices of the county of Devon, under the statute 56 G. 3, c. 139, for binding the pauper, a poor child of the parish of Powderham, apprentice to Lord Viscount Courtenay, described in the order as of Powderham in the said county, and on the following day the pauper was bound accordingly, in the usual form, by indenture, referring to the above order, with the allowance of the two justices, to be instructed in husbandry work. The indenture was executed by the churchwardens and *overseers of Powderham, but not by Lord Courtenay. At the time of [*819] this binding, Lord Courtenay was in a foreign country, where he had been residing for some years, and has continued to reside ever since; but during all that time he kept in his own hands the mansion called Powderham Castle, and an estate of between 200 and 300 acres, all within the parish of Powderham. This property was under the care of Mr. John Pidsley, Lord Courtenay's steward, who, as the general agent of Lord Courtenay, conducted all his affairs at Powderham, but acted under no power of attorney or written instructions. When the pauper was bound as above mentioned, the steward accepted him as Lord Courtenay's apprentice, and, intending to assign him to a new master, agreed with his mother to take care of him in the parish of Powderham till he could get a place for him, and allowed her a weekly sum for his maintenance. Some time afterwards, Mr. Pidsley agreed with one Richard Paddon, living in the parish of Spreyton, that Paddon, in consideration of 5*l.*, should take an assignment of the apprentice; and accordingly, in January, 1820, a written instrument bearing a stamp of 1*l.* was drawn up, by which, after reciting the execution of the indenture, it was stated that Lord Viscount Courtenay, with the consent and approbation of two justices for the county of Devon, did thereby assign the apprentice to Paddon, to serve him during the residue of the term of apprenticeship; and that Paddon, in consideration of the said sum of 5*l.*, agreed to accept and take the apprentice during the residue of the term, and acknowledged himself, his executors, &c., bound by the agreements and covenants mentioned in the indenture on the part of Lord Courtenay to be performed, agreeably

*820] to the statute, &c. *The instrument was signed "Lord Viscount Courtenay, by John Pidsley, his steward. Richard Paddon." The consent of the two justices was added, and subscribed with their names. Mr. Pidsley had no special authority, either written or verbal, to assign apprentices in general, or to sign this instrument for Lord Courtenay, but did it only by virtue of his general agency. He had on several occasions received parish apprentices on behalf of Lord Courtenay, had expended sums for their maintenance, and had paid money on the assignment of them to other masters (which assignments were executed in the same manner as the present), and these sums were always allowed him on the annual settlement of his accounts with Lord Courtenay. The 5*l*. which he paid to Paddon on this occasion, was in like manner allowed. The pauper served the remainder of his term with Paddon, in Spreyton. The questions for this Court were, first, whether the original binding was valid; secondly, whether the assignment was valid. This case was argued (*a*) on a former day of the term.

Cowder and Praed, in support of the order of sessions. The objection to the indenture is grounded on the statute 56 G. 3, c. 139, s. 1, which provides that no child shall be bound as a parish apprentice, "to any person residing or having any establishment in trade at which it is intended that such child shall be employed out of the same county, at a greater distance than forty miles from the parish or place to which such child shall belong," unless (where the child belongs to a place more than forty miles from London) by a special order of

*821] the *justices who authorize the apprenticing, to be made in the manner there pointed out. Sect. 5 enacts, that no settlement shall be gained by virtue of any parish binding, in which the directions of the act shall not be complied with. This statute does not contemplate the case of an individual residing personally out of the country, but still having his establishment within the distance at which the act permits apprentices to be bound. The object is, that the apprentice shall not be obliged to serve out of his own county, at an undue distance from the place to which he belongs. The precautions directed by the act, and particularly by sect. 8 (in case of the master's residence or establishment of business being removed), evidently have this view; and it may be inferred from the language of sects. 2 and 3, that this was the whole intention of the statute. All the enactments which are essential for the apprentice's protection may be fulfilled, whether the master himself be in the country or not. Here the apprentice was not, in fact, bound out of his own parish. To hold that persons residing abroad could not be obliged to take apprentices, would be giving them an undue relief from parochial burdens; and it would be very difficult to say what length of absence would, or would not, constitute an exemption. The obligation to receive parish apprentices is not a personal charge, but in respect of property, and does not depend on residence in the parish, *Rex v. Clapp*, 3 T. R. 107; *Rex v. Tunstead*, 3 T. R. 523; and no injury to the apprentice is likely to result from the binding to a non-resident party, if he leaves a bailiff or steward on his estate, by whom the property is

*822] managed, and the *apprentice can be taken care of, and over whom the control of the justices can be exercised. The pauper here was bound to the business of husbandry, and the master's establishment for that business, though not his personal residence, was within the apprentice's parish. It was not necessary that Lord Courtenay himself should execute the indenture, *Rex v. Fleet*, Cald. 31. Secondly, the assignment, though executed by Lord Courtenay's steward, and without any special authority, was sufficient under the act 32 G. 3, c. 57, s. 7. No special duty is thrown by that clause upon the master assigning; it is enough if the transfer is made in writing, and the party taking the assignment becomes bound to fulfil the covenants in the indenture, which is the essential part of the transaction. There was no reason that the steward should not, as agent to Lord Courtenay, execute this assignment (which is not

an instrument under seal), as well as perform any other ordinary business on his behalf.

John Greenwood and Cockburn, contra. First, the original binding was not valid. The power of binding out poor apprentices is given by 43 Eliz. c. 2; and the act 8 & 9 W. 3, c. 30, s. 5, limits, rather than extends it in respect of the persons to whom such apprentices may be bound, *Rex v. St. Nicholas in Nottingham*, 2 T. R. 726. A penalty under the latter statute, for not receiving an apprentice, could not be enforced against a master living abroad, for the apprentice, or a counterpart of the indenture, could not be tendered to him there. The jurisdiction of magistrates between masters and apprentices upon summons, cannot take effect where the master *is permanently resident abroad. [823 And if these are good objections to the binding, they are not cured by a subsequent recognition of it. Nor do the facts stated amount to a recognition. It is directed by 56 G. 3, c. 139, s. 1 (with a view to prevent the estrangement of children from their parents), that the justices "shall particularly inquire and consider" whether the master "reside" or have his place of business within a reasonable distance from the place to which the child belongs; but according to the argument on the other side, the inquiry must in reality be as to the place where the master intends to employ the apprentice. The word "reside" in cases like this must be construed strictly, according to its usual acceptation, *Rex v. Tunstead*, 3 T. R. 523. The statute 32 G. 3, c. 57, provides that in case of the master's death during the term of the indenture, two justices of the county, &c., or place where the master shall have died, may make certain orders respecting the apprentice. In a case like the present these provisions could not be executed. The same may be said of several other directions of the same act, which are to be fulfilled by two justices of the county, &c., where the master shall live. The act 4 G. 4, c. 34, s. 4, recites that masters frequently reside at considerable distances from the parishes or places where their business is carried on, or are occasionally absent for long periods of time, either beyond the seas, or at considerable distances, &c.; and empowers a justice or justices in case of complaint respecting wages, to summon the steward, agent, &c., to whom the business of any such master is intrusted during such residence or occasional absence, and determine the *complaint as if the master were himself summoned. That could not be done in the present case. This [824 is not an "occasional absence," but a residence beyond the seas. Then as to the assignment. The act 32 G. 3, c. 57, s. 7, which empowers masters to assign over apprentices, clearly requires that the master, personally, should be a party to that act; his mere concurrence, or subsequent consent, is not sufficient. This appears also from the form of assignment in schedule D. of the act. The discretion which the master is to exercise in assigning is not superseded by the intervention of the justices: and where there is a personal trust, and a discretion to be exercised in the fulfilment of it, the power cannot be delegated, *The Attorney-General v. Scott*, 1 Ves. sen. 417. In such a case, even if a mere assent be all that is necessary, it cannot be given through the medium of another person holding a general authority, though such authority be conferred on him by power of attorney, *Hawkins v. Kemp*, 3 East, 410. But here the steward had no power of attorney, or direct authority or instruction of any kind, either for binding this apprentice, or apprentices generally: and supposing that the facts stated amount to a recognition by Lord Courtenay of what had been done, still, where a power is to be exercised with the assent of a particular party, the subsequent approbation of that party is not equivalent to an authority previously given, *Bateman v. Davis*, 3 Madd. 98. And if this were otherwise, here the statute prescribes a particular mode in which the master shall authorize the assignment. Besides, the assignment, by 32 G. 3, c. 57, s. 7, is to be with the *consent of two justices of the county, &c., or place where such master shall dwell. [825

Cur. adv. vult.

Lord TENTERDEN, C. J., now delivered the judgment of the Court. After

stating the facts, his Lordship proceeded as follows. Two objections were relied upon by the respondents ; first, that the original binding of the apprentice to Lord Courtenay, then residing abroad, was invalid ; and, secondly, that the assignment was also invalid. It is unnecessary to decide the first point, as we are all of opinion that the assignment was bad. The statute 32 G. 3, c. 57, s. 7, enacts, "That it shall and may be lawful for any master or mistress of any such parish apprentice as aforesaid, by endorsement on the indenture of apprenticeship, or by other instrument in writing, by and with the consent of two justices of the peace of the county, &c., where such master or mistress shall dwell, testified by such justices under their hands, to assign such apprentice to any person who is willing to take such apprentice for the residue of the term mentioned in such indenture of apprenticeship : " provided that the person to whom the apprentice is to be assigned, shall at the same time, "by endorsement on the counterpart of such indenture, or by writing under his or her hand, stating the said indenture of apprenticeship, and the endorsement and consent aforesaid, declare his or her acceptance of such apprentice," and acknowledge himself, herself, &c., bound by the covenants on the part of the master or mistress to be performed. It is not expressly said, that the master assigning the apprentice shall himself sign the instrument ; but I do not see how it could be valid unless he did, and *826] the form *given in schedule (D.) purports to be so signed. But assuming that a person duly authorized by the master might execute the assignment, we think that, in this case, no sufficient authority is shown. The master ought, at all events, to exercise his own discretion as to the making of the assignment. Here no discretion was exercised on his part. There is no proof of any direction given by him : it only appears, that after the assignment was made, he allowed the expenses of it in his steward's account. We think that is not equivalent to a distinct authority from Lord Courtenay to the steward to execute this instrument for him. No settlement, therefore, was gained by the service in Spreyton ; and whether the original binding was valid or not, the pauper's settlement is in the parish of Powderham, to which he belonged before the binding, and in which he was bound. Order of sessions quashed.

The KING v. The Inhabitants of ELMLEY CASTLE. June 9.

A. hired himself to serve for a year, but told his master, at the time of the hiring, that he had been called upon to serve in the local militia the year before, and expected to be called out again in the May following ; and it was agreed that the master should deduct out of his wages 1s. a day for as many days as he should be absent on service in the militia. A. having served under that contract a year all but fourteen days, during which he was absent on service in the militia, and 1s. a day was deducted from his wages ; it was held, that he thereby, and by virtue of the militia act, 52 G. 3, c. 38, s. 66, gained a settlement.

On appeal against an order of two justices, whereby G. Hall, his wife and children were removed from the parish of Kemerton, in the county of Gloucester, to the parish of Elmley Castle, in the county of Worcester, the sessions confirmed the order, subject to the opinion of this Court on the following case :—

G. Hall, the pauper, hired himself on the 10th of October, 1811, to Thomas *827] Bluck, of Elmley Castle, until Old *Michaelmas-day in the following year, at 14*l.* 14*s.* wages. Having been called upon to serve in the Warwickshire local militia in the course of the preceding year, he informed Bluck of that fact at the time of hiring, and at the same time told him, that he expected to be called out to serve again in the May following ; and it formed part of the agreement between them, that the pauper should allow his master to deduct out of his wages 1s. a day for as many days as he should be absent on service with the militia. The pauper entered into the master's service, and resided and served the whole year in the appellant parish, except fourteen days, during which he was absent on service with the militia. At the end of the year he

received his wages, with the exception of 14s. which Mr. Bluck deducted for the fourteen days absence.

W. J. Alexander and Talbot, in support of the order of sessions. It must be conceded, that a balloted militia-man is incapable of making an unconditional contract to serve for a whole year, and upon that ground it was held, in *Rex v. Holsworthy*, 6 B. & C. 283, where it appeared that the pauper did not, at the time of hiring, inform his master of his being a militia-man, that he gained no settlement by serving for a year under such a contract: but here the pauper did, at the time of the hiring, communicate to his master, the fact of his being liable to be called out to serve in the militia. That case was recognised in *Rex v. Taunton St. James*, 9 B. & C. 831, where also the pauper had not communicated to the master the fact of his being in the militia, and it was held, that notwithstanding *the 48 G. 3, c. 111, s. 15, the militia act then in force, [*828 he was not, at the time when he hired himself, capable of making an absolute contract to serve for a year; and, consequently, that he was not lawfully hired for a year, and gained no settlement. Here, the pauper made a conditional contract only, which it was competent for him to do. There was, therefore, a good contract of hiring for a year; and by the last local militia act, the 52 G. 3, c. 38, the sixty-fifth section of which repeals the 48 G. 3, c. 111, and which received the royal assent on the 20th of April 1812, it is expressly provided (as in sect. 15 of the former act) that no service by any apprentice or servant in the militia shall be deemed an absence from the master's service. At all events, there was a dispensation by the master with the service, for there was an allowance made to him for the time the pauper was absent, and he took him again into his service when his duty of a militia-man had ceased. Besides, this case falls within *Rex v. Westerleigh*, Burr. S. C. 753, and *Rex v. Winchcombe*, Dougl. 391. In the former case the pauper told his mistress that he was in the militia, and he might be absent about a month in a year to attend on that duty, and he would pay a man to serve in his place, or else he would make her an allowance out of his wages for the time he was absent. In the latter case, the pauper, being hired for a year, told his master, that, being a balloted man in the militia, he should be absent for a month, and in lieu of that month would serve another at the end of the year; and these hirings were held to be good on the following grounds, as stated by Mr. Nolan, 1 Nolan, 383, that there was not a chasm in the contract, but a dispensation with the *personal service; that it was not an absolute exception of a month; [*829 there was an alternative, as it might happen that the servant would not be called out; and the agreement as to the absence for a month in the militia, was only what would have been implied, and what the master must have consented to, as the law would have compelled the absence, and the exception was not of time which it was in the option of either to dispense with. In the subsequent case of *Rex v. The Inhabitants of Over*, 1 East, 599, Lord Kenyon said, that *Rex v. Winchcombe* was decided altogether on the last of these grounds. Here the Court called upon

Justice and Greaves, contrd. It is conceded that this was, in the first instance, a conditional hiring; that is, the hiring was for a year, provided the party should not be called out to serve as a militia-man. But the moment he was called out, it had the same effect as if the number of days which he served in the militia had been excepted out of the contract. In *Rex v. Arlington*, 1 East, 239, the pauper was hired for a year as a shepherd, to receive weekly wages, with liberty to be absent during the sheep-shearing season, but to find a man at his own expense to do his work during his absence, his own wages to go on during the whole time; and it was held he gained no settlement, because there was an exception in the original contract. In *Rex v. Martham*, 1 M. & S. 622, where it was held that a settlement had been gained, there was no exception of time when the contract was made, but it was merely stipulated that there should be a deduction from the wages, provided the pauper were prevented from

*830] *working by bad weather, illness, &c. The cases decided as to militia-men were spoken of with disapprobation by Lord Ellenborough, in *Rex v. Beaulieu*, 3 M. & S. 229. In *Rex v. South Killingholme*, 10 B. & C. 802, the pauper hired himself at 5*l.* a year to his aunt, who occupied six acres of land; when she had no work for him, he was to work for anybody, for his own benefit; and it was held that this was an exceptive hiring, and that service under it did not confer a settlement. [Lord TENTERDEN, C. J. How can you get over the sixty-fifth section of the 52 G. 3, c. 38?] That applies only to contracts existing at the time of the ballot or enrolment, and not to contracts subsequently made. Here, the contract of hiring was made after the enrolment.

Lord TENTERDEN, C. J. I think the pauper clearly gained a settlement in the parish of Elmley Castle, and my opinion is founded on the terms of the contract of hiring, and the language of the sixty-fifth section of the 52 G. 3, c. 38. It appears that the pauper, on the 10th of October, 1811, hired himself to Old Michaelmas-day following; and he informed his master, at the time of hiring, that he had been called upon to serve in the militia, in the course of the preceding year, and expected to be again called out to serve in the May following; and it was part of the agreement, that his master should deduct out of his wages 1*s.* a day for as many days as the pauper should be absent on service in the militia. There is nothing of absolute exception in the terms of the contract. The exception or condition, if any such there was, arose from the *831] operation of law on the individual. He was a militia-man, and, *as such, was bound by law to serve, if called upon so to do. Then the 48 G. 3, c. 111, s. 15, and the 52 G. 3, c. 38, s. 65, enact, "that no ballot, enrolment, and service, under this act, shall extend to make void, or in any manner to affect, any indenture of apprenticeship or contract of service between any master or servant, notwithstanding any covenant or agreement in any such indenture or contract, and no service under this act, of any apprentice or servant, shall be deemed to be an absence from service, or a breach of any covenant or agreement as to any service or absence from service in any indenture of apprenticeship or contract of service." The service of the pauper, therefore, in the militia, is not, in point of law, an absence from his service with his master. It is true, that in this case, the parties by their contract have provided, that while the pauper was serving in the militia, though, in point of law, he must be considered as serving his master, he was not to receive any wages. But that makes no difference; the general words of the act are sufficient to enable us to say, that under such a contract as the present, and notice having been given at the time of hiring, that the servant was liable to be called on to serve, he was, in point of law, serving his master while he was in the militia, so as to acquire a settlement by hiring and a service for a year.

LITTLEDALE, J. This case comes very near those of *Rex v. Westerleigh*, Burr. S. C. 753, and *Rex v. Winchcombe*, Dougl. 391; but whether those decisions were right or not, the effect of the clauses in the militia act is to place this party in the same situation as if he had served the master during the time he was in the militia.

*832] *PARKE, J. This case is undoubtedly very like *Rex v. Westerleigh*, Burr. S. C. 753, and *Rex v. Winchcombe*, Dougl. 391. In *Rex v. Taunton St. James*, 9 B. & C. 831, the objection was, that the pauper was not, when he hired himself, capable of making an absolute contract to serve for a year, and, therefore, having made such contract without reference to his liability as a militia-man, he was not lawfully hired for a year, and gained no settlement. But here, the pauper did communicate the fact of his being a militia-man to the master. There is nothing in that case to show that under such circumstances a service in the militia may not be considered as service to the master.

TAUNTON, J. I am of the same opinion, and I think the sessions would have done better not to send up this case. *Rex v. Westerleigh*, Burr. S. C. 753, and *Rex v. Winchcombe*, Dougl. 391, were decided by Judges who were eminent

sessions lawyers, and I think the principles upon which those decisions took place are correctly stated by Mr. Nolan, in his *Treatise on the Poor Laws*. *Rex v. Holsworthy*, 6 B. & C. 282, was decided on the ground that the pauper did not, at the time of hiring, inform his master that he was a militia-man. Here the pauper did so. There was a good hiring for a year. The statute enacts, that no service in the militia shall be deemed to be an absence from service with the master; but, independently of that statute, my opinion, founded on the decisions of *Rex v. Westerleigh* and *Rex v. Winchcombe*, would have been the same.

Order of sessions confirmed.

*The KING v. The Inhabitants of CHEADLE. June 9. [*833]

Appellants against an order of removal, proved that J. J., the father of the pauper's wife, being seised in fee of land, and having several children, it was in his lifetime agreed between them that part of the land should be allotted to each child, in pursuance of which agreement, on the marriage of the pauper in 1808, a portion of the land was allotted to him, upon which he built a house, and resided in it for sixteen years, and then sold the whole for 60*l.* to a party who held it ever since. The respondents then produced a conveyance to the pauper of the land in question in 1815 by S. J., the eldest son and heir at law of J. J. It recited, that the pauper had agreed to purchase the above parcel of land of S. J., and had paid him two guineas for the same, but no conveyance thereof had yet been made; and then expressed, that in consideration of that sum, S. J. bargained and sold, &c. :

Held, that the appellants were not estopped by the recital of this deed from giving parol evidence that the consideration stated in the deed was never paid or intended to be paid, and that the deed was made for the purpose of confirming the pauper's title to the land allotted to him in virtue of the above-mentioned parol agreement.

ON appeal against an order of two justices, whereby William Smith and his wife and children, were removed from the parish of Cheadle, in the county of Stafford, to the township of Scropton and Foston, in the county of Derby, the sessions quashed the order, subject to the opinion of this Court on the following case :—

The settlement of the pauper, W. Smith, at the time of his marriage in 1808, was in the appellant township of Scropton and Foston. The appellants, in order to establish a subsequent settlement by estate in Cheadle, the respondent parish, proved that John James, the father of the pauper's wife, had been seised in fee of a house and some land in Cheadle, on which he resided with his family (a wife and five children), and of which he continued in possession till 1807, when he died intestate, leaving his eldest son, Simon James, his heir at law. It had been agreed in the lifetime of John James, by all the members of the family, including Simon James, that the four younger children (of whom the pauper's wife was one), should have a parcel of the said land allotted to each of them, in order that they might build houses thereon respectively, when they could raise the money. In pursuance of this agreement, a portion of the land was staked out for the *pauper to build on a short time after his marriage, and he built a cottage thereon upwards of twenty-one years since, [*834 in which he resided sixteen or seventeen years, and then sold it for 60*l.* to one John Higgs, who still has it. The land so staked out was a small plot, about four yards by six or seven, and the full value of it in fee before the cottage was built was two guineas or two guineas and a half. When the cottage was built, Simon James (the eldest son of John), who lived within a few yards, assisted the pauper in staking out the land, and in doing some of the work at the foundation. On the part of the respondents, indentures of lease and release of the 6th and 7th of January, 1815, were produced and proved, for the purpose of showing that this land had been purchased by the pauper for a money consideration not amounting to 30*l.* The release was between Simon James (therein described as eldest son and heir at law of John James, deceased), of the first

part; William Smith, the pauper, of the second part, and John Moreton (therein described as a trustee nominated by and on behalf of the said William Smith) of the third part; and after reciting, that "the said William Smith some time since agreed to purchase from the said Simon James the plot or parcel of land thereafter mentioned, and had paid the said Simon James the sum of 2*l.* 2*s.* as consideration for the same, and lately erected a dwelling-house thereon, but no conveyance thereof had yet been made," it was witnessed, that for and in consideration of 2*l.* 2*s.* to the said Simon James in hand paid by the said William Smith at or before the sealing and delivery of these presents, the receipt whereof Simon James did thereby acknowledge, and thereof did acquit and for ever discharge the said William *Smith, his heirs, &c.; he the *835] said Simon James did grant, bargain, &c., the said plot of land, and the said house erected thereon, to the pauper, his heirs and assigns, &c. Each of these deeds was stamped with a 15*s.* stamp. The evidence of the pauper, and also of one Jeremiah Robinson (who was not a party to the deed), was then tendered on the part of the appellants, and objected to on the other side, but received by the Court, to show that the consideration stated in the deed was not paid, nor intended by the parties to be paid; and that the deed was only made for the purpose of confirming the pauper's title to the plot of land which had been allotted to him shortly after his marriage, under the parol arrangement between John James and his children. The sessions found that the consideration mentioned in the deed was not paid, nor intended to be paid. The questions for the opinion of this Court were, 1st, whether the last-mentioned evidence was properly admitted? and if it was, then, 2dly, whether, on all the facts of the case, the pauper acquired a settlement in the respondent parish?

Shutt and Whateley, in support of the order of sessions. The evidence was properly received, at all events, to show that the deed was void as being a fraud on the revenue laws; for the stat. 48 G. 3, c. 149, Sched. part 1, tit. *Conveyance*, requires a stamp of 15*s.* where the purchase or consideration money does not amount to 50*l.*, but where it exceeds that sum, and does not amount to 150*l.*, a stamp of 1*l.* Now, the deed on the face of it had a proper stamp; but the actual value of the property being 60*l.* (for it was sold for that sum a few *836] years after the deed), the stamp was insufficient. But *the parol evidence was admissible on another ground, because, though the parties to the deed might be estopped by it from saying that it was not made for a money consideration, the parish officers, who are neither parties nor privies, are not. *Starkie on Evidence*, 1051; *Rex v. Scammonden*, 3 T. R. 474; *Rex v. Laindon*, 8 T. R. 379. In *Rex v. Olney*, 1 M. & S. 387, the appellants were admitted to prove that only 12*l.* purchase-money was paid for a messuage by the pauper, though the deed by which it was conveyed to him stated 52*l.* to have been paid. Then, supposing the evidence properly received, the pauper clearly acquired a settlement by estate, the property having been possessed uninterruptedly by and through him for more than twenty years, *Rex v. Cold Ashton*, Burr. S. C. 444; *Rex v. Butterton*, 6 T. R. 554; *Rex v. Calow*, 3 M. & S. 22.

Corbet and Whitcombe, contra. The sessions have not found fraud; and even if there had been a fraud on the revenue, the deed, as between the parties, might have been valid, *Doe d. Kettle v. Lewis*, 10 B. & C. 673; *Robinson v. Macdonell*, 5 M. & S. 228. Then, as to the next point; the evidence merely went to show that the two guineas were not paid, or intended to be paid; it was not offered for the purpose of proving that any other consideration was in question, or whether or not such different consideration was paid, or intended so to be. *Rex v. Scammonden*, 3 T. R. 474, and *Rex v. Laindon*, 8 T. R. 379, only establish that parol evidence, though not receivable to contradict a *837] deed, may be admitted to ascertain an independent fact: but here, *the object of the evidence was merely to contradict a particular fact recited in the deed, viz., that two guineas was the consideration paid. In *Rex v. Scammonden*, 3 T. R. 474, the evidence was given to establish a fact consistent

with the deed, namely, that a further sum than that mentioned therein was paid; but here the effect of the evidence is to show that no consideration whatever was paid, and that is to contradict the deed. Then, as to the adverse possession, if the pauper had brought an ejectment, a conveyance under these circumstances would be evidence to prove that he was not seised before its date, 7th of January, 1815, and then there has not been twenty years' adverse possession.

Lord TENTERDEN, C. J. I think a settlement was gained in Cheadle. The appellants proved that John James, the father of the pauper's wife, being seised in fee of a house and land in Cheadle, and having several children, it was agreed among them in his lifetime that a part of the land should be allotted to each of them. One of the children married the pauper in 1808, and, soon after, in pursuance of the agreement, a portion of the land was staked out, upon which the pauper built a house, and after residing there seventeen years, he sold the house for 60%. There having been twenty years' possession, the case thus far showed such an estate as gave the pauper a settlement. To avoid this settlement by estate, the parish officers of Cheadle proposed to show, by the deed of 1815, that the pauper's title to it accrued by a purchase for a money consideration not amounting to 30%. That deed recited, that Smith *had agreed to purchase the land for the consideration of two guineas. The other parish [838 alleged in answer that the recital was not true, and that the real consideration was not a money consideration; and they gave evidence that the two guineas were not paid, or intended to be paid, and that the only object of the parties in executing this deed was to confirm the pauper's title. The objection is, that evidence to contradict the statement of the consideration in the deed ought not to have been admitted. Now, the parties to the deed might be estopped by it from saying that this was not a purchase for a money consideration; but the parish officers, who are strangers to it, are not. If that were otherwise, the greatest inconvenience and injustice might arise, because a settlement might be acquired or not according to the language used by parties in an instrument of this nature. The evidence was, in my opinion, properly received, as showing, not that the deed was void, but that this was not a purchase for a money consideration.

LITTLEDALE, J., concurred.

PARKE, J. It is quite clear, that although the parties to this deed were estopped by it, strangers were not, and consequently the parish officers might show the real nature of the transaction. If this were not so, parishes might be burthened with settlements for which there was no colour. It is clear that a settlement was gained in this case by an estate voluntarily conveyed to the pauper.

TAUNTON, J., concurred.

Order of sessions confirmed.

*FOLLIOT NASH and Others v. BENJAMIN COATES, JOHN COLLOE, SAMUEL NASH, MARY NASH, Widow, FREDE. [839 RICK WILLIAMS, an Infant, JOHN NASH, the younger, an Infant, and JOHN NASH.

Testator devised lands to trustees and the survivor of them, and the heirs of such survivor, in trust for F. W., then an infant, till he should arrive at the age of twenty-one years, upon his legally taking and using the testator's surname; and then, upon his attaining such age, and taking that name, habendum to him for life; and from and after his decease, to hold to the trustees and the survivor of them, and the heirs of such survivor, to preserve contingent remainders, in trust for the heirs male of F. W., taking the testator's name, and the heirs and assigns of such male issue for ever; but in default of such male issue, then over: Held, that the trustees did not take the legal estate in the lands devised, but that F. W. took a legal estate-tail in them on his coming of age and adopting the testator's surname.

THE following case was sent by the Vice-Chancellor for the opinion of this Court:

Richard Nash, by his will dated May 5th, 1814, devised as follows:—"I give to my trustees, Benjamin Coates, John Colloe, and Samuel Nash, certain lands and premises (described in the will) in the county of Hereford, to hold to my said trustees and the survivor of them, and the heirs of such survivor, in trust for Folliot Williams, now an infant, my natural son, till he arrives at the age of twenty-one years, upon his legally taking and using the surname of Nash, in lieu and instead of that of Williams, and then, upon his attaining such age and legally taking the name of Nash as aforesaid, and using the same, to hold to him, the said Folliot Williams, then taking the name of Nash, for and during the term of his natural life; and from and after his decease, to hold to my said trustees and the survivor of them, and the heirs of such survivor, to preserve contingent remainders, in trust for the heirs male of the body of the said Folliot Williams, taking the name of Nash, lawfully issuing, and the heirs and assigns of such male issue for ever; but for want of and in default of such male issue lawfully issuing, then in trust for my natural son *Frederick *840] Williams, brother of the said Folliot Williams, on his attaining the age of twenty-one years, and legally changing, taking, and using the surname of Nash as aforesaid, and then, upon his attaining such age and taking and using the surname of Nash as aforesaid, to hold to him the said Frederick Williams for and during the term of his natural life; and from and immediately after his decease, to hold to my said trustees and the survivor of them, and the heirs of such survivor, to preserve contingent remainders, in trust for the heirs male of the body of the said Frederick Williams (taking the name of Nash) lawfully issuing, and the heirs and assigns of such male issue for ever; but in default of such male issue, then in trust for Samuel Nash, junior, son of my kinsman Samuel Nash." The testator then devised his Shropshire estates, therein specially described, to the same trustees, in trust for Frederick Williams, in the same terms and subject to the same conditions which were contained in the devise to Folliot Williams, remainder to Folliot Williams, and ultimate remainder over to Samuel Nash in fee. The testator died on the 14th of June, 1815, leaving all the devisees in trust, and also the said Folliot Williams, now Folliot Nash, and Frederick Williams, him surviving. Folliot Nash attained his age of twenty-one years on the 11th of February, 1825, and thereupon applied for and obtained his majesty's license to adopt and use the name of Nash, and was let into the possession of the testator's Herefordshire estates, and still is in such possession, and in receipt of the rents and profits thereof. The defendant Frederick Williams is still an infant.

A bill in this cause was filed in Michaelmas term, 1825, praying, amongst *841] other things, that the testator's will might be established, and the trusts thereof performed and carried into execution, and that the interest of all parties under the same might be ascertained.

The cause was heard before the Master of the Rolls on the 27th of July 1827, and by the decree made on that hearing, it was declared that the said testator's will ought to be established, and the trusts thereof performed and carried into execution, and the same was decreed accordingly, and certain directions were thereby given relating to the accounts to be taken of the testator's estate.

The cause coming on to be heard before the Vice-Chancellor, for further directions upon the Master's general report made in pursuance of the said decree, and the plaintiff Folliot Nash claiming to take an estate tail in the Herefordshire estates, under the devise thereof by the said testator's will, and the defendant Frederick Williams also claiming, on his attaining the age of twenty-one years, to take an estate tail in the Shropshire estates, under the devise thereof by the testator's will, his Honour directed a case to be made for the opinion of this Court, and that the question should be,

What estate Folliot Nash takes in the Herefordshire estates, under the devise thereof by the testator's will? Whether an estate tail, or for life only? And also what estate, the defendant Frederick Williams, on his attaining the age of twenty-one years, and taking the surname of Nash as directed by the testator's will, will take in the Shropshire estates, under the devise thereof by the said will? Whether an estate tail, or for life only? This case was argued in last Hilary term by

**Dodd* for the plaintiffs. Folliot Nash and Frederick Williams take estates tail in the property devised; for this falls within the rule in [*842 Shelley's case, 1 Rep. 164, a, that where the ancestor, by any gift or conveyance takes an estate of freehold, and in the same gift or conveyance an estate is limited either mediately or immediately to his heirs in fee or in tail, in such case, *heirs* are words of limitation and not words of purchase; and the remainder is executed in possession in the ancestor so taking the freehold, and is not contingent; the two estates unite, and the ancestor takes an estate in fee or in tail. This rule applies to devises as well as to deeds, and the interposition of an estate to trustees to preserve contingent remainders does not prevent its taking effect, *Papillon v. Voice*, 2 P. Wms. 471. If the limitation to trustees had been during the lives of the tenants for life to preserve contingent remainders, the application of the above rule would not be disputed; but it will be said that, here, the limitation in trust to preserve contingent remainders, being, not during the lives of the tenants for life, but after their decease, gives the trustees the legal estate, and the heir male of the body an equitable estate only; and, then, that the estates for life and in remainder, being of different natures—one legal, and one equitable—will not coalesce; *Fearne's Cont. Rem.* 58. It is undoubtedly established by authorities, that where the ancestor's estate is merely equitable, a limitation of the legal fee to the heirs of the body will not fall within the rule in Shelley's case; and Mr. Fearne contends that, by parity of reasoning, where the legal freehold is limited to the ancestor, *and [*843 the equitable fee to the heirs of his body, the estates will not fall within that rule; and in a note to the 6th edit. of *Fearne's Cont. Rem.* p. 60., *Venables v. Morris*, 7 T. R. 342, 438, which will probably be relied on here, is cited as a strong authority in support of that conclusion. There, an estate was limited to the husband for life; remainder to trustees and their heirs during his life, in trust to preserve contingent remainder; remainder to the wife for life; remainder to trustees and their heirs (not during her life) in trust to support the contingent remainders thereafter limited; remainder to the first and other sons successively in tail; remainder to the wife in tail; remainder to such uses as she should by deed or will appoint. It was held that the trustees took a legal estate in fee after the determination of the wife's life estate, and that all the subsequent limitations were of trust estates: and that an appointment by the wife to the use of the right heirs of the husband did not create any estate which could unite with the antecedent life estate of the husband, but only gave an equitable estate to the person who, at his death, should answer the description of his right heir. The decision in that case proceeded on the ground stated by Lord Kenyon in *Doe dem. Lee Comper v. Hicks*, 7 T. R. 433, viz. that it was absolutely necessary that the fee should be in the trustees; for the tenant for life (the wife) had a power of appointment, and if, in exercising that power, she had introduced any contingent remainders, they might all have been defeated if the uses were not executed in the trustees. But here there are no contingent estates; and, therefore, it is not necessary that the trustees should take the legal estate for a longer term *than during the [*844 lives of the tenants for life. It is a general rule, that where an estate is given to trustees, it shall enure no longer than the purposes of the trust require; and, here, those purposes do not require that the trustees should take the legal fee, therefore, it is in the *cestui que trust*. *Doe v. Hicks*, 7 T. R. 433, is like the present case. There, after a devise to one for life, with re-

mainder over, the devisor limited the estate from and after the determination of the former estate to trustees and their heirs in trust to preserve contingent remainders but to permit the tenant for life to take the profits, and he afterwards gave other estates for lives with remainders over; and after each estate for life, he interposed the same estate to trustees and their heirs: it was held, that this showed his intent to be, that the estates to the trustees should be confined to the lives of the several tenants for life; and, consequently, that those in remainder took legal estates, there being no other circumstances in the will to show a contrary intent. There the Court observed, that there was no necessity for a greater estate vesting in the trustees; and that the devisor, by again giving the same estate to the trustees and their heirs after each successive estate for life, appeared evidently to have understood that he had not vested the whole interest in them by the first limitation. The same reasoning applies to this case, in which, as was observed in the former, the whole doubt arises from the inaccurate penning of the will. This, therefore, is merely the ordinary case of a trust estate interposed to preserve contingent remainders during an estate for life. In *Curtis v. Price*, 12 Ves. 89, the objects of the limitation *845] were *all limited to the life of the tenant for life, and the Court there thought it unnecessary that the trustees should take the fee. And according to the argument adopted by the Court in that case, to effectuate the testator's intention, the will may be read as if additional words were introduced; here, therefore, the words, "*during the life of Folliot Nash*," may be understood as part of the will, in favour of the general intention, which undoubtedly was, that the estate should not go over until the issue of the tenants for life was exhausted.

Preston, contra. Folliot Nash and Frederick Williams took estates for life, with an equitable remainder in fee to their sons. The trustees had the legal fee, and therefore the interests of the parents and of their heirs-male are of different qualities, one legal and the other equitable; and there are superadded words of limitation to the gift to the heirs-male. *Venables v. Morris*, 7 T. R. 342, 438, is in point, to prove that it was necessary that the trustees should take the legal fee. The testator, after giving a life estate to Folliot Williams on his attaining the age of twenty-one years and taking the name of Nash, says, "and from and after his decease to hold to my said trustees, and the survivor of them, and the heirs of such survivor, to preserve contingent remainders, in trust for the heirs-male of the body of the said Folliot Williams, taking the name of Nash, lawfully issuing, and the heirs and assigns of such male issue for ever." The words of this devise to the trustees *prima facie* import a gift to them of the legal fee, and there is nothing to show that their legal estate was to cease with *the life of the first taker. In *Doe v. Hicks*, *846] 7 T. R. 433, and *Curtis v. Price*, 12 Ves. 89, though the devise was to the trustees and their heirs, there was sufficient on the face of the will, to enable the Court to see that the estate of the trustees was intended to be restricted in each case, to the life of the first taker. In *Doe v. Hicks*, the limitation to the trustees and their heirs was construed to operate only for the lives of the tenants for life; first, because the object for which the estate was given to them, being to preserve contingent remainders, did not require their estate to endure any longer; secondly, because from the context of the will it was evident the testator was limiting trust estates for the lives only of the several tenants for life, since he repeated the limitations to the trustees after each estate for life. In *Curtis v. Price*, the purpose to be answered was one for which an estate in the trustees during the life of the wife, would be sufficient. Besides there was a term for years to the same trustees, immediately after the limitation to the trustees and to their heirs; and this term could not take effect as a legal estate if the trustees had the fee under the former gift. The case of *Colmore v. Tyn-dall*, 2 Younge & J. 605, shows that it is not a sufficient ground for restricting an estate limited in a deed to a trustee and his heirs, to an estate for life, that

the estate given to the trustee seems to be larger than was essential to the purpose; or that the limitation has in subsequent parts of the deed been unnecessarily repeated. In that case lands are limited to the use of A. for life, and after the determination of that estate by forfeiture or otherwise, to the use of B. and his heirs, during the life of A., to support contingent remainders, remainder to the use of C. for *life; remainder to the same B. and his heirs, during the life of C. to support contingent remainders; remainder to the first and other sons of C. in tail male; remainder to the use of D. for life, and if she should marry, and her husband should survive her, then to her husband for his life, and "after the determination of those estates," to the said B. and his heirs (without adding during the life of D.) to support and preserve contingent remainders; and after the decease of the survivor of D., and such husband, to the first and other sons of D. in tail; remainder to the use of E. for her life, and if she should marry and the husband should survive her, to her husband for his life, "and after the determination of those estates," to the said B. and his heirs (without saying during the life of E.), to support contingent remainders; and after the decease of E., and the survivor of the said E., and such husband as she should happen to marry, to the first and other sons of E. in tail male: and it was decided that under the limitations to B. and his heirs, following the limitations of the estates for life to D. and E., the trustee took the fee, and that as a consequence E. took an equitable estate only. There is also a peculiarity in the present case; each successive taker is to attain the age of twenty-one years, and to assume the testator's name of Nash, and then follows the gift to the trustees and their heirs, to preserve contingent remainders in trust for the heirs male of the body of *Folliot Williams taking the name of Nash*, and then in default of such issue in trust for Frederick Williams, with like limitations. This was a contingent remainder to the heirs male, i. e. the sons as purchasers, and to preserve this remainder, it might be necessary that the trustees *should take a legal estate, because the name might not be taken during the life estate: and in this view the case falls within *Venables v. Morris*, 7 T. R. 342, 438, which establishes that the bare possibility of there being a contingent interest to require support after the determination of the life interest, is a reason for giving the trustees a fee, because, without that construction, the gift might fail; as would be the case here, if this were a contingent remainder of the legal estate. There is in this case a devise which in its terms imports a gift of a fee to the trustees; there is an absence of all circumstances to cut that gift down to a life estate: and there are purposes to be answered after the death of the owner of the life interest, which require that the trustees should take a fee, for there are contingent gifts which might otherwise be defeated.

Dodd in reply. In *Colmore v. Tyndall*, 2 Y. & J. 605, the question turned upon a deed, not a will. Here the remainder to the heirs male of *Folliot Williams* was not contingent, but was a vested interest liable to be defeated; *Doe dem. Hunt v. Moore*, 14 East, 601. There were therefore no contingent estates requiring to be supported by a legal estate in the trustees, as was suggested in *Venables v. Morris*, 7 T. R. 342, 438.

The following certificate was afterwards sent:—

We have heard this case argued by counsel, and we are of opinion that the plaintiff *Folliot Nash* took an estate tail in the Herefordshire estates under the devise thereof by the will of the testator *Richard Nash*, and also that the defendant *Frederick Williams* on his *attaining his age of twenty-one years, and taking the surname of *Nash*, as directed by the said testator's will, will take an estate tail in the Shropshire estates under the devise thereof.

TENTERDEN.

J. LITTLEDALE,

W. E. TAUNTON,

J. PATTESON.

PRESCOTT v. THOMAS BOUCHER.

The executor of a person who was seised in fee of land, and demised it for a term of years, reserving a rent, cannot distrain for arrears of rent accrued in the testator's lifetime; for the latter was not a tenant in fee-simple of a rent within the meaning of the statute 32 Hen. 8, c. 37, s. 1.

REFLEVIN. Avowry by the defendant as executor of the last will and testament of William Boucher, deceased, stated that the plaintiff from the 25th of March, 1829, until and after the 25th of March, 1830, and from thence until and at the time of the death of the said W. Boucher, held and enjoyed the premises mentioned in the declaration, &c., as tenant to W. Boucher by virtue of a demise thereof to him the defendant theretofore made at the yearly rent of 70*l.*, and because 70*l.* of the rent for the space of one year ending on the 26th of March, 1830, was due, and unpaid until and at the time of the death of W. Boucher, and from thence until and at the said time when, &c., continued in arrear from the plaintiff to the defendant, as such executor, he the defendant as such executor avowed, &c. Plea in bar by the plaintiff, that the said W. Boucher at the time of the making of the said demise in the avowry mentioned, and from thence until and at the time of his death, was seised in his demesne as of fee of and in the said premises, in which, &c., and that the *850] said demise *under which the plaintiff held and enjoyed the same, &c., at the yearly rent in the avowry mentioned, was a certain demise thereof, heretofore, to wit on the 25th of March, 1825, made by the said W. Boucher, in his lifetime to the plaintiff for a term of years still unexpired, to wit, the term of seven years. General demurrer and joinder. This case was argued in last Easter term. (a)

Follett, in support of the demurrer. The question is, whether, if a person seised in fee of land demises it for years, reserving rent, his executor can, by the statute 32 Hen. 8, c. 37, distrain after his death for arrears of rent incurred in his lifetime. That statute recites, that by the order of the common law the executors of tenants in fee simple, tenants in fee tail, and tenants for terms of lives, of rents services, rent charges, rent seeks, and fee farms, have no remedy to recover such arrearages of the said rents or fee farms as were due unto their testators in their lives, &c., and then enacts, that it shall be lawful to every executor of any such person unto whom such rent or fee farm is or shall be due and not paid at the time of his death as aforesaid, to distrain for the arrearages of all such rents and fee farms, &c. (b) Now, an executor of a person seised in fee simple of land, who demised it for years, is clearly within the equity of the statute, for such executor had no remedy at common law, and the authorities collected in Chitty's Statutes, title Landlord and Tenant, show that such an executor may distrain under the statute. A doubt is indeed suggested on the point in Buller's N. P., p. 57, where it is *851] observed, "Lord Coke *says, if a man make a lease for life, or a gift in tail, reserving a rent, this is a rent service within the statute; from whence it may be inferred, that he thought that a rent reserved upon a lease for years was not within it, and I apprehend that it is not, for the landlord is not tenant in fee tail, or for life, of such a rent; and it is the executors of such tenants only who are mentioned in the act. It is assumed there that a tenant in fee, who demises for years, reserving a rent, is not a tenant in fee of the rent, but, if not, what interest has he? Rent is part and parcel of the estate, is incident to and partakes of the nature of the reversion. If tenant in tail leases for twenty-one years, reserving rent to himself, his heirs, and assigns, the rent will go with the reversion to the heir in tail, Cother v. Merri-
rick, Hardr. 89. So, if it be generally reserved to a man, his heirs and assigns,

(a) Before Lord Tenterden, C. J., Littledale, Parke, and Patteson, Js.

(b) See it given at length, page 854, post.

it will go to the heir in borough English, and to the heir on the part of the mother, Hill's case, cited in Cother v. Merrick. It may be said that, because the term here is for years, the rent issuing out of the land must be a chattel interest. If that were so, the accruing rent would go to the executors, whereas it goes to the heir: therefore the testator's interest must have been the same as it was in the reversion, and of that he was seised in fee. The difficulty has arisen from confounding a reservation of rent by the tenant of the freehold out of which the rent issues, with a rent granted by the owner of the land to a stranger. A tenant in fee of land, who leases for years reserving rent, thereby does no more than keep to himself part of his estate; he may grant the term without *reserving a rent, but if he grants the term and reserves the [*852 rent, he has the same interest in that rent as he had in the land before he granted the term. The testator, in this case, must therefore be taken to have been seised in fee of the rent. It cannot be shown that he had any other interest. And this is consistent with the construction put upon the statute by Lee, C. J., in Powell v. Killick, Selwyn N. P. 678, 8th edit., which was approved of by Burrough, J., in Martin v. Burton, 1 B. & B. 279, and Merito v. Gilbee, 8 Taunt. 159, and by the Court of Common Pleas in Staniford v. Sinclair, 2 Bingham 193. In Renvin v. Watkin, Selwyn N. P. 678, on demurrer to an avowry by the administrator of a party who died seised in fee, for rent due to the intestate on a demise for years, it was observed that the statute, 32 H. 8, c. 37, only gives a remedy by distress for rents of freehold; and it is said, that the Court seemed of this opinion: but no judgment appears to have been ultimately given.

Crowder, contra. The testator was not a tenant in fee simple of a rent service, rent charge, or rent seek. He was merely a tenant in fee simple of land, who had demised it for seven years, and reserved out of it a rent to continue for that period. The executor might have had a remedy in debt for these arrears; and even if the case be, as is contended, within the equity of the statute, it cannot be brought within its words. It is said the testator was tenant in fee simple of the rent, because he had the fee simple of the land out of which it issued; but the nature of the rent, whether it be freehold or not, cannot depend upon the quality of *the landlord's estate. He could [*853 not have a fee simple in a rent which was to endure for seven years only. It is clear from the language of the statute, that it was not meant to take in every case where a demise is made by the party having the fee. The law, as stated in the passage cited from Buller's N. P., has been considered by text writers in general to be correctly laid down. Mr. Bradby, in his Treatise on the Law of Distresses, p. 80, says, that a rent reserved upon a lease for years is not within the statute, because terms for years are not mentioned in it; and after citing the passage from Buller's N. P., and the case of Powell v. Killick, Selwyn N. P. 678, Buller N. P. 57, he observes, that that decision at Nisi Prius can hardly be sufficient to weigh against the authorities that oppose it. In a note to Co. Litt. 162, a, by Mr. Thomas, 3d vol. p. 257 of his edition, after referring to the above passage and to Powell v. Killick, it is added, "rents, therefore, in which the testator or intestate had an estate of freehold, or of freehold and inheritance, are within the statute of Hen. 8; but for arrears incurred in his lifetime on a lease for years, no distress can be made by his executors or administrators, otherwise than at common law." In Meriton v. Gilbee, 8 Taunt. 159, Martin v. Burton, 1 Brod. & B. 279, and Staniford v. Sinclair, 2 Bingham 193, the present point did not come directly in question, and the passage from Buller's N. P. does not appear to have been cited.

Follett, in reply. It has formerly been held, that this statute would not apply if the executor had an independent remedy by action of debt, but this is answered in Co. Litt. 162, b, where it is said that the statute in *that point adds another remedy to that which before existed. The preamble [*854 of the act mentions several kinds of rents, among which the term "rents ser-

vices" comprehends those that are, in their nature, incident to, and inseparable from, the reversion, being reserved out of an interest which the landlord creates by his demise or grant. And the interest which the landlord has in the rent, for the time it lasts, is the same as he had in the reversion. [Lord TENTERDEN, C. J. The statute 32 H. 8, c. 37, has always been treated as if the words *rents services* in the commencement of the preamble were one word, but elsewhere in the act, the word *rent* occurs by itself.] *Cur. adv. vult.*

Lord TENTERDEN, C. J., in the course of this term, delivered the judgment of the Court.

The question raised upon this record is this, whether the executor of a person who was seized in fee of land and demised it for a term of years, reserving a rent, can distrain for the arrears of such rent, accrued in the lifetime of the testator? At common law it is clear that he could not so distrain, and his power to do so, if he has any, must be derived from the provisions of the statute, 32 H. 8, c. 37, s. 1.

The preamble of that statute is material because the enacting part of the first section has no words distinctly describing the persons whose executors are empowered to distrain; but refers to the preamble by the word "such."

The preamble and first section of the act are as follows: "Forasmuch as by the order of the common law, the executors, or administrators of tenants in fee simple, *tenants in fee tail, and tenants for term of lives, of rents services, rent charges, rents secks, and fee farms, have no remedy to recover such arrearages of the said rents or fee farms, as were due unto the testators in their lives, nor yet the heirs of such testator, nor any person having the reversion of his estate after his decease, may distrain, or have any lawful action to levy any such arrearages of rents or fee farms, due unto him in his life as is aforesaid; by reason whereof, the tenants of the demesne of such lands, tenements or hereditaments, out of the which such rents were due and payable, who of right ought to pay their rents and farms at such days and terms as they were due, do many times keep, hold, and retain such arrearages in their own hands, so that the executors and administrators of the persons to whom such rents or fee farms were due, cannot have or come by the said arrearages of the same, towards the payment of the debts and performance of the will of the said testators: for remedy whereof be it enacted, &c., that the executors and administrators of every *such person or persons*, unto whom any such rent or fee farm is or shall be due, and not paid at the time of his death, shall and may have an action of debt for all such arrearages, against the tenant or tenants that ought to have paid the said rent or fee farms so being behind in the life of their testator, or against the executors and administrators of the said tenants; and also furthermore, it shall be lawful to every such executor and administrator of any such person or persons unto whom such rent or fee farm is or shall be due, and not paid at the time of his death as is aforesaid, to distrain for the arrearages of all such rents and fee farms, upon the lands, tenements, and other hereditaments, which were charged with the payment of such *rents or fee farms, and chargeable to the distress of the said testator, so long as the said lands, tenements, or hereditaments continue, remain and be in the seisin, or possession of the said tenant in demesne, who ought immediately to have paid the said rent or fee farm so being behind, to the said testator in his life, or in the seisin or possession of any other person or persons claiming the said lands, tenements, and hereditaments, only by and from the same tenant by purchase, gift, or descent, in like manner and form, as their said testator might or ought to have done in his lifetime, and the said executors and administrators shall, for the same distress, lawfully make avowry upon their matter aforesaid."

Looking at these words independently of decided cases, it should seem that the legislature meant to provide remedy for those only who were previously without any remedy, by action or otherwise; and the statute provides a double remedy, namely, by action of debt, and by distress. What persons had a remedy

by action of debt, and the reasons why they had it, will be found laid down in Bacon's Abridgment, tit. *Rent* (K) 6,^(a) referring to Gilbert on Rents, 93, Co. Litt. 162, and Ognel's case, 4 Co. 49. The passage is as follows: "The remedy by action of debt extended only to rents reserved on leases for years, but did not affect freehold rents; the reason whereof is this: Actions of debt were given for rent reserved upon leases for years, for that such terms being of short continuance, it was necessary that the lessor should follow the chattels of his tenant, wherever they were, or wheresoever he should remove them: but when the rents were reserved on the durable estate of the feud, *the feud itself, and the chattels thereupon were pledged for the rent; and if the land [*857 were unstocked for two years, the lord had his *cessavit per biennium* to recover the land itself; and hence it is that if the durable estate of the feud determined, as if the lessee for life died, the lessor might have an action of debt for the arrears: because the land was no longer a security for the rent, and therefore the chattels of the tenant were liable to satisfy the arrears in an action of debt wherever the tenant removed them. So it was in the case of a rent charge; for if a man were seised of it in fee, and it was arrear, he could have no action of debt for the arrears; and if he died, his heir could not have any real action for the arrears, for that is proper for the recovery of the possession, which was still in him, nor could he have a personal action, because, besides the former reason, it were absurd to give a real action for the rent running on in his own time, and a personal action for the arrears in the lifetime of the ancestor at the same time; for it could not be supposed to be both a real and personal thing; for this reason, also, the executor could have no action for the arrears (who is entitled to the personal estate), and also because he could not entitle himself by virtue of the contract that created the rent, since the heir was constituted representative by the contract, and by consequence that representation excluded all other persons from taking any benefit as representatives that did not come under that character."

The view of the statute which has been above suggested, was acted upon in the case of *Turner v. Lee*, Cro. Car. 471, in which it was held that where a rent charge had been *granted for years, if the grantee should so long live, the executor of the grantee could not distrain under the statute, [*858 because he had a remedy by action of debt at the common law. If this construction had always been adhered to, the present case would be clear: but a different view of the statute seems to have been taken in a previous case of *Lambert v. Austin*, Cro. Eliz. 332, in which it was assumed that the executor of the grantee for his own life of a rent charge could distrain under this statute, although it is plain that such executor had a remedy by action of debt at common law, the estate for life in the rent having been determined. And in *Hool v. Bell*, 1 Ld. Raym. 172, the point was expressly so held. It was there argued that the expression, "tenants for life," in the statute must be taken to mean tenants *pour autre vie*, whose executors were, certainly without remedy during the life of *cestuique vie*; but the court said, "the statute is a remedial law, and shall extend to the executors of all tenants for life, and the law has been taken so always since the statute, and has never been questioned, and the words of the statute are general enough to extend to all. And in *Lambert v. Austin*, Cro. Eliz. 332, this seems to be admitted, and therefore the rule in *Turner v. Lee*, Cro. Car. 471, so generally taken, cannot be law." The case of *Hool v. Bell*, 1 Ld. Raym. 172, appears to have been always treated as good law, and it must be considered that the statute 32 H. 8, c. 37, is not confined to persons who had no remedy at all previously.

The question then is whether the present case be within the words or meaning of the statute. The words are "executors or administrators of tenants in fee *simple, tenants in fee tail, and tenants for term of lives, of rents [*859 services, rent charges, rents secks and fee farms." Nothing is said as to tenants for term of years. If, therefore, the testator in the present case was

(a) Vol. vii. p. 47, 7th ed., by Gwillim and Dodd.

tenant for term of years, his executor is not within the words of the statute. If the testator was tenant of the *rent* at all, it seems difficult to say that he was tenant for a longer time or for a greater estate, than the *rent* could have continuance; it seems absurd to say that a man is seised in fee of a *rent*, the duration of which is limited to a few years, or to a particular life. In the case of a *rent* charge granted for years, it is impossible to say that the grantee is within the words "tenant in fee simple, fee tail, or for term of lives," and why should a lessor who reserves a *rent* to himself and his heirs, by a lease for years, be thought to be within the same words? The reasons which are pressed in argument are that the *rent* is incident to the reversion, that the lessor is seised in fee of the reversion, and must therefore be seised in fee of the *rent*, which is incident to it; and that he cannot be tenant for years of the *rent*, for if he were, it would go to his executors on his death, whereas, by law, it is incident to the reversion, and passes with it. This argument may be very forcible to show that the lessor who has demised for years, is not tenant for years of the *rent*; but it does not follow that he is tenant in fee simple, fee tail, or for term of lives, of the same *rent*. It is true that in the present case the testator was seised in fee of the land before he made a lease for years; after making that lease, he continued seised in fee of the land, seised of the immediate freehold, but, in respect to the right of possession, having a reversionary estate expectant on the determination of the lease for years: he still continues tenant of the freehold in every legal sense, *860] and is *not tenant of the *rent* at all in the legal sense of the word "*tenant*," as used in the statute in question.

Where, indeed, the *rent* is reserved on a lease for life, or a gift in tail, the lessor or donor parts with the immediate freehold in the land; he has only a reversionary estate expectant on the determination of the immediate estate of freehold which is in another; and during that estate of freehold he is strictly tenant of the *rent* in a legal sense, though it be but a *rent* service, and be incident to the reversion; his remedy for the *rent* is by writ of assize, and not by a personal action of debt. If the lease be for life, he is tenant for life of the *rent*; if it be a gift in tail, he is seised of the *rent* during the continuance of the estate tail. It is true that since the statute *quia emptores*, no one can reserve a *rent* service on a conveyance in fee; but the statute 32 H. 8, c. 37, may allude by the words "tenants in fee simple of a *rent* service," to *rent* services created before the statute *quia emptores*, of which there are still many which are called quit *rents*. Or the words of the statute may be taken *reddendo singula singulis*, and applying the words "tenants in fee simple, tenants in fee tail," to *rent* charges and fee farms.

For these reasons we are of opinion that a person seised in fee of land and demising it for years, reserving a *rent*, though he be not tenant for years of the *rent*, is still not within the words of this statute "tenant in fee simple, fee tail, or for term of lives," of the *rent*, and is indeed not tenant at all of the *rent*.

It remains to be considered whether he is within the meaning of the statute.

It is a matter of history that at the time when this statute passed, leases for years were but little regarded. It is clear also that an action of debt for *861] *rent* on such *leases was maintainable. Such leases, therefore, do not appear to have been within the mischief intended to be remedied by the statute, nor probably within the contemplation of the framers of the act, and Lord Coke in his observations on this statute, Co. Litt. 162, b, makes no allusion to leases for years, and evidently considers the statute as applicable only to freehold *rents*.

Some authorities upon this subject remain to be noticed. The first is the case of *Turner v. Lee*, Cro. Car. 471, already cited, which arose on a lease for years determinable on a life, and the statute was held not to apply. The point does not appear to have been raised in any reported case from that time till the case of *Renvin v. Watkin*, Mich. T. 5 Geo. 2, B. R., which is to be found in the first vol. of Selwyn's *Nisi Prius*, p. 678, of the 8th edition. It is as fol-

lows: "A. seised in fee let to the plaintiff for twenty-one years, and afterwards died seised of the reversion: the defendant administered, and distrained for half a year's rent due to the intestate, for which he avowed. On demurrer to the avowry it was objected that there was not any privity of estate between the administrator and the lessor, and therefore the avowry, which is in the realty, could not be maintained by him. And it was observed that this was a case out of the statute 32 H. 8, c. 37, for that only gives a remedy by way of distress for rents of freehold, and of this opinion the Court seemed. 1 Inst. 162, a; 4 Rep. 50; Cro. Car. 471; Latch. 211 (*Wade v. Marsh*), were cited." There is a note as follows:—

"But in *Powell v. Killick*, Middlesex sittings, M. 25 G. 2, where in trespass for entering plaintiff's house and carrying away his goods, upon not guilty, *defendant gave in evidence that he was executor of A. who was plaintiff's landlord of the house, and that he distrained for rent due to his [*862 testator at the time of his death; it was objected for plaintiff that executor was empowered to distrain only by virtue of the statute 32 H. 8, c. 37, and that the statute extended to the executors and administrators of those persons only to whom rent services, rent charges, rents seek, or fee farms were due, and that the present case did not fall within either of those descriptions. But Lee, C. J., overruled the objection, and said this was a rent service, the testator being in his lifetime seised in fee, and the plaintiff holding under a tenure which implied fealty." It is to be observed that this was a nisi prius decision, and the point argued seems to have been only whether the rent was a rent service, which it clearly was. The point now raised does not seem to have been discussed, and it should also be observed, that Mr. Justice Buller in his *Nisi Prius*, p. 57, cites the case and apparently disapproves of it. His words are, "Lord Coke says, if a man make a lease for life, or a gift in tail, reserving a rent, this is a rent service within the statute: from whence it may be inferred that he thought a rent reserved upon a lease for years was not within it: and I apprehend that it is not, for the landlord is not tenant in fee, fee tail, or for life, of such a rent; and it is the executors of such tenants only who are mentioned in the act. However, in trespass, where it appeared that the defendant had distrained the plaintiff's goods for rent due to his testator upon a lease for years, Lord C. J. Lee held it to be within the statute, and the defendant obtained a verdict."

The next case was *Meriton v. Gilbee*, 8 Taunt. 159, where the *point [*863 was attempted to be raised; but the Court said, that it did not appear whether the tenancy was for term of years or for life. Then came the case of *Martin v. Burton*, 1 Brod. & B. 279, which was decided on the ground that it did not appear that the testator was not seised in fee, in tail, or for life. Afterwards the case of *Staniford v. Sinclair*, 2 Bing. 193, was decided on the same ground, though the Court in giving judgment examined into some of the cases, and into the point now raised, which was not necessary to the determination of the case. (a)

Upon the whole, therefore, and for the reasons stated, we are of opinion that this case is neither within the words nor the meaning of the statute 32 H. 8, c. 37, s. 1, and that the judgment of the Court must be for the plaintiff.

Judgment for the plaintiff.

(a) See the cases on this subject collected and reviewed in E. V. Williams' *Law of Executors*, vol. i. p. 602, &c.

LOWE and Another v. GOVETT. June 12.

By act of parliament reciting that a certain tract of land daily overflowed by the sea, and to which the king in right of his crown claimed title, might be rendered productive if embanked, and that his majesty had consented to such embankment, a part of the said land, called Lipson Bay, was granted to a company for that purpose. On

one side of the bay was the northern side of an estate called Lipson Ground, forming an irregular declivity, in parts perpendicular, and in parts sloping down to the sea-shore and overgrown with brushwood and old trees. The company in embanking the bay, made a drain on this side, in the same direction with the cliff, cutting through it in parts, but leaving several recesses of small extent between the projecting points. These recesses used to be overspread with sea-weed and beach, and were covered by the high water of the ordinary spring tides, but not by the medium tides:

Held, in the absence of proof as to acts of ownership, that the soil of these recesses must be presumed to have belonged to the owner of the adjoining estate, and not to the crown; and did not, therefore, pass to the embankment company by the act of parliament.

Quære, Whether upon issue joined on a plea of *liberum tenementum*, the plaintiff may prove twenty years' adverse possession; or whether it must be specially replied?

TRESPASS for breaking and entering the plaintiff's closes. Pleas, not guilty, and *liberum tenementum*, upon which issue was joined. At the trial before

*864] *Littledale, J., at the Devon Spring assizes, 1828, a verdict was found for the plaintiffs, subject to the opinion of this Court upon the following case:—

By a public act of parliament, 42 G. 3, c. 32, after reciting that there was near Plymouth a tract of land known by the name of the Lairy, which was daily overflowed by the sea, and was thereby totally unproductive, but that if certain parts thereof called Tothill Bay and Lipson Bay were embanked, they might be cultivated and rendered of great public benefit; and reciting also that the king, in right of his crown and dignity claimed title to the parts to be so embanked, and that his majesty had consented to such embankment; the parcel of land called Lipson Bay, part of the said Lairy, which was then a navigable arm of the sea, and daily overflowed by it, was granted for 500*l.* to a company incorporated by the act under the name of "The Company of proprietors for embanking part of the Lairy near Plymouth;" and they afterwards embanked Lipson Bay.

On the southern side of the bay, at the time of this embankment, was an estate called Lipson Ground, of which the defendant at the time of the alleged trespass was the owner and occupier, and which had been conveyed to him in 1824. The northern side of this estate was an irregular declivity, in parts perpendicular, and in parts sloping down to the sea-shore and overgrown with brushwood interspersed with old trees, particularly towards the top. Adjoining the cultivated closes of the estate, upon the top, was an irregular fence of bushes and trees, sufficient to protect the cattle there from falling over into the bay. At the northern extremity of the estate was an old quay, which before the embankment was used for the purpose of depositing manure *for the

*865] estate; it communicated with the closes on the top of the cliff by a path up the declivity used for conveying the manure. After the embankment the quay ceased to be of use.

The company, in embanking Lipson Bay, cut a gutter for drainage along the southern side of the bay, in the same direction with the cliff, and as near as it could be carried in a straight line, but leaving several recesses between points where the cliff projected beyond the general line. In some instances the extremities of these projections were cut through. The recesses, at the time when the drain was cut, were covered with sea-weed and beech; part of the soil of the drain, when dug out, was thrown upon their surface. Before the embankment the recesses used to be covered by the high water of the ordinary spring tides, but not by the medium tides between the spring and neap tides. The quay was never covered with water. It did not appear that the owners of the Lipson Ground estate had exercised any act of ownership on the recesses, and their situation and trifling extent had prevented any profitable occupation of them; but in 1812 an occupier of Lipson Ground had cut wood on the declivities of the cliff. In 1806 the company sold in lots a portion of the embanked land of Lipson Bay. The fences of these allotments were carried across the

above-mentioned drain and rested on the cliff. The purchaser took possession in 1806, and continued possessed until 1826, when he died, leaving two daughters his coheirresses, one of whom, and the husband of the other, were the present plaintiffs. The case then went on to state facts which raised the question whether or not the purchaser, in and after 1807, had exercised acts of ownership over *the recesses between the points of the cliff, which acts had been acquiesced in by the owners of the Lipson Ground estate. The present [*866 action was brought for cutting down some trees planted in the recesses by the purchaser. The questions for the opinion of the Court were: First, whether the ownership of the recesses and quay was in the crown before the passing of the act for embanking Lipson Bay? Secondly, if not, whether any estate or interest in them passed to the defendant by the conveyance of the Lipson Ground estate to him in 1824, so as to support his plea of *liberum tenementum*? This case was now argued by

Campbell, for the plaintiffs. The defendant, to support his plea of *liberum tenementum*, should have proved that he had a freehold in the recesses in question, and also a right of entry at the time of the trespass. He gave no proof of either. He showed no conveyance, nor did it appear that he, or those under whom he claimed, had exercised any act of ownership over the recesses. They are described in the case as having been covered with sea-weed and beech. This does not correspond with the description also given in the case of that part of the Lipson Ground estate which adjoined the sea-shore, and which is said to have been overgrown with brushwood and old trees. It was not necessary for the plaintiffs to show conclusively to whom these recesses belonged: it is sufficient that they might belong to the crown; and in the absence of express proof, the presumption in favour of the crown may extend to all lands between the low water mark and the high water of the ordinary spring tides. This is the sense of the passage in *Hale, De Jure Maris*, c. 4, *p. 12 (*Harg. Law Tracts*), where it is laid down, that "It is certain, that that which the [*867 sea overflows either at *high* spring tides, or at extraordinary tides, comes not as to this purpose (*i. e.*, as to the king's right of property), under the denomination of *litus maris*." That part of the shore which is above the common high water mark, but below the height of the ordinary spring tides, though perhaps it does not necessarily belong to the king, may do so; and will be presumed to have done so in a case like this, no proof being offered to the contrary. At all events it does not appear, either by the recital of the act or otherwise, that the recesses belonged to the Lipson Ground estate. (He then proceeded to argue, in the second place, that the defendant's title was, at all events, barred either by *disseisin* and a descent cast, or by twenty years' adverse possession.)

Follett, contra. The plaintiffs were not entitled, on an issue upon the plea of *liberum tenementum*, to show that the defendant's right of entry was gone; but if they meant to rely on a possessory right grounded on adverse possession, such matter ought to have been specially replied. Twenty years' adverse possession does not shift the freehold, but only changes the right of entry; it is, therefore, no answer to the plea of *liberum tenementum*. And it cannot be necessary, upon that plea, to prove both the title to the soil and freehold, and also the right of entry; the form of the plea shows this. If it were otherwise, the plaintiff would have all the advantage of replying double. In replying a possessory title grounded on the statute of limitations or a demise [*868 *for years, the freehold is confessed; the right of entry only is denied: see *Lambert v. Stroother*, Willes, 218. But, further, no adverse possession was proved as to these recesses. (He then went into the facts bearing upon this point.) As to the effect of the act of parliament, the recesses were not the property of the crown before the act, and did not, therefore, pass to the embankment company under it. [Lord TENTERDEN, C. J. The act only speaks of land "daily overflowed by the sea."] So much only as is covered by the ordinary high water is to be considered as sea-shore, and, as such, presumed to belong

to the crown or the lord of the manor, where there is no evidence of other ownership. *Hale de Jure Maris*, part 1, c. 4, p. 12, c. 6, p. 25. In *Blundell v. Catterall*, 5 B. & A. 304, Bayley, J., says, "By the sea-shore I understand the space between the *ordinary* high and low water mark." Lands which are not overflowed by the medium tides must be presumed to belong, not to the crown, but the owner of the adjacent land.

Campbell, in reply. There is no sufficient authority for saying that the right of the crown, as against the title of a subject, unsupported by proof as in this case, does not extend over the whole beach, up to the highest mark of the spring tides. Nothing is adduced, beyond presumption, to show that the recesses were part of the Lipson Ground estate. The words of the act are not to be taken as confining the grant to what was literally overflowed by the tide every day; they are meant to include the sea-beach generally.

*869] *Lord TENTERDEN*, C. J. I am of opinion that the defendant is entitled to judgment. The act of parliament authorising the grant under which the plaintiff claims, makes mention in its recital of land "daily overflowed by the sea," which it vests in a company of proprietors. Assuming that those words mean only land *ordinarily* overflowed by the sea, still the recesses in question do not come within that description. If these, then, did not belong to the company or the crown, whose property were they? The common presumption would be, that they belonged to the owner of the adjoining estate. It is urged, that the description given of them in the case is inconsistent with that supposition, it being said there, that the northern side of the estate is a declivity overgrown with brushwood and trees, whereas these recesses appear to be covered with sea-weed and beech; but I do not think the former part of this description ought to be so construed as to exclude from the estate those pieces of ground which lie low and adjoining the sea-shore, and would, according to the usual presumption, be considered as belonging to the owner of the adjacent land. As to the remaining question, it appears to me that the case furnishes no sufficient proof of an adverse possession, and therefore there is no occasion to determine the point, whether, to a plea of *liberum tenementum*, the statute of limitations must be specially replied; of which I should have desired time to consider.

LITTLEDALE, J. The company could only grant what was in the crown, that is, the ground between the ordinary high and low water mark; if, there-
*870] fore, the purchaser under whom the plaintiffs claim had any *property* in these recesses, it could not be by the company's grant. He might indeed have had a right by adverse possession sufficient to ground an action against a trespasser, but of that there is not sufficient proof. Then it is said, that, according to the description given in this case of the northern extremity of the Lipson Ground estate, these recesses cannot have formed part of it. But the proprietor of that estate was entitled to the land as far as the point at which the king's right to the sea-shore terminates. Down to that point, the land covered with beech and sea-weed, as these recesses are described to have been, would of common right belong to the owner of the adjoining estate, and I do not think that right is excluded by the manner in which the northern extremity of the estate is described in the case. Whether those spots formed part of what was called the Lipson Ground estate or not, they appear by the case to have belonged to the owner of that estate. It is contended that the land up to the top of the ordinary spring tides might have been in the crown; but it does not appear that the crown ever made any claim to it, or exercised any act of ownership upon it. No question arises on the alleged adverse possession, for that fact is not sufficiently proved.

PARKE, J. It is unnecessary in this case to deliver any judgment on the question, whether or not a twenty years' adverse possession, should be replied specially to the plea of *liberum tenementum*; though I have an opinion on that subject. The land in question here was above the ordinary high water mark,

and the plaintiffs, therefore, upon the case as stated, could not entitle themselves to it under the crown, or the company *who derived their title from the crown. In the absence of proof to the contrary, the presumption as to such land is in favour of the adjoining proprietor; and there was no proof here of adverse possession. The judgment must, therefore, be for the defendant. [871]

TAUNTON, J., concurred.

Judgment for the defendant.

WYATT v. HARRISON. June 12.

The possessor of a house which is not ancient, cannot maintain an action against the owner of the adjoining land, for digging away that land, so that the house falls in; and, therefore, where a declaration stated that A. was lawfully possessed of a dwelling-house, adjoining to a dwelling-house of B., and that B. dug into the soil and foundation of the last-mentioned house so negligently, and so near to the plaintiff's house that the wall of the latter house gave way; on demurrer to so much of the declaration as alleged the digging so near, &c., the defendant had judgment.

But if it had appeared that the plaintiff's house was ancient; or if the complaint had been that the digging occasioned a falling in of soil of the plaintiff, to which no artificial weight had been added, quære, whether an action would not have lain?

CASE. The last count of the declaration stated that the plaintiff before and at the time, &c., was lawfully possessed of and dwelt with her family in a certain dwelling-house situate at, &c., and contiguous and next adjoining to a certain dwelling-house of the defendant with the appurtenances, there also situate: that the defendant by his workmen and servants, was rebuilding his said dwelling-house, with, &c., and in so doing was digging into the soil and foundation thereof, and near and adjoining to the soil and foundation of the said dwelling-house of the plaintiff. Yet defendant, well knowing the premises, but intending to injure the plaintiff, and to annoy her in the possession of her said dwelling-house, afterwards, and whilst the defendant was so rebuilding his said dwelling-house, and so digging into the soil and foundation thereof, and near and adjoining to the soil and foundation of the said dwelling-house of *the plaintiff, to wit, on, &c., dug so negligently, carelessly, and improperly into the soil and foundation of the said dwelling-house of him the defendant, and so near to the soil and foundation of the said dwelling-house of the plaintiff, that by reason thereof the wall of the said dwelling-house of the plaintiff, standing and being upon the soil and foundation of her said dwelling-house, and next to and adjoining the soil and foundation of the said dwelling-house of the defendant, sank, and gave way, and became and was greatly weakened, loosened, and damaged; by means whereof the plaintiff was prevented from carrying on her business in her said dwelling-house, and was put to great expense, &c. [872]

Plea, to all the matters in the above count alleged except the part herein after mentioned, not guilty; and as to so much of that count as related to the defendant's digging into the soil and foundation of the said dwelling-house of him the defendant, so near to the soil and foundation of the said dwelling-house of the plaintiff that by reason thereof, &c., the defendant demurred generally. Joinder in demurrer. This demurrer was argued in last Easter term. (a)

Talfourd, for the defendant. The question is whether, if a party occupy premises which adjoin those of another person, and which are injured by the act of that person, in digging near the extremity of his own ground, he is entitled, merely by reason of the propinquity, to recover against the neighbour by whose act such injury was occasioned. The cases applicable to this subject are

(a) Before Lord Tenterden, C. J., Littledale, Parke, and Patteson, Js.

*873] reviewed in *Peyton v. The Mayor and Commonalty of London*, 9 B. & C. 725, which was an action for damage occasioned by the defendants in pulling down their house, without shoring up that of the plaintiff, which adjoined it: and the Court there held, that as the plaintiff showed no right to have his house supported by that of the defendants, he could not recover. So here, the plaintiff shows no right to have her land supported by the defendant's. It is said in *Com. Dig. Action on the Case for a Nuisance*, (C) citing 2 Roll. Abr. *Trespass*, (I) pl. 1, (a) and 1 Siderfin, 167 (*Palmer v. Fleshees*), that no action lies if a man build a house and make cellars upon his soil, whereby a house newly built in an adjoining soil falls down. In the present case it may be assumed that the house was newly built, for nothing appears to the contrary. *Roberts v. Read*, 16 East, 215, and *Jones v. Bird*, 5 B. & A. 837, are distinguishable: there the defendants, who were held liable, acted, not upon a common law right, but by a special authority, operating against the rights of the public; and in what they did they were not using property of their own.

*874] *Mansel, contra*. The declaration, so far as it is demurred to, is in no essential particular different from that in *Smith v. Martin*, 2 Saund. 394, 400, upon which the plaintiff had judgment. In *Roberts v. Read*, 16 East, 215, the declaration was, substantially, for digging so near the plaintiff's wall that it was weakened and fell. In *Peyton v. The Mayor of London*, 9 B. & C. 725, it may have been the duty of the plaintiff to shore up his own house; but that case was different from this; there the proceeding which endangered the plaintiff's house was apparent, and he therefore had warning to secure himself against the probable injury: but where, as in this instance, the mischief is done by mining under ground, an operation which is secret, or of which, at least, the neighbour cannot be aware so as to guard himself against its effect, the party carrying on the work is bound to give his neighbour notice, and moreover to use such reasonable care in doing the work that mischief may not ensue; *Massey v. Goyder*, 4 C. & P. 161; and if injury be complained of, it rests with him to show that he used proper care. *Jones v. Bird*, 5 B. & A. 837, also supports this view of the case. In *Sutton v. Clarke*, 6 Taunt. 44, *Gibbs, C. J.* says that where an individual, "for his own benefit, makes an improvement on his own land according to his best skill and diligence, and not foreseeing it will produce any injury to his neighbour, if he thereby unwittingly injure his neighbour, he is answerable." In a case, however, like the present, the party carrying on the work must know that he is occasioning injury to his neighbour.

*875] *Talfourd* in reply. The allegation of the plaintiff which is demurred to is, not that the defendant dug so carelessly, but that he dug so near to the plaintiff's foundation that damage ensued. These averments are divisible, and the one objected to may and ought to be demurred to by itself. *Pinkney v. The Inhabitants of East Hundred*, 2 Saund. 379; *Powdick v. Lyon*, 11 East, 565. [LITLEDAL, J. Can the averment of negligence here be separated from the rest of the sentence?] The negligence, and the digging near to the plaintiff's land, are distinct propositions. The defendant here was acting on a common law right: if there was any peculiarity in the circumstances

(a) The whole passage in Rolle is as follows:—"If A. be seised in fee of copyhold land next adjoining the land of B., and A. erect a new house on his copyhold land, and some part of the house is erected on the confines of his land next adjoining the land of B.; if B. afterwards digs his land so near the foundation of A.'s house (but no part of the land of A.) that thereby the foundation of the house, and the house itself falls into the pit, yet no action lies by A. against B., because it was A.'s own fault that he built his house so near B.'s land; for he by his act cannot hinder B. from making the best use of his own land that he can. Pasch. 15 Car. B. R. between Wilde and Minsterley, by the court, after a verdict for the plaintiff. But *semble*, that a man who has land next adjoining my land cannot dig his land so near mine that thereby my land shall go into his pit; and, therefore, if the action had been brought for that it would lie."

which could render him liable at the suit of the plaintiff for what he so did, the plaintiff ought to have shown it. *Our. adv. vult.*

The judgment of the Court was now delivered by Lord TENTERDEN, C. J., who, after having stated the pleadings, proceeded as follows:—

The question reduces itself to this, Whether, if a person builds to the utmost extremity of his own land, and the owner of the adjoining land, digs the ground there, so as to remove some part of the soil which formed the support of the building so erected, an action lies for the injury thereby occasioned? Whatever the law might be, if the damage complained of were in respect of an ancient messuage possessed by the plaintiff at the extremity of his own land, which circumstance of antiquity might imply the consent of the adjoining proprietor, at a former time, to the erection of a building in *that situation, [*876 it is enough to say in this case that the building is not alleged to be [*876 ancient, but may, as far as appears from the declaration, have been recently erected; and if so, then, according to the authorities, the plaintiff is not entitled to recover. It may be true that if my land adjoins that of another, and I have not by building increased the weight upon my soil, and my neighbour digs in his land so as to occasion mine to fall in, he may be liable to an action. But if I have laid an additional weight upon my land, it does not follow that he is to be deprived of the right of digging his own ground, because mine will then become incapable of supporting the artificial weight which I have laid upon it. And this is consistent with 2 Roll. Ab. *Trespass* (I.) pl. 1. The judgment will therefore be for the defendant.

Judgment for the defendant.

*J. G. S. LEFEVRE, W. J. DEACON, and W. UNWIN SIMS v. BOYLE. *June 13.* [*877

A policy was effected by A. upon her own life, with an insurance company; it was by deed, and executed by three trustees of the company. A. afterwards assigned it to B. and died. The money due on the policy was paid to B. by a check drawn by the trustees on the bankers of the company, and he gave an acknowledgment of having received the money from the trustees. By the deed of trust the board of directors were to cause all moneys belonging to the company to be deposited with the bankers of the company, in the name of the trustees, and such moneys were not to be withdrawn but for the purposes of the company, and by checks signed by the trustees, or by three or more directors under some authority to be given by the trustees. After the payment to B. it was discovered that the policy was void on account of fraud.

Held, that under these circumstances the three trustees were the proper plaintiffs in an action to recover back the money so paid to B.

ASSUMPSIT for money had and received. Plea, general issue. At the trial before Lord Tenterden, C. J., at the Middlesex sittings after Michaelmas term, 1831, it appeared that the plaintiffs were trustees of the Promoter Life Assurance Company. In 1828, one Lydia Simpson effected with that company a policy of insurance upon her own life for 850*l.* The policy was by deed, and was executed by the plaintiffs, and by it the responsibility of the trustees was limited to the amount of the funds of the company. The deed of trust under which the plaintiffs acted, purported to be executed by the shareholders and by all the trustees; the execution by Deacon, one of the plaintiffs, was not proved, but he had acted as a trustee and executed this policy. It was afterwards transferred to the defendant. In February, 1829, Miss Simpson died; the money due on the policy was paid to the defendant by a check drawn by the trustees upon their bankers, and the defendant gave the following receipt, endorsed on the policy:—"Received of the trustees to the Promoter Life Assurance Company, the sum of 850*l.*" The policy was afterwards discovered

to be void on account of fraud, and the company, by a letter written by their secretary, applied to the defendant to refund the money he had received. In *878] that letter it was stated that *the board* would have to call upon him for the amount. By the deed of trust the board of directors were to cause all moneys and securities belonging to the company to be deposited in the name of the trustees with the bankers for the time being of the company, and such moneys were not to be withdrawn but for the purposes of the company, and by checks signed by the trustees, or by three or more directors under some authority to be given by the trustees. It was objected at the trial that, the company not having been incorporated, the action ought to have been brought in the names of all the members. Lord Tenterden directed a verdict for the plaintiffs, but reserved liberty to move to enter a nonsuit on the objection. A rule nisi having been obtained for that purpose,

Campbell and Hill now showed cause. The action is properly brought by the present plaintiffs. The policy of insurance being by deed, which was executed by the plaintiffs, they only, and not the members of the association, would have been liable to be sued, *Schack v. Anthony*, 1 M. & S. 573. The funds of the company are vested in them; an account is kept in a banking-house in their names; and the sum paid to the defendant was out of moneys invested in the plaintiffs' names with those bankers. The defendant has, by his receipt, acknowledged that he received the money due on the policy from the trustees of the company. Then, if this money may be recovered back, the trustees must be the proper persons to sue. If, instead of money, the defendant, by false representations, had obtained possession of any goods and *879] chattels of the company, and he had refused to deliver them back, but had acknowledged that he received them from the trustees, they might have maintained trover. It is not competent for the defendant, who has so dealt with the trustees, to say that the money is that of some other person; as between him and them, it must be taken to be theirs.

White, contrâ. The defendant is not estopped by his having treated with the plaintiffs as trustees; for, after the money had been paid, the secretary of the company, in his letter, giving him notice to refund, stated that *the Board* would have to call upon him. And if he is not estopped, it is quite clear that the action ought to have been brought in the names of all the members of the company, 1 Wms. Saunders, 154, note (1). It is true, the payment was made in this case by a check on the bankers with whom the money was placed by the present plaintiffs, but it was so placed pursuant to the directions of the trust deed; and it was not competent to the members of this association to transfer to others the right of bringing actions, which the law vested in all the parties interested, for a mere right of action cannot be transferred, Co. Litt. 214 a, 266 a.

Lord TENTERDEN, C. J. The policy of assurance was executed by the three plaintiffs under their hands and seals; they only could have been sued upon that policy. The money received by the defendant was paid out of funds lodged with bankers in the plaintiffs' names. Under these peculiar circumstances I am of opinion that the action was maintainable in the names of the three trustees.

*880] *LITTLEDALE, J.* I agree that it is not competent for such an association as this to transfer to a few of its members the right of bringing actions, which, by law, is vested in all; but if a party, instead of contracting with all the members of such a company, choose to contract with three trustees, in whom the property of all is vested, and afterwards in virtue of that contract to receive money from those trustees to which he has no right, I think it is not competent to that party to say that they are not the persons entitled to sue for it. In this case, then, Miss Simpson having originally contracted with the trustees and they with her, and the defendant, the assignee of the policy, having received the money from them, the action is well brought in their names to recover it back.

PARKE, J. It appears to me perfectly clear that this action is well brought by the three trustees. They originally contracted by deed; that was assigned to the defendant, and he received the money from them. That money having been placed with bankers in the names of the trustees, was, in my opinion, their money, as much as a sum would be mine, which I myself had put into my banker's hands.

TAUNTON, J., concurred.

Rule discharged.

*SAUNDERS v. ASTON. June 13.

[*881]

A patent was taken out for improvements in making buttons. The specification stated the improvement to consist in the substitution of a flexible material for metal shanks, and it described the mode in which this material might be fixed to the intended button, and made to project from it in the necessary condition for use, by the help, among other things, of a metal collet or ring with teeth. Neither the construction of the button, nor the application of a flexible shank, was new; the use of the toothed ring, as described in the specification, was so, but this was not stated to be the subject-matter of the invention; and it appeared by the specification that the effect produced by it might be brought about in other modes, which the plaintiff had also used:

Held, that the patent was not maintainable, since the invention consisted only in combining two things which were not new, and the use of the toothed ring in forming the flexible shank, though new, was not the object of the invention, but only a mode, among others which were already known, of carrying it into effect.

CASE for infringing a patent. At the trial before Lord Tenterden, C. J., at the sittings in London after Michaelmas term, 1831, it appeared that the plaintiff's patent, obtained in 1825, was for the sole making, using, &c., of his invention of "certain improvements in constructing or making buttons." In the specification enrolled in Chancery the plaintiff stated the nature of his invention as follows:—"My said improvements in the constructing or making buttons consist in the substitution of a proper, soft, and flexible material or materials in the place of metal shanks upon the backs or bottoms of buttons of certain descriptions, and which said flexible material or materials afford the means of affixing such buttons to garments with far greater convenience and neatness than where metal shanks are employed. The buttons are such as I have manufactured under a patent granted to me by his late Majesty King George the Third, dated the 4th of November, in the fifty-fourth year of the reign of his said late Majesty, for my invention of a new and improved method of manufacturing buttons; and as such method is peculiar to me, I shall proceed to furnish such a description thereof as is necessary to the proper understanding of my present improvements thereon, *accompanied by explanatory drawings." The specification then went on to describe, with the assistance of drawings, the plaintiff's mode of manufacturing covered buttons according to the invention referred to in the former patent, and the new improvement which was the subject of the patent now in question. Except as regarded the improvement by the substitution of a flexible for a metal shank, it did not appear that the processes under the two patents materially differed. The button was made by placing a circular plate of metal, or other unyielding substance (having attached to it the flexible material intended for the shank), on a piece of cloth of the same circular form, but larger, so that, in the process after mentioned, the cloth would overlap the metal on the upper side. A glutinous material was introduced between them, and the pieces of cloth and metal, in this position, were laid upon, and concentric with, the mouth of a cylindrical mould or barrel, and were forced down it by a hollow, cylindrical implement called a charger, which pressed the several materials together. The edges of the cloth, which rose up round the sides of the metal plate when forced into the mould, were then, by another instrument, pressed down, and bent over

the upper surface of the plate, which formed the back of the intended button; they were afterwards secured by a toothed steel collet or ring (also used for this purpose under the former patent), which was introduced into the mould with its circle of teeth downwards. The points of these (it was stated) "seize hold of and penetrate into the pieces so bent over; and when the final pressure is given, they materially serve to hold the materials forming the intended *883] button firmly together; the teeth being bent, *clenched, or turned, by coming into contact with the metal plate which bears the flexible material forming the substitute for the metal shank." A particular detail was given of the mode in which this flexible material was applied to the metal plate on that side which formed the back of the button, so that when the ring or collet had been put in, and the whole finally pressed down, the button came out complete, with the part intended for the shank projecting from the centre, and ready for the tailor's needle. The specification stated several modes (in addition to that first described) in which materials of different kinds might be applied to the metal plate, to be made into shanks by the above process; and it concluded as follows:—"I again repeat that I hereby claim as my invention, and the object of this my said patent, the substitution of a proper, soft, and flexible material or materials in place of metal shanks, to all such buttons as may be formed in the various methods herein described." It appeared in evidence that the plaintiff had lately made some slight improvement on the processes described in the specification, by causing the flexible material to be pinched up in the centre, so as to project in the manner above described, without any assistance (which, under the above-described plan, was derived) from the collet. It was further proved that flexible shanks to buttons had been in use long before the plaintiff took out either of his patents. Some evidence, too, was given for the defendant, to show that these shanks had been made in one or more of the particular modes pointed out in the specification; but it was also contended, on the defendant's part, that, at all events, the *884] patent in question was, in substance, only for the application of *flexible shanks to the button formerly constructed by the plaintiff, and therefore, that as the invention consisted merely in combining two things, neither of which was new, though the particular things had not been combined before, the patent was bad; and *Brunton v. Hawkes*, 4 B. & A. 541, was cited. Lord Tenterden directed a nonsuit, giving leave to move to enter a verdict for the plaintiff. A rule nisi having been obtained for this purpose,

Sir *James Scarlett* and *Rotch* now showed cause, and again urged the objection above stated, observing, that, at all events, the patent was taken out for more than the specification warranted, as the latter disclosed nothing new but the application of flexible shanks made in a particular manner, to a button for which a former patent had been granted and had expired.

The Attorney-General, F. Pollock, and Hill, contra. The patent is for a new article, described in the specification, namely, a button of the kind there described, with a flexible shank of a particular kind. It is true, flexible shanks have been used before, but this patent is for one formed and attached to the button by a new system of machinery. The combination here is not the same as that under the former patent, for the collet performs an entirely new office, in assisting to compress and raise up the material forming the flexible shank: before, it merely fastened down the edges of cloth at the back of the button, the shank being of metal, and affixed to the plate, over which, in both buttons, the cloth is stretched.

*885] *Lord TENTERDEN, C. J.* I am of opinion that the nonsuit was right. It is stated early in the plaintiff's specification, that his improvements consist in "the substitution of a flexible material in the place of metal shanks on buttons." Before this patent was obtained, the plaintiff had obtained another, for a mode of manufacturing buttons with metal shanks. Flexible shanks had been known long before. The present specification de-

scribes the mode of substituting one for the other. A great part of it merely repeats the process employed under the former patent, when metal shanks were used; and with regard to the modes of putting on the flexible shank, there was evidence that such shanks had been put on buttons for many years before, in several of the ways described by the plaintiff. It has been ingeniously contended that there was a novelty, at least, in the application of the toothed collet to the production of a flexible shank under the present patent. But the collet itself is not new; and although it is said in one part of the specification, that the teeth of the collet, when it is pressed down, "materially serve to hold the materials forming the intended button firmly together," the teeth being bent by coming in contact with the plate which bears the flexible substitute for metal shanks, yet it does not anywhere appear from the specification, that the patentee relies upon this collet as the material part of his invention. He declares that his invention consists in the substitution of a soft material for the metal shank; but he does not say a substitution by the special aid of this collet. And even assuming that the collet, where it is described as part of the machinery, is meant to be represented as the important part, then, indeed, if there were no other mode in which the object of the present invention *could be accomplished, than those in which the collet is so used, the patent might, perhaps, be sustained; but it appears in [*886 evidence that this is not so. I think, therefore, the plaintiff is not entitled to recover.

LITTLEDALE, J. Neither the button nor the flexible shank was new: and they did not, by merely being put together, constitute such an invention as could support this patent. It is contended that the operation of the collet, under the present patent, is new; but that is not stated in the specification as the object of the invention, and it is, in fact, only one mode of carrying it into effect: it appears on the plaintiff's case that there were other ways of producing the same result. I think, therefore, the nonsuit was right.

PARKE, J. I am of the same opinion. The specification, after having described the mode of using the collet, concludes by repeating what is also stated in the beginning, that the object is the substitution of a flexible material in place of metal shanks. I thought at first we might infer that the substitution here spoken of meant a substitution by the particular method which has been relied upon, namely, by the toothed collet. If so, the patent might have been good. But it does not appear that that is claimed as a part of the invention; it is admitted that other methods will answer the purpose. I think, therefore, that the plaintiff's claim by this patent cannot be supported.

TAUNTON, J. The object stated in the specification is the substitution of a soft material for metal: the use of the collet is but one of the modes in which that *substitution is to be effected; and that is the only part of the [*887 process described in the specification which has a claim to novelty. The patent, therefore, is not supported.

Rule discharged.

The KING v. The Justices of CAMBRIDGESHIRE. June 14.

A notice to justices of a motion to be made for a certiorari "on behalf of the churchwardens and overseers of S.," if signed only by one churchwarden, is not a sufficient notice by the "party or parties suing forth" the writ, within the statute 13 G. 2. c. 18, s. 5.

A RULE nisi was obtained in last Michaelmas term, for a certiorari to remove into this court an order made by the above-mentioned justices in sessions, commanding the churchwardens and overseers of the parish of Soham, in the county of Cambridge, to pay over certain sums of money collected by them under a poor-rate, to the preceding churchwardens and overseer. The notice

of application for a certiorari, given to two of the justices, pursuant to the statute 13 G. 2, c. 18, s. 5, began as follows:—"I, the undersigned, being one of the churchwardens of the parish of Soham, in the county of C., do hereby, according to the form of the statute, &c., give you and each of you notice that his Majesty's Court of King's Bench will, in six days, &c., be moved *on behalf of the churchwardens and overseers of the poor of the said parish of Soham* in the said county, for a writ of certiorari," &c. The notice was signed "Thomas Wilkin, one of the churchwardens of the said parish." On cause being shown against the rule in Hilary term, several affidavits were put in, and, among them, one by the remaining churchwarden and another by one of the *888] overseers, denying that these *parties, respectively, had authorized the notice, and stating that a declaration had been made by the remaining overseer to the same effect. The rule was enlarged, and leave given to read fresh affidavits on each side, which were accordingly put in, having reference both to the above point and to the more general merits of the application. And now

F. Pallock, B. Andrews, and Kelly again showed cause, and contended, among other things, that the notice was bad, inasmuch as it was not given by the parties suing forth the certiorari, as the statute requires; to which point they cited *Rex v. The Justices of Lancashire*, 4 B. & A. 289. There the notices did not mention the name of the party intending to sue out the writ, but were signed, "Lace, Miller, and Lace, attorneys;" and they were therefore held insufficient, the court observing that "the notice should be given by the party suing out the writ, and that circumstance should appear upon the face of the notice itself."

Sir James Scarlett, Talfourd, and Gunning, contra. This objection cannot be insisted upon after the case has been fully discussed, and two sets of affidavits put in, upon the merits. The object of the statute in requiring the notice prescribed is, that the justices may know against whom they are showing cause. That purpose is answered by the present notice, which is, substantially, on behalf of all the parish officers: in *Rex v. The Justices of Lancashire*, 4 B. & A. 289, the justices were not informed as to the party applying.

*889] *Lord TENTERDEN, C. J.* I think this notice was not such as the act requires. The notice ought to be within the terms of the statute. The justices here, looking to Wilkin only, might be disposed to show, as a cause for the writ not issuing, that he was not a proper person to make the application; but if he may say that he makes it on behalf of the other parish officers, he shuts them out from the opportunity of taking that course; and in the present instance it turns out that the assertion is untrue, for two of the four parish officers dissent from the application, and the assent of the third is doubtful.

LITLEDAL, J., concurred.

PARKE, J. The justices might have had objections to Wilkin as the person applying for this writ, which they would not have to the other parish officers: the notice, therefore, is calculated to mislead them. They are entitled to have true information of the parties intending to sue out the certiorari. It is said that this is, substantially, a notice on behalf of the other parish officers. But it may be tried by this criterion. The party suing out a certiorari (and by whom the notice ought to be given), is required to enter into recognisances for prosecuting it with effect, and for paying costs, before the writ shall be granted, 5 G. 2, c. 19, s. 2. Would the three parish officers have been bound to do so on this application? If not, the notice here is not given by the proper parties.

*890] *TAUNTON, J.* This is a stronger case than *Rex v. The Justices of Lancashire*, 4 B. & A. 289. The objection there was non-description, here it is misdescription.

The court discharged the rule, but without costs, saying that the objection should have been taken earlier.(a)

DOE dem. E. B. PATTESHALL v. TURFORD. June 15.

Where it was the usual course of practice in an attorney's office for the clerks to serve notices to quit on tenants, and to endorse on duplicates of such notices the fact and time of service; and on one occasion, the attorney himself prepared a notice to quit to serve on a tenant, took it out with him together with two others prepared at the same time, and returned to his office in the evening, having endorsed on the duplicate of each notice a memorandum of his having delivered it to the tenant; and two of them were proved to have been delivered by him on that occasion:

Held, on the trial of an ejectment, after the attorney's death, that the endorsement so made by him was admissible evidence to prove the service of the third notice.

EJECTMENT. At the trial before Littledale, J., at the Hereford assizes, 1832, it appeared that the defendant was tenant from year to year to the lessor of the plaintiff; that on the 18th of July, the lessor of the plaintiff had instructed Mr. Bellamy, who was then in partnership with Mr. William Patteshall, to give the defendant notice to quit at the following Candlemas; that Bellamy, on the 19th of July, told his partner, William Patteshall, who usually managed the business of the lessor of the plaintiff, of the instructions which he had received; that the latter prepared three notices to quit (two of them being to be served on other persons), and as many duplicates; that he went out, and returned in the evening, and delivered to Mr. Bellamy three duplicate notices (one of which was a duplicate of the notice to the defendant) endorsed by him, Patteshall. It was *proved that the other notices to quit had been delivered by Patteshall to the tenants for whom they [*891] were intended. The defendant, after the 19th of July, requested Mr. Bellamy that he might not be compelled to quit. It was proved by Mr. Bellamy to have been the invariable practice for their clerks, who usually served the notices to quit, to endorse on a duplicate of such notice a memorandum of the fact and time of service. The duplicate in question was so endorsed. Mr. Patteshall himself had never, to the knowledge of Mr. Bellamy, served any other notices than these three. Mr. Patteshall died on the 26th of February, 1832. It was objected, that the endorsement on the copy of the notice to quit in the handwriting of Patteshall was not, after his death, admissible evidence of the delivery of the notice to the defendant. The learned Judge received the evidence, but reserved liberty to the defendant to move to enter a nonsuit if the court should be of opinion that it ought not to have been admitted. A rule nisi having been obtained for that purpose,

Campbell and R. V. Richards, now showed cause. The endorsement on the duplicate of the notice to quit, which was proved to be in the handwriting of the deceased attorney, was admissible evidence of the service of the notice. It was an entry of a deceased agent of the lessor of the plaintiff, made contemporaneously with the act in the course of his duty as agent. In *Price v. Lord Torrington*, 1 Salk. 285, which was an action for beer sold and delivered, it appeared that the draymen were in the habit of coming every night to the clerk of the brewhouse, and giving him an account of the *beer they had de- [*892] livered out, which he entered in a book kept for that purpose, and the draymen set their hands to it; and on proof that a particular drayman was dead, an entry in this book signed by him was held good evidence of a delivery to charge the defendant. So in *Pitman v. Maddox*, 2 Salk. 690, in an action on a tailor's bill, a shop book was allowed for evidence; it being proved that the servant who wrote the book was dead, and this was his hand, and he had been accustomed to make the entries. In *Hagedorn v. Reid*, 3 Campb. 379, the copy of a license in a merchant's letter book, written by a deceased clerk, with a memorandum that the original had been sent to a correspondent abroad (and which entries were proved to be in the usual course of business), was admitted. In *Champneys v. Peck*, 1 Stark. N. P. 404, a bill with an endorsement upon it, "March 4, 1815, delivered a copy to C. D." which endorsement was proved

to be in the handwriting of a deceased clerk of the plaintiff (whose duty it was to deliver a copy of the bill), was held to be evidence to prove the delivery of the bill, such endorsement being shown to have existed at the time of the date. In *Pritt v. Fairclough*, 3 Camp. 305, an entry by a deceased clerk of the plaintiff in a letter book, professing to be a copy of a letter of the same date from the plaintiff to the defendants, was held to be good secondary evidence of the contents of the letter, on proof that, according to the plaintiff's course of business, the letters which he wrote were copied by this clerk, and then sent off by the post; and that in other instances the copies so made by the clerk had been *893] compared with the originals, and always found *correct. *Calvert v. The Archbishop of Canterbury*, 2 Esp. N. P. C. 645, will be referred to on the other side; but there it did not appear that the entry was contemporaneous, or that it was made in the discharge of the writer's duty. In *Cooper v. Marsden*, 1 Esp. N. P. C. 1, the clerk was not dead, nor was the entry proved to be contemporaneous.

Maule, contrd. Entries or declarations made by deceased persons are admissible to prove facts, not ordinarily provable by hearsay, in two cases only; first, where the entry or declaration is against the interest of the party making it, as in *Higham v. Ridgway*, 10 East, 109; *Doe d. Reece v. Robson*, 15 East, 32; *Roe d. Brune v. Rawlings*, 7 East, 279. See the cases collected in a note to *Barker v. Ray*, 2 Russ. 67, or where it is made in a regular course of business, as in *Pritt v. Fairclough*, 3 Campb. 305. In a note to that case it is stated that the entry of a deceased servant is not admissible without evidence of his usual course of dealing and his general punctuality; for which *Clerk v. Bedford*, Bull. N. P. 282, is cited, and *Doe v. Robson*, 15 East, 32, and *Hagedorn v. Reid*, 3 Campb. 379, are also referred to. Now, where a declaration or memorandum is made by a party in the usual course of dealing, it is not so much by way of statement of a fact that it is evidence, as because it is part of a transaction, which being proved, the other parts are presumed from it, in the same manner as proof that a letter was put into the post-office is evidence of its delivery to a party to whom it was directed. The whole series of facts to *894] be proved is the putting it in the post-office and *its successive delivery from one office to another, and ultimately to the person to whom it was directed; from proof of one of these facts, all the others, being such as evidently follow in a regular course from it, are presumed. Indeed, it is very rarely that direct evidence of every part of a transaction required to be proved is given. The usual way is to infer from proof of one part of it such other parts as either necessarily must be, or, according to the course of affairs, ordinarily are connected with it. In *Pritt v. Fairclough*, 3 Campb. 305, the invariable course was proved to be for the senior partner to write letters, to hand them over to a clerk to be copied in a letter book, and then send off the originals by the post. In that case there was no statement, by memorandum or otherwise, that the letter had been sent by the post; but one part of this transaction, that is, the copy, being proved, the other part, the writing and sending, were presumed. In *Barker v. Ray*, 2 Russ. 76, Lord Eldon appears to have thought that declarations were not admissible after the death of the party making them, if they were not against his interest. In *Chambers v. Bernasconi*, 1 Tyr. 335, the Court of Exchequer intimated an opinion that a written memorandum of an arrest, and of the place where it occurred, made by a sheriff's officer at the time of the caption, and sent by him immediately to the sheriff's office, and there filed in the course of business, was not, after the death of the officer, evidence of the place of arrest in an action between a bankrupt and his assignees, on the ground that the entry was not against the writer's interest. In the present case, there was no evidence that Mr. Patteshall was in the habit of serving *895] notices *and making endorsements of the service: the evidence, indeed, negatived that; and therefore the entry in question was not admissible as being made in the usual course of dealing. And there is no pretence for saying that it was a declaration against the interest of the party making it.

So that it was admissible on neither of the grounds on which such declarations are to be received.

LORD TENTERDEN, C. J. I am of opinion that the evidence was properly received. I take it to be proved that the practice in Messrs. Bellamy and Patteshall's office was, that any person who undertook to serve a notice to quit, endorsed on the duplicate, at the time of the service, the fact of his having served the original. Notices to quit were usually served by the clerks, and not by the principals; but a principal might occasionally serve such a notice, and we must assume, that when a principal served the notice, he would do what he required his clerk to do. Now, here it is proved that Patteshall took the notice with him when he went out, and that the endorsement on it is in his handwriting. Then the endorsement having been made in the discharge of his duty, was, according to the authorities cited, admissible evidence of the fact of the service of the original.

LITTLEDALE, J. According to the testimony of Bellamy, the practice of the office was for every clerk, at the time of serving a notice, to endorse on a duplicate a memorandum of that fact. If the notice in question had been served by a deceased clerk, his endorsement on the duplicate, coupled with proof of the practice of the office, would have been sufficient evidence of the service. Then the next question is, whether Patteshall having served it himself, his endorsement is tantamount to a clerk's. I think it is; for it must be assumed that he would do what he required his clerk to do. Here Patteshall took out the notices: his going out and delivering two of the notices is proved; and the endorsement on this duplicate must have been contemporaneous with the fact of service; for Bellamy says, that on that night or the next morning Patteshall delivered to him the duplicates, and that all these were endorsed by him.

PARKE, J. I am also of opinion that this rule ought to be discharged. The only question in the case is, whether the entry made by Mr. Patteshall was admissible in evidence, and I think it was, not on the ground that it was an entry against his own interest, but because the fact of such an entry was made at the time of his return from his journey, was one of the chain of facts (there are many others) from which the delivery of the notice to quit might lawfully be inferred. That the delivery might be proved by direct evidence, as by the testimony of the person who made it, or saw it made; it might be proved also by circumstantial evidence, as many facts ordinarily are which are of much greater importance to the interests of mankind, and followed by much more serious consequences. In this point of view, it is not the matter contained in the written entry simply which is admissible, but the fact that an entry containing such matter was made at the time it purports to bear date, and when in the ordinary course of business such an entry would be made if the principal fact to be proved had really taken place. The making of that written contemporaneous memorandum is one circumstance; the request by the lessor of the plaintiff to Mr. Bellamy to give the notice to quit, the subsequent communication by Bellamy to Patteshall, his departure and return, when the entry was made, the actual delivery of other notices to quit to other tenants taken out at the same time, the defendant's request that he might not be obliged to quit, are other circumstances, which, coupled with the proof of the practice in the office, lead to an inference, beyond all reasonable doubt, that the notice in question was delivered at the time stated in the memorandum. The learned counsel for the defendant has contended that an entry is to be received in two cases only; first, where it is an admission against the interest of a deceased party who makes it, and secondly, where it is one of a chain or combination of facts, and the proof of one raises a presumption that another has taken place; but it is contended that the facts here do not fall within the latter branch of the rule, because Mr. Patteshall, who served the notice, was not shown to have been in the habit of serving notices. I agree in the rule as laid down, but I think that, in the second case, a neces-

sary and invariable connexion of facts is not required; it is enough if one fact is ordinarily and usually connected with the other: and it appears to me that the present case is not, in its circumstances, an exception to that part of the rule. It was proved to be the ordinary course of this office that when notices to quit were served, endorsements like that in question were made; and it is to be presumed that Mr. Patteshall, one of the principals, observed the rule of the office as well as the clerks. It is to be observed, that in the case of an *898] entry *falling under the first head of the rule, as being an admission against interest, proof of the handwriting of the party, and his death, is enough to authorize its reception; at whatever time it was made it is admissible; but in the other case it is essential to prove that it was made at the time it purports to bear date; it must be a contemporaneous entry. It is on the ground above stated, as I conceive, that similar evidence was received, in Lord Torrington's case, 1 Salk. 285; 2 Ld. Raym. 873; *Pritt v. Fairclough*, 3 Campb. 305; *Hagedorn v. Reid*, 3 Campb. 379; *Champneys v. Peck*, 1 Stark. N. P. C. 404, and *Pitman v. Maddox*, 2 Salk. 690, and others of the same nature.

TAUNTON, J. I am of the same opinion. A minute in writing like the present, made at the time when the fact it records took place, by a person since deceased, in the ordinary course of his business, corroborated by other circumstances which render it probable that that fact occurred, is admissible in evidence. Those corroborating circumstances must be proved; and here many such circumstances did appear. The principle is established by *Price v. Lord Torrington*, 1 Salk. 285, 2 Ld. Raym. 873, and the other cases which have been referred to. It may be said that these were mere *nisi prius* decisions; but in *Evans v. Lake*, Bull, N. P. 282, which was a trial at bar, the question was, whether eight parcels of Hudson's Bay stock were bought in the name of Mr. Lake on his own account, or in trust for Sir Stephen Evans. To prove the latter of these positions, the assignees of Sir Stephen Evans, who were the plaintiffs, first showed that there was no entry in the books of Mr. Lake *899] relating to this *transaction; they then produced receipts in the possession of Sir S. Evans for the payment of part of the stock, and on the back of the receipts there was a reference in the handwriting of Sir Stephen's book-keeper, since deceased, to a certain shop-book of Sir Stephen. Upon this, the question was, whether the book so referred to, in which was an entry of the payment of money for the whole of the stock, should be read. And the Court of King's Bench, upon the trial, admitted the entry, not only as to the part mentioned in the receipts, but also as to the remainder of the stock in the hands of Mr. Lake's son.

Rule discharged.

DONELLAN v. READ. June 15.

A landlord who had demised premises for a term of years at 50*l.* a year, agreed with his tenant to lay out 50*l.* in making certain improvements upon them, the tenant undertaking to pay him an increased rent of 5*l.* a year during the remainder of the term (of which several years were unexpired), to commence from the quarter preceding the completion of the work:

Held, that the landlord, having done the work, might recover arrears of the 5*l.* a year against the tenant, though the agreement had not been signed by either party; for that it was not a contract for any interest in or concerning lands within the statute of frauds; nor was it, according to that statute, an agreement "not to be performed within one year from the making thereof," no time being fixed for the performance on the part of the landlord.

ASSUMPSIT. The declaration stated that the defendant held a messuage and premises as tenant thereof to the plaintiff under a lease, for the residue of a term, at 50*l.* a year rent, and had applied to the plaintiff to make certain improvements on the said premises; and that in consideration that the plaintiff would make the same at his, the plaintiff's expense, the defendant promised to

pay him the yearly rent or sum of 5*l.* in addition to the above-mentioned annual rent of 50*l.*, making together the yearly rent or sum of 55*l.*, to *commence on the 29th of September, 1827, and to be paid thenceforth at [*900 the days appointed in the lease for payment of the rent thereby reserved. Averment that the plaintiff made the improvements; but that afterwards, and while the defendant continued tenant to the plaintiff, the said additional rent for two years and three quarters, amounting to 13*l.* 15*s.*, was and continued in arrear and unpaid. The second count described the promise as made upon an executed consideration, and there were also a count on a quantum meruit for use and occupation, and the money counts. Plea, the general issue. At the trial before Alderson, J., at the assizes for Somersetshire, in August, 1831, the following facts appeared:

The defendant was tenant to the plaintiff of a house and bakehouse under a lease for twenty years, commencing from the 7th of June, 1822, at the yearly rent of 50*l.*, payable at the usual quarter days. The defendant being desirous of some improvements in the house, proposed to the plaintiff in August or September, 1827, to lay out 50*l.* on such alterations, which the plaintiff consented to do; and the defendant thereupon undertook to pay him an increased rent of 5*l.* a year during the remainder of the term, to commence from the quarter preceding the completion of the work. A memorandum in writing was prepared to that effect, but the defendant for some reason refused to sign it. The alterations were completed in November, 1827, at an expense of 55*l.*; and the defendant, after Christmas, 1827, paid the increased rent for the first quarter, but afterwards refused to pay any more than the original rent of 50*l.* The present action was brought for the increased rent.

It was objected, on behalf of the defendant, that this *case came within [*901 the statute of frauds, 29 Car. 2, c. 3, s. 4, which enacts, "that no action shall be brought upon any contract or sale of lands, tenements, or hereditaments, or any interest in or concerning them, or upon any agreement that is not to be performed within the space of one year from the making thereof, unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized;" and that this was a contract or agreement for an interest in or concerning land, and was in effect a purchase of an increased rent. It was also contended that the agreement was not to be performed within a year, inasmuch as it was to have continuance to the end of the lease. It was further urged that there was a variance between the promise as laid in the declaration, which was to pay the additional rent quarterly, and the promise proved, which it was said was to pay the rent of 5*l.* yearly, to begin on a particular quarter day, but not to pay a rent reserved quarterly. On the part of the plaintiff it was answered that this was a mere agreement collateral to the lease, and that it came within the principle of *Hoby v. Roebuck*, 7 Taunt. 157; 2 Marsh. 433, and on the second point under the statute of frauds, that the whole agreement on one side was executed during the year, and that therefore the clause cited did not apply. On the point of variance Alderson, J., was of opinion that the agreement meant an additional rent payable on the quarterly days of the old rent. But on the question under the statute of frauds, he thought that *as the plaintiff had in his declaration [*902 expressly claimed this as an additional yearly rent, there was a distinction between *Hoby v. Roebuck*, 7 Taunt. 157, 2 Marsh. 433, and this case; that this was the purchase of a rent issuing out of the premises, and therefore within the provisions of the statute of frauds; and he nonsuited the plaintiff, with liberty to move to enter a verdict for him. A rule nisi was accordingly granted. On a former day in this term,

Manning and Follett showed cause. (a) As to the first point, *Hoby v. Roe-*

(a) Before Littledale, Parke, and Taunton, Js. Lord Tenterden had gone to attend the Privy Council.

buck does not govern this case. The question there was not put to the Court upon the ground that the purchase was of "an interest in or concerning lands" within s. 4, of the act: it was merely insisted, that the contract for an additional rent was, in effect, a demise of the new buildings erected by the plaintiff; and the Court held that there was no contract for a rent, but merely a collateral agreement for so much money to be paid during the term. They observed that it could not have been distrained for. But here the agreement is expressly for an increased rent, and it is so stated in the declaration. There clearly might have been a distress for it. This contract, then, would have operated to charge the land if a written memorandum had been executed. It was equivalent to a new demise at the rent of 55*l*. [PARKE, J. Even if there had been a note in writing, would the 55*l*. have become a rent, unless the transaction had amounted to a surrender of the former term?] It would have had that effect. Secondly, *903] this was not an agreement to be completely performed *within the space of one year from the making thereof, and it was therefore void for want of a memorandum in writing, *Boydell v. Drummond*, 11 East, 142. The word agreement comprehends what is to be done by both parties: unless the promise of each is to be fulfilled within a year, there must be a memorandum in writing. [PARKE, J. If goods are sold, to be delivered immediately, or work contracted for, to be done in less than a year, but to be paid for in fourteen months, or by more than four quarterly instalments, is that a case within the statute?] It is within the policy of the act as stated by Holt, C. J., in *Smith v. Westall*, 1 *Ld. Raym.* 316, viz., "not to trust to the memory of witnesses for a longer time than one year." [PARKE, J. In *Bracegirdle v. Heald*, 1 B. & A. 722, Abbott, J., takes the distinction, that in the case of an agreement for goods to be delivered by one party in six months, and to be paid for in eighteen, all that is to be performed on one side is to be done within a year; which was not so in the case then before the Court.] It is only assumed here that the plaintiff's part was to be executed within a year. [TAUNTON, J. Unless the contrary is expressly agreed, the statute does not apply, *Fenton v. Emblers*, 8 Burr. 1278.]

Merewether, Serjt., *contra*. In the first place, this was not a contract giving any interest in or concerning lands. The defendant is lessee of a house, and the landlord undertakes, in consideration of 5*l*. a year to be paid during a certain period, to improve it. The case is just the same as if any other person had entered into that engagement. There would, then, clearly have been no *904] new interest created in the land. And it makes no *difference that, in one case or the other, the sum to be paid is called rent. It is a mere collateral agreement, like that in *Hoby v. Roebuck*, 7 Taunt. 157; 2 Marsh. 433. No intention appears of superseding the original written contract; nor is it likely that these parties should have contemplated a surrender, by which the landlord would lose the covenants of the lease, and the tenant his term in the premises. As to the second point, *Boydell v. Drummond*, 11 East, 142, is a very different case. There, neither the delivery of the work nor the payment was to be completed in a year; here the work was actually finished on one side in less than that period; and it has never been held that in such a case the statute shall attach, and the party performing his contract lose his remedy, merely because he has agreed that the payment shall be postponed beyond a year.

On this last point, the Court intimated their opinion to be in favour of the rule; as to the other.

Cur. adv. vult.

The judgment of the Court was now delivered by LITLEDAL, J., who, after stating the case proceeded as follows:—

We are of opinion that the case does not fall within the statute of frauds. The most favourable words for the defendant are, that it is a contract for an "interest in or concerning land." But no additional interest in the land is given to the defendant by this contract; for his interest is the same as before; it is only that there are bricks and other materials removed from the house,

and some others substituted in their room. Then is *there any additional interest in the land given to the landlord? It is said to be a [*905 purchase of a rent of 5*l.* a year for the sum of 50*l.*, and therefore an interest in or concerning the land; but though it be called a rent in the present contract, and also a rent in the declaration, yet we are of opinion that it is not rent in the legal sense and understanding of the word rent; and that the word is not to be understood in its legal sense either in one or the other. It could not be distrained for, for there is no lease that embraces it; the lease is for 50*l.* a year, and there is no lease at 55*l.* If there be a power of re-entry for non-payment of the rent, as is probably the case, there could be no ground for enforcing it in respect to the additional 5*l.* The assignee of the term could not be charged with the increased rent; the assignee of the reversion could not claim it, because it is not annexed to the reversion: if the lessor should die, the rent of 50*l.* would go to his heir or devisee, but the right to this additional 5*l.* being a mere matter of personal contract would go to his executor. The only way in which it could be taken to be rent would be that this contract creates a new demise at an increased rent, and that therefore, by operation of law, the old lease is surrendered by such new demise; but it could never be supposed to be in the contemplation either of the landlord or the tenant that the old lease should be at an end, and that instead of it a new lease should be created, which being only by parol could only have the effect of a lease at will; and as it is quite improbable that such should be the intention of either party, we think that though the word rent has been used, it is too much to treat it as rent in the technical strict meaning of the term, and that all that the parties meant was a personal contract to *pay an additional 5*l.* a year; and we think this case is to be governed by *Hoby v. Roebuck*, 7 Taunt. 157; [*906 2 Marsh. 433; for though the agreement there was to pay ten per cent. upon the money laid out, and it was not called rent, yet that was in truth the same thing, and it only amounted to a collateral contract.

As to the contract not being to be performed within a year, we think that as the contract was entirely executed on one side within a year, and as it was the intention of the parties, founded on a reasonable expectation, that it should be so, the statute of frauds does not extend to such a case. In case of a parol sale of goods, it often happens that they are not to be paid for in full till after the expiration of a longer period of time than a year; and surely the law would not sanction a defence on that ground, when the buyer had had the full benefit of the goods on his part. In the case of *Boydell v. Drummond*, 11 East, 142, the contract was not completely executed on one side, and the case was such that in the common course of the publication it was not expected that it should be completed in a year.

With regard to the variance as to the time of payment of the rent, we think there is no ground for that objection.

On the whole, therefore, we are of opinion that the rule to enter a verdict for the plaintiff should be made absolute.

Rule absolute.

*The KING v. The Churchwardens and Overseers of ST. MARTIN-IN-THE-FIELDS. June 15. [*907

Where an ancient select vestry existed in a parish, having and exercising certain powers in the management and care of the poor, but not all the powers required by the statute 59 G. 3, c. 12, to be exercised by select vestries, the Court granted a mandamus calling on the parish officers to convene a meeting, pursuant to the act, for the purpose of establishing a new select vestry, to perform those functions under the act, which the former vestry could not discharge; but not otherwise to interfere with it.

A RULE nisi was obtained in last Easter term, for a mandamus calling on the

defendants to give public notice of, and to convene, a general meeting of the rated inhabitants of the parish, for the purpose of establishing a select vestry for managing the concerns of the poor, according to the statute (59 G. 3, c. 12), and to nominate and elect such and so many substantial householders, &c., not exceeding twenty, nor less than five, as should at any such meeting be thought fit to be vestrymen. It appeared on affidavit made in answer to the application that there was an ancient select vestry in the parish (see *Golding v. Fenn*, 7 B. & C. 765); that by virtue of several acts of parliament (23 G. 2, c. 35, 2 G. 3, c. 22, 7 G. 3, c. 89, 10 G. 3, c. 75), the vestrymen had acted with the parish officers and certain other inhabitants, in the care and management of the poor; and that they had, by the last-mentioned act, a joint authority with the parish officers, and with certain inhabitants, in making poor-rates and enforcing their payment. It did not, however, appear that the vestry enjoyed all the powers required by the act 59 G. 3, c. 12, to be exercised by select vestries.

Sir *James Scarlett*, *Ludlow*, Serjt., and *Platt*, now showed cause. It cannot be contended, after the opinions expressed by the Court in *Rex v. St. Bartholomew* *908] vestry having authority in the concerns of the poor, is an answer to this application. But here the vestry has sufficient powers to make such an application unnecessary, and if a new vestry were established, there would be a conflict of authorities. The case comes within sect. 86 of the act 59 G. 3, c. 12, which provides that nothing in that act shall extend "to alter, affect, or disturb any select vestry which in any parish has been established and acted upon by virtue of any ancient usage or custom."

Campbell, *contra*. It is clear from *Rex v. St. Bartholomew the Great*, 2 B. & Ad. 506, that if there be already a select vestry which can perform all the duties required by 59 G. 3, c. 12, the provisions of that statute will not apply; but that if there be any of those duties which the existing vestry cannot perform, the parishioners may establish a new one. That is the case with the present vestry. He then proceeded to point out instances in which the vestry could not fulfil the directions of the act. [Lord TENTERDEN, C. J. You propose to leave everything in the parish as it is at present, only giving to the new vestry those powers which the present has not?] That is the object. [Lord TENTERDEN, C. J. Then there will be two select vestries in the parish.] The Court, in *Rex v. St. Bartholomew the Great*, 2 B. & Ad. 506, contemplated such a case as one that might occur.

Lord TENTERDEN, C. J. The new vestry being intended only to exercise *909] those special functions required *by the act, which the present vestry cannot perform, I think the rule, as to the first part of it, may be made absolute. The other part, perhaps, had better be taken separately.

LITLEDALE, J. The act provides, by sect. 86, (a) that nothing therein contained shall take away or affect the powers or provisions of any special or local act; therefore a new vestry may be furnished with the powers given by this statute, without destroying the former vestry.

PARKER, J. The thirty-sixth section enacts, that such of the directions and powers of that act as are not repugnant to, nor incompatible with the provisions of special or local acts, shall be adopted, as in other parishes or places, and that

(e) Sect. 86 enacts, that nothing in the act contained shall extend or be construed to extend, "to take away, abridge, alter, prejudice, or affect any of the powers or provisions of any special or local act or acts for the maintenance, relief, or regulation of the poor in any city, town, hundred, district, parish, or place, so nevertheless that in every city, &c., such of the clauses, directions, and powers in this act contained, as are not repugnant to, nor incompatible with the provisions of such respective special or local acts, shall have the like force and effect, and may be adopted and applied in like manner as in other parishes and places; provided also, that nothing in this act contained shall extend or be construed to extend, to alter, affect, or disturb any select vestry which in any parish has been established and acted upon by virtue of any ancient usage or custom."

no ancient select vestry should be disturbed. The powers sought in this case are not repugnant to the provisions under which the former vestry has acted. If, indeed, this parish had had a local act, giving the old vestry all the powers specified by 59 G. 3, c. 12, that vestry could not have been interfered with.

*TAUNTON, J., concurred.

The rule was made absolute, as moved for, it being understood that [*910 different days were to be appointed for the two purposes mentioned in the rule.

The KING v. The Justices of SALOP. *June 16.*

(Case of OLDBURY Township.)

The parish of H. consisted of three townships in the county of W., and certain townships and districts in the county of S. The townships in W. had always had their own overseers, and relieved their own poor; but four overseers had been appointed for the division of the parish lying in S., and rates collected and applied for the relief of the poor of that division indiscriminately. On application by a township in the latter division, for a mandamus to the justices of S. to appoint overseers for that township, pursuant to 18 & 14 Car. 2, c. 12, s. 21, on the ground that the parish had not enjoyed, and could not enjoy the benefit of the statute 43 Eliz., c. 2; facts being also stated to show the expediency of a separate appointment:

Held, that the divisions of the parish in W. and in S. could not be considered, with reference to the statute of Charles, as distinct parishes; and the mandamus was granted.

A RULE nisi had been obtained for a mandamus to the above justices, to appoint two overseers of the poor for the township of Oldbury, upon the following statement:—The parish of Hales-owen consists of the township of the borough of Hales-owen, the township of Oldbury, and ten other divisions or villas, situate in Shropshire, and three townships, Lutley, Cradley, and Warley, situate in Worcestershire. The parish is nine miles long and five broad. Two churchwardens have immemorially been appointed for the whole parish, and the rate for repairs of the church is laid on the whole. The three Worcestershire townships have always had two overseers each, who, with one of the churchwardens of the parish, have made separate poor-rates for each of those townships respectively, and they have supported their poor apart from each other and from the rest of the parish. But the justices of Salop have annually appointed four overseers for that part of the parish which is in Shropshire, comprehending Oldbury, the borough of *Hales-owen, and the ten villas above-mentioned, [*911 which overseers, with one of the churchwardens, have taken order and made rates for the poor; and these have been exclusively applied to the relief of the poor of those places: there is a joint account of all disbursements on the part of the last-mentioned places, and a general settlement of such account at the end of the year, and the expenses are borne by the inhabitants of the last-mentioned places equally. There has always been a distinct constable for the borough of Hales-owen, and one for the residue of the parish, exclusively of the townships of Oldbury, Lutley, Cradley, and Warley (each of which has its own constable), but including the ten villas, which have also their head-boroughs respectively. All the townships and villas repair their highways separately. Oldbury contains 4651 inhabitants and 924 houses, and is four miles from the borough of Hales-owen, where all meetings respecting rates and the relief of the poor are held. It has a chapel of its own, with a licensed chaplain of the church of England. The contribution to the poor from Oldbury nearly equals that from the borough of Hales-owen and the ten villas together; the property of the respective places, according to a valuation made in 1830, is in the same proportion. It was alleged that the parish of Hales-owen could not and cannot, nor could or can the township of Oldbury, reap the benefit of the statute 43 Eliz.,

c. 2, as to the maintenance of the poor, by reason of the largeness of the parish, the population, and the fact that three of the townships have immemorially maintained their own poor. An application had been made to the justices to appoint two overseers for Oldbury township exclusively, but they had refused.

*912] In opposition to the rule, it was stated that the concerns of *the poor in the Shropshire part of the parish had immemorially, as was believed, been administered by the churchwardens and by four overseers, appointed respectively for four quarters (Oldbury being one), into which part of the parish was divided; that those overseers paid the money which they collected to a treasurer, and it was expended under the direction of a select vestry for that part of the parish; that the borough of Hales-owen was in a central situation; that the management by four overseers as above had been found beneficial, and no complaint had arisen respecting it till 1830, when a new assessment was made for the Shropshire part of the parish, by which a larger, and, as was represented, a more just share of the contribution to the poor, was imposed upon Oldbury. On a former day of the term,

Talfourd and *Follett* showed cause against the rule. (a) This is not a case to which the provisions of the statute 13 & 14 Car. 2, c. 12, s. 21, can be applied. The Shropshire and Worcestershire parts of Hales-owen are to all intents, except as to repairing the mother church, two parishes: their overseers are not even appointed by the same justices. The fact therefore that the Worcestershire townships maintain their own poor is of no importance. *Rex v. Sir Watts Horton*, 1 T. R. 374, may be cited, but is distinguishable on the ground already mentioned, and also because, there, while the townships were not separated, the parish had a greater number of overseers than the statute of

*913] Elizabeth requires. (b) Besides, that *case only lays down principles by which the discretion of the Court may be guided, and not an inflexible rule. Lord Ellenborough, in *Rex v. Palmer*, 8 East, 416, considers it as a matter of discretion, whether or not the Court will, in a particular case, enforce the provisions of 13 & 14 Car. 2, c. 12. The only question here is, whether that part of the parish of Hales-owen which is in Shropshire can have the benefit of the statute of Elizabeth, and there is nothing to show that it cannot.

The Attorney-General, Campbell and *R. V. Richards, contra*. According to the general principle (recognised in *Rex v. Leigh*, 3 T. R. 746, and several other cases), where it appears that from a distant period a parish has not availed itself of the statute of Elizabeth by maintaining its poor as one parish, that is the strongest evidence that it cannot enjoy the benefit of the statute. And if that clearly appears, as it does on these affidavits, the townships in the parish are entitled respectively to have a distinct appointment of overseers for themselves. Convenience is on the side of adhering to the general rule. The fact that the three townships at present maintaining their own poor severally, lie within the jurisdiction of the Shropshire justices, is no objection, but rather facilitates the course proposed. [PARKE, J. In a case at the Old Bailey, *Sir T. Ray*, 476, where a parish lay in two counties, and it appeared that each part of the parish had distinct officers, made distinct rates, and had used time out of mind to make distinct accounts to the justices of each county, it was resolved by Pemberton, C. J., Dolben, and other justices, that in the absence

*914] of any *particular usage to the contrary, the parish, in both counties, ought to contribute, but that in this case each division was to be looked upon as a separate parish, and the Court made an order upon one separately, for the maintenance of children.] That was before the decision in *Rex v. Sir Watts Horton*, 1 T. R. 374.

Cur. adv. vult.

Lord TENTERDEN, C. J., now delivered the judgment of the Court. After

(a) Before Lord Tenterden, C. J., Parke, and Taunton, Js. *Littledale J.*, was in the bail court, Pattenon, J., having gone to Guildhall.

(b) See as to this, Lord Kenyon's observation in *Rex v. Newell*, 4 T. R. 272, and *Rex v. Loxdale*, 1 Burn, 456.

stating the facts, his Lordship said :—Looking at the parish of Halea-owen as a whole, it is clear there never, within memory, has been one set of overseers for the parish ; there has been one set for the townships in Worcestershire, and one for the part of the parish lying in Shropshire. Then the parties applying for the rule relied upon *Rex v. Sir Watts Horton*, 1 T. R. 374, which has been followed up in principle by several other cases. On the other hand, a case in *Sir T. Raymond*, p. 476, was referred to in the course of the argument, where a parish was situate partly in London and partly in Middlesex, each part having distinct officers, making distinct rates, and passing distinct accounts before the justices of the respective counties ; and the question being as to the liability to maintain children who were left chargeable to one of the divisions, it was held that each division must be looked upon as a several parish. We have looked into that case, and we think it is no authority to show, that in every case in which a parish lies in two counties, each part may be considered as a separate parish. The case happened after the statute of Charles, and probably was no more than an application of the provisions of that statute to each part *as [915 a distinct township ; at all events there is nothing in it calculated to raise any reasonable doubt on the application of *Rex v. Sir Watts Horton* to the case now before the Court. The rule must therefore be absolute.

Rule absolute.

BRITTEN v. WAIT.

A beneficed clergyman granted an annuity by deed, and made it chargeable on his living, and gave a warrant of attorney in the common form, to confess judgment at the suit of the grantee for 8200*l*. By the annuity deed, it was agreed that the judgment to be entered up on the warrant of attorney was to be a further security for the annuity, and that no execution or sequestration should be issued thereon, other than such sequestration as was therein mentioned, until the annuity should be in arrear ; and the grantor then covenanted, that if the grantee should at any time deem it expedient to sequester the living, it should be lawful for him to issue a sequestration by virtue of the judgment, for the 8200*l*. or any part thereof. Judgment having been entered up on the warrant of attorney, and the annuity being in arrear, the grantee issued a sequestration for 8200*l*. (which sum greatly exceeded the arrears due), and entered into possession of the living.

On motion, the Court refused to set aside the annuity deed, warrant of attorney, and judgment, but directed that the writ of sequestration should continue in force only for the arrears that had become due on the annuity.

By indenture of the 5th of June, 1822, reciting that the defendant had contracted to sell one Mandeville an annuity of 120*l*. for 1000*l*., and had executed a warrant of attorney to confess a judgment against him, the defendant, at the suit of Mandeville for 2000*l*., and that judgment was thereupon entered up ; defendant covenanted to pay Mandeville the said annuity for the term of ninety-nine years, if he, defendant, should so long live, by quarterly payments, and granted, bargained, sold, and demised to Mandeville the benefice of Blagdon with the appurtenances, to hold to Mandeville for the said term, at the rent of a pepper-corn ; and it was agreed that the judgment so entered up was intended to be a further security to Mandeville for the annuity. There was a covenant reserving power to the defendant to repurchase. The defendant having afterwards contracted with the plaintiff to sell him an annuity of 162*l*. 6*s*., and agreed with Mandeville for the *repurchase of the former annuity, the [916 plaintiff paid Mandeville 1030*l*. for such repurchase, and 570*l*. to the defendant ; and the annuity of 120*l*., and the said term of years, judgment and all other securities for the same were kept on foot and assigned to a trustee for better securing the annuity of 162*l*. 6*s*.

In August, 1825, the defendant executed an indenture, whereby the benefice of Blagdon became charged with the due payment of the annuity of 162*l*. 6*s*.,

and also a warrant of attorney, to confess a judgment against him, the defendant, at the suit of the plaintiff for 3200*l*. The indenture contained the following clauses :—" And it is hereby agreed and declared, that the judgment so to be entered up against the defendant as aforesaid, is intended and agreed to be a further security to the said John Britten, his executors, &c., for the said annuity of 162*l*. 6*s*. hereinbefore mentioned ; and that no execution or sequestration shall be issued or taken out upon the said judgment (*other than such sequestrations as are herein mentioned*), unless and until the said annuity of 162*l*. 6*s*., or some part thereof, shall be in arrear by the space of thirty days next after the same shall become due and payable : " and defendant covenanted with the plaintiff, his executors, &c., that in case the plaintiff shall at any time deem it expedient to sequester the said rectory, or any future benefice of the defendant, then it shall be lawful for the plaintiff to issue any writ of sequestration under or by virtue of the said judgment so to be entered up as aforesaid, and thereupon or at any other time thereafter to sequester the said rectory, and such future benefice or benefices or any of them as aforesaid, for the said sum of 3200*l*., for which judgment shall be so entered up, or any part thereof."

*917] *In September, 1825, judgment was entered up on the last-mentioned warrant of attorney, at which time no payment in respect of this annuity had become due ; but in 1829, there was an arrear on the annuity, which the defendant being unable to discharge, the plaintiff entered into possession of the benefice of Blagdon, by virtue of a writ of sequestration for the sum of 3200*l*., issued upon the judgment so entered up on the warrant of attorney of August, 1825, and the plaintiff has since continued in the possession thereof, and in the receipt of the tithes and other proceeds. A rule nisi having been obtained for setting aside the annuity deeds, the warrants of attorney, the judgments, and the sequestration, upon the ground that the annuity was charged on the defendant's benefice, and therefore void under the statute 13 Eliz. c. 20,

Follett now showed cause. This does not fall within the case of *Flight v. Salter*, 1 B. & Ad. 673, for there the warrant of attorney recited that it was executed to secure the annuity, and to the intent that a sequestration might be obtained by the grantee, and continued during the continuance of the annuity, for better securing the same. But here the warrant of attorney is in the common form, and is therefore clearly valid so far as it operates to secure the arrears of the annuity. *Gibbons v. Hooper*, 2 B. & Ad. 734, *Kirlew v. Butts*, 2 B. & Ad. 736, note (b), and *Moore v. Ramsden* (a) establish that if *a
*918] warrant of attorney merely authorizes a sequestration to issue from time to time as default is made in the payment of the arrears, and to cease when the arrears are satisfied, as the grantee is thereby placed in no better situation than other creditors, the Court will not set aside the execution. [Lord TENTERDEN, C. J. The question must in every case depend upon the effect of the instrument.] The effect of the covenant here is not to give the grantee a power to charge the benefice permanently, but a more speedy mode of enforcing the sequestration. [PARKE, J. The covenant gives him a power to sequester either for the whole 3200*l*. or for a part.]

Campbell and Sewell, *contra*. This case falls within the principle of *Flight v. Salter*, 1 B. & Ad. 673, and is clearly distinguishable from *Kirlew v. Butts*, 2 B. & Ad. 736, note (b), and *Gibbons v. Hooper*, 2 B. & Ad. 734. The war-

(a) In *Moore v. Ramsden*, B. R. Hilary term, 1832, the deed recited an agreement, that a warrant of attorney should be given to authorize a judgment to be entered upon a collateral security. The warrant of attorney gave power to issue a sequestration from time to time, as arrears fell due ; and inasmuch as the sequestration was only to issue for satisfaction of the arrears, the Court (Lord Tenterden, C. J. and Patteson, J.) refused to set aside the warrant of attorney, but they confined the sequestration to the arrears due when it issued.

rant of attorney and the annuity deed refer to each other, and are to be taken as one security. It is quite clear the parties intended to charge the living beyond the mere amount of the arrears from time to time accruing. There are two distinct powers of sequestration given to the grantee of the annuity, and admitting that the power to sequester for arrears be good, still that which enables the grantee to sequester for the whole sum, is, in effect, a charge on the benefice, and therefore void as an attempt to do that indirectly, which cannot by law be done directly, *Doe dem. *Mitchinson v. Carter*, 8 T. R. 300. [*919 At all events, if the warrant of attorney be considered good, the sequestration itself, being for the whole sum, and not for the arrears, must be set aside.

LORD TENTERDEN, C. J. The sequestration cannot stand; but all we can do is to prevent any further proceedings on that. We cannot set aside the warrant of attorney, which on the face of it is free from objection. It appears by the deed that there is power reserved to the plaintiff to sequester the rectory for 3200*l*. Now he could not by law sequester to that extent, but he might for part of that sum, viz., for the arrears which had actually become due.

LITLEDALE, J. The sequestration cannot be supported to the extent for which it is issued, but the warrant of attorney cannot be set aside, because the terms of the deed are not incorporated in it.

PARKE, J. I am of the same opinion. All that we can do under the circumstances is to prevent any further proceedings taking place on the sequestration. The warrant of attorney is good. In *Flight v. Salter*, 1 B. & Ad. 673, the declared intention was to do an illegal act. Here the warrant of attorney was given for a legal and an illegal purpose: we cannot say it is for an illegal purpose only: but the sequestration has issued for a larger sum than it ought. This case falls within *Gibbons v. Hooper*, 2 B. & Ad. 734, *Kirlew v. Butts*, 2 B. & Ad. 736, note (b), and *Moore v. Ramsden*, ante, p. 917, note (d).

*TAUNTON, J. concurred.

[*920]

The rule drawn up was, that no further proceedings be taken on the writ of sequestration, and that the plaintiff do account before the Master for what he has received under the sequestration, he being allowed to retain the arrears that have become due on the annuity; and that until the account shall have been taken by the Master, no further proceedings be had against the defendant on the warrant of attorney, the plaintiff being at liberty hereafter to issue a fresh writ of sequestration for any future arrears of the annuity which may become due.

*WARNER v. POTCHETT, Clerk. June 16.

[*921]

The 42 G. 3, c. 116, s. 69, authorizes bodies corporate, for the purpose of redeeming land tax charged on their lands, to sell and convey any lands whereof they shall be in actual possession, or entitled beneficially to the rents or profits, or the fee simple and inheritance of any lands belonging to them which shall have been or shall be granted or demised for any beneficial lease for life or lives or years, *and also the rents and services* and other profits reserved or payable in respect of such leasehold tenements.

Section 76 enacts, that no sale shall be valid unless two of the commissioners appointed under s. 72, of the act, shall certify their assent by signing and sealing the deed of sale as parties thereto.

A prebendary agreed by writing, in consideration of a sum in 8 per cent. stock (of the amount necessary for redeeming the land tax) to convey to a lessee then in possession, a part of the reversion in the prebendal estate, such part to be set out and valued by A. B., and approved by the king's commissioners. The lessee furnished the sum required for purchasing the stock, and the prebendary concluded the necessary contract with the land-tax commissioners, transferred the stock into the names of the commissioners for reducing the national debt, and had the contracts duly registered; the land was also set out and valued; but the lessee then refused to sign the necessary

memorial for the purpose of obtaining the approbation of the king's commissioners pursuant to s. 76. The prebendary afterwards distrained upon an under-tenant of the land for the amount of the redeemed land tax, as additional rent, pursuant to s. 88: Held, that there had been no valid sale of the land, for want of the assent of the commissioners, and because, in order to comply with the provisions of s. 69, the prebendary ought to have sold, not only the fee simple of the lands demised, but also the rents, services, and other profits: Held, also, that he had no right by s. 88, to distrain until the precise quantity of land, and the portion of reserved rent, to be sold, were ascertained by the commissioners.

REPLEVIN. The defendant avowed, first, that one Joseph Smith was prebendary of the prebend of North Grantham, and made a lease of the locus in quo, and that he died, and the defendant became prebendary, and afterwards, and during the continuance of the lease, redeemed the land-tax with moneys which were raised for that purpose by virtue of the statute in that case made and provided, and distrained for four years' arrears of this land-tax. There were also avowries as for rent. The plaintiff in his plea in bar traversed that the land-tax had been redeemed by the defendant with moneys raised for that purpose by virtue of the statute. At the trial before Tindal, C. J., at the Lincoln Summer assizes, 1831, the jury found a verdict for the defendant, subject to the opinion of this Court on the following case:—

*922] "In May, 1825, Joseph Smith, then prebendary of the prebend of North Grantham, demised the locus in quo (being part of the prebendal estate) to Robert Snow, a trustee for Lord Huntingtower, on a lease for three lives, at the annual rent of 33*l.* The plaintiff is undertenant of Lord Huntingtower. Smith died, and in June, 1825, the defendant was instituted and inducted to the prebend. Negotiations having taken place between the defendant and Lord Huntingtower for the redemption of the land-tax on the demised estate by sale to his Lordship of the reversion of part of the same property, the defendant, in April, 1826, signed the following agreement:—"Upon Lord Huntingtower transferring the stock of 641*l.* 13*s.* 4*d.* and 146*l.* 13*s.* 4*d.* 8 per cent., being the consideration for the land-tax of 17*l.* 10*s.*, and 4*l.* charged on the north prebendal estate, I agree to convey such part or parts of the prebendal estate on lease to Lord Huntingtower, to his Lordship in fee, as shall be set out and valued by Mr. John Burcham, and approved by the king's commissioners, as a compensation for the same, and expenses." Then followed a memorandum as to the particular parts of the estate from which the land was to be set out.

In pursuance of this agreement, the defendant concluded the necessary contract with two commissioners for the redemption of the land-tax, and in May, 1826, the requisite amount of stock having been purchased by the defendant for 613*l.* 18*s.* 4*d.* with moneys advanced for that purpose by Lord Huntingtower, the stock was transferred into the name of the commissioners for the reduction of the national debt. The contracts were, in the same month, duly registered, and estate exonerated from land-tax from the 25th day of March preceeding. A

*923] "short time afterwards, Mr. Burcham viewed the prebendal estate, and set out land in the parts of the estate stipulated by the memorandum, altogether of the annual value of 65*l.*, the reversion of which, estimated at ten years' purchase, would raise the sum of 650*l.*; and of this valuation Mr. Burcham made the usual affidavits. In December, 1830, the defendant having signed the joint memorial of himself and Lord Huntingtower to the commissioners for regulating, approving, and confirming sales by ecclesiastical bodies pursuant to the statute, tendered the same to Lord Huntingtower for his signature, presenting at the same time the valuation of Mr. Burcham, but Lord Huntingtower absolutely refused to sign the memorial, or to proceed further in the business. The distress was taken on the 19th of February, 1831. The question for the opinion of the Court was, whether the money with which the land-tax was redeemed was raised agreeably to the statute. This case was argued on a former day in the term.

sumed, would take care to settle the proportion in such a manner as not to allow the party selling to enjoy an undue share of the benefit, or cast an undue share of the loss upon his successor. This previous apportionment is necessary to authorize a distress, because the land-tax redeemed is to be considered as yearly rent payable to the prebendary, over and above the reserved rent, and to be recovered and paid as such; but until the *quantum* of the remaining rent is ascertained, how can the whole rent to be distrained for be rendered certain? And no proposition is more clear, than that there can be no distress for a rent of uncertain amount.

It is no answer to this objection to say that the distress was made for the land-tax only, by way of additional rent, for if a person cannot distrain for an entire rent because it is not ascertained, it is equally clear that he cannot for a part of it; and in our opinion a distress is given for the land-tax, only as forming an *addition to and part of the rent*, for otherwise the tenant of the land would be subject to two distresses.

It may be further observed that the defendant cannot *in this case [*929 insist on his right to distrain as for a rent charge on the ground that he was the purchaser of the land-tax with his own money, or what is the same thing, money which he had borrowed on his own credit, and entitled to distrain under the 154th section or the 123d and 125th sections, for the pleadings do not raise that question. The question raised by them is substantially whether he be entitled under the 88th section.

For these reasons, we are of opinion, that the plaintiff is entitled to recover, and the *postea* is to be delivered to him. Postea to the plaintiff.

SOULBY and Another v. SMITH, Treasurer of the West India Dock Company. (a) June 16.

The West India Dock Act, 39 G. 3, c. 69, provides that twenty-one persons shall be directors of the affairs of the company, and that all suits for any cause of action against the company, shall be brought against the treasurer for the time being. In *assumpsit* against the treasurer, the declaration stated that, by order of the *Court of Directors*, the defendant put up goods to sale, subject to certain conditions; and that in consideration that the plaintiffs, at the request of the *directors*, had promised them to perform the conditions of sale, they, the *directors*, promised to perform the same on their part. The declaration then alleged a breach of the conditions by the directors, and concluded that the plaintiffs brought their suit against the treasurer according to the statute. At the trial it appeared that the goods had been put up and sold by order of the directors, on account of the company:

Held, first, that there was no variance between the declaration which charged the *directors*, and the evidence, which showed that the contract was the *company's*; and, secondly, on motion in arrest of judgment, that the declaration was sufficient, because the contract alleged was, in legal effect, a contract by the company, for breach of which an action was maintainable against the treasurer.

ASSUMPSIT. The declaration stated, that by order of the court of directors of the West India Dock Company, the defendant, on, &c., at, &c., put up to sale *by public auction a quantity of turtle, under and subject to certain [*930 conditions in the declaration mentioned, and that in consideration that the plaintiffs, at the request of the directors of the West India Dock Company, had promised them to perform the said conditions, they, the directors, undertook and promised to perform the same in all things on their part and in behalf to be performed: that the plaintiffs purchased the turtle of the directors, but that they refused to deliver the same according to the conditions. The decla-

(a) The plaintiff was nonsuited on a former trial, when the action was brought against the defendant without describing him as treasurer of the West India Dock Company: on the ground that a judgment against him in such an action would make him personally liable.

ration concluded, that the plaintiffs brought their suit against the defendant, as treasurer of the West India Dock Company, according to the statute. Plea, that the company did not promise, in manner and form, &c. Issue thereon. At the trial before Lord Tenterden, C. J., at the London sittings after Michaelmas term, 1831, it appeared that the sale was announced to be made "by order of the court of directors." The conditions referred to the company in a manner implying that they were the principals in the sale. It was objected that there was a variance, inasmuch as the legal effect of the contract, as proved, was to bind the company, and there was no proof of any promises made by the directors, as laid in the declaration. Lord Tenterden overruled the objection; and a verdict having been found for the plaintiffs, a rule nisi was obtained for a new trial upon the above objection, or for arresting the judgment, on the ground that the declaration stated a contract made by the directors, and not by the company, and *931] that the treasurer was liable(a) to be sued only in actions to be *brought against the company, or for the recovery of a claim on them.

John Williams and Platt, on a former day in this term, showed cause. First, there was no variance, for the contract proved corresponded literally as well as substantially with that alleged in the declaration. The contract made by the directors operates in legal effect as a contract by the company. The declaration merely alleges the agency through which the contract was made, and that does not negative that it was made by the company. The fact that the contract was made by the directors, which must have been proved, is stated upon the record; the necessary legal consequence of that fact is, that there was a contract by the company. [Lord TENTERDEN, C. J. There clearly is no variance.]

*932] Then as to the motion in arrest of judgment, it is *said that the defendant is liable only upon a contract made by the company, and not upon a contract made by the directors. The answer to that is, that any contract made by the directors is in point of law a contract made by the company, and therefore the defendant is liable. The 39 G. 3, c. 69, s. 48, enacts, that twenty-one persons, to be nominated and appointed as therein mentioned, shall be directors for conducting and managing the affairs of the company. Here it is alleged that the turtle was put up to sale by order of the court of directors. They are described not by name, but as directors. They cannot be recognised as directors by this Court except as persons acting for and on behalf of the company. The contract of sale must, therefore, be taken to have been made by the directors in the course of conducting the affairs of the company. Secondly, supposing that the count were insufficient, it is aided by the plea, in which the defendant thereby alleges that the company did not undertake in manner and form, &c., Com. Dig., tit. *Pleader* (C), 85. Thirdly, it is aided by verdict, for the plaintiff, by his replication, puts himself on the country to try the issue tendered by the plea, viz., whether the com-

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By section 184, "All actions instituted by or on behalf of the West India Dock Company against any person or persons, &c., shall or lawfully may be instituted in the name of the treasurer for the time being of the company, as the nominal plaintiff for and on behalf of the company; and all actions to be instituted by any person or persons, &c., against the West India Dock Company, or for the recovery of any claim or demand upon, or of any damages occasioned by the said company, or for any other cause of action or suit against the company, shall or lawfully may be instituted against the treasurer for the time being of the company, who shall be the nominal defendant in such last-mentioned actions and suits respectively, for and on behalf of the company; and such action, and the process, verdict, judgment, and execution to be had thereon respectively, shall be as valid and effectual against the said company, and their capital stock and effects, as if all the members of the company had been the defendants in the said action, and actually named as such therein: Provided, that the body or goods, chattels, lands, or tenements of such treasurer, shall not, by reason of his being defendant in any such action or suit, be liable to be arrested, seized, detained, or taken in execution."

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Held, first, that there was no variance between the declaration which charged the *directors*, and the evidence, which showed that the contract was the *company's*; and, secondly, on motion in arrest of judgment, that the declaration was sufficient, because the contract alleged was, in legal effect, a contract by the company, for breach of which an action was maintainable against the treasurer.

ASSUMPSIT. The declaration stated, that by order of the court of directors of the West India Dock Company, the defendant, on, &c., at, &c., put up to sale *by public auction a quantity of turtle, under and subject to certain [930] conditions in the declaration mentioned, and that in consideration that the plaintiffs, at the request of the directors of the West India Dock Company, had promised them to perform the said conditions, they, the directors, undertook and promised to perform the same in all things on their part and in behalf to be performed: that the plaintiffs purchased the turtle of the directors, but that they refused to deliver the same according to the conditions. The decla-

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ration concluded, that the plaintiffs brought their suit against the defendant, as treasurer of the West India Dock Company, according to the statute. Plea, that the company did not promise, in manner and form, &c. Issue thereon. At the trial before Lord Tenterden, C. J., at the London sittings after Michaelmas term, 1831, it appeared that the sale was announced to be made "by order of the court of directors." The conditions referred to the company in a manner implying that they were the principals in the sale. It was objected that there was a variance, inasmuch as the legal effect of the contract, as proved, was to bind the *company*, and there was no proof of any promises made by the *directors*, as laid in the declaration. Lord Tenterden overruled the objection; and a verdict having been found for the plaintiffs, a rule nisi was obtained for a new trial upon the above objection, or for arresting the judgment, on the ground that the declaration stated a contract made by the *directors*, and not by the company, and *931] that the treasurer was liable(a) to be sued only in actions to be *brought against the company, or for the recovery of a claim on them.

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pany undertook, &c., and the jury have found the affirmative of that issue. Therefore the form of the *postea* will be, that the jurors say that the company did undertake in manner and form as the plaintiff has in his declaration alleged. The general rule is that where a declaration omits that without proving which the plaintiff could not have recovered, the verdict will aid. Com. Dig., tit. *Pleader* (C), 87.

Sir James Scarlett and Campbell, *contra*. The declaration imports that a contract was made by the directors *which would render them personally liable, and if that be so, the action is not maintainable against the treasurer. [*933

Cur. adv. vult.

LORD TENTERDEN, C. J., now delivered the judgment of the Court. It is said that an action is not maintainable against the treasurer of this company on a contract alleged to be made by the directors. We are of opinion that the contract stated in the declaration is in legal effect the contract of the company. By s. 48 of the act 39 G. 3, c. 69, the directors are to manage the affairs of the company. Any act done by the directors in the course of managing those affairs is in point of law an act done by the company, and any contract made by the directors, a contract made by the company. The allegation therefore that the directors promised, imports, in legal effect, that the company promised, and the plea shows that this was so understood by the defendant. We do not, however, rely upon the plea, but are of opinion that the declaration is itself sufficient on the ground that the act of the directors was the act of the company, and the contract of the directors the contract of the company. The rule therefore must be discharged. Rule discharged.

*GEORGE MARTIN v. MARY MARTIN.

[*934]

A. being indebted for rent to her landlord, the latter proposed to C., her son-in-law, to take his promissory note as security. C. said he would give an answer in a week or ten days. The landlord then asked him whether A. owed him anything; he replied that she did not, or what she did owe he considered as a gift. Within the ten days, A. executed a warrant of attorney to C. upon which judgment was entered up, execution issued, and C. took possession of the goods.

The Court considering the representations and conduct of A. to have been intended to defraud the landlord, set aside the warrant of attorney at his instance.

THE defendant was tenant of a farm, at a rent of 76*l.* a year, to James Sims and William Stafford, devisees in trust of Thomas Spilling. There was 14*l.* rent in arrear. On the 4th of April, 1832, a meeting took place between the defendant and Sims, when the latter offered to abate 42*l.* of the rent in arrear, and to take the balance by instalments, if the defendant would give security for their due payment. A notice to quit was at the same time served on the defendant, but with the express understanding that if the proposed arrangement was made, it should not be enforced. The defendant stated that she could not then give an answer to the proposition, but that she would apply to her sons-in-law and give an answer in the course of a fortnight. On the 16th of April, George Martin, a son-in-law of the defendant, called upon Sims, and accompanied him to the office of his solicitor, when Sims proposed to take the joint and several note of George Martin, and Digby, another son-in-law of the defendant, payable in twelve months, for the arrears due, abating therefrom 42*l.* George Martin said he would consult Digby and give an answer in a week or ten days; he was then asked by Sims whether Mary Martin owed him anything. He replied she did not, or what she did owe, he should not require payment of, but should give her. Sims then said, "What there is between you and Mary Martin you consider as a gift," and George Martin replied he did. No further communication was made to Sims or his *attorney. [*935 On the 26th of April, Mary Martin executed a warrant of attorney to

George Martin for 754*l.* 15*s.* for securing payment of 377*l.* 7*s.* 6*d.* and judgment was entered up, a *fi. fa.* issued, and the plaintiff took possession of the defendant's goods. It was further stated by Sims that he and his co-trustees forbore to distrain for the arrears of rent, as well from a wish not to harass and distress Mary Martin, as from the statements made by her and George Martin, and particularly by the latter on the occasion above-mentioned, when he required time to consult Digby. George Martin, in his affidavit in answer to the rule, admitted that the question, whether Mary Martin owed him anything, was put to him, but stated his answer to have been, that if he had had the money which he had let his father have at different times, and which he had nothing to show for, the defendant would be in his debt, but that he considered those sums a gift: he added, that for his own security he did not mention a promissory note of the defendant for 200*l.* which he held, dated March, 1830, knowing that if he had done so, the trustees would have put a distress on the premises and deprived him of his debt. He further swore that the warrant of attorney was given for a *bonâ fide* debt owing from the defendant to him. A rule nisi having been obtained for setting aside the warrant of attorney,

Sir *James Scarlett* now showed cause. This application is made, not on behalf of either of the parties to the warrant of attorney, but of another person, and there is no instance where the Court has set aside such an instrument at the instance of a third party.

*936] *Campbell and Manning, contra.* The Court will not allow a judgment entered up on a warrant of attorney to be made the means of effecting fraud to the prejudice of any person. Here, the plaintiff by contrivance induced the defendant's landlord not to distrain, and thereby prevented him from recovering his rent.

Lord TENTERDEN, C. J. This is a very peculiar case. No doubt the Court has a general authority over warrants of attorney, and we ought to take care that such an instrument does not operate improperly to the prejudice of a debtor, or, as I think, of any other person. Now the facts here stated in support of the application are, that the defendant being indebted to her landlord for rent, the latter proposed to remit part of the sum due, and to take the joint and several promissory notes of her sons-in-law, George Martin, and Digby, for payment of the residue in twelve months; that George Martin, at a meeting between him and Sims, at the office of Sims's solicitor, said he would consult Digby and give an answer in a week or ten days; that he was then asked, whether his mother-in-law, Mary Martin, owed him anything; and he said she did not, or what she did owe he should not require the payment of; that he considered it a gift. George Martin, in his affidavit, denies that he so answered; but it is clear from his own showing, that he conducted his part of the conversation in such a manner as to induce a belief that he, George Martin, had no demand upon the defendant. Sims, the landlord, being anxious to know whether George Martin had any legal claim on the defendant, Martin gives him reason to think that he has not, and thereby induces him to distrain; *937] and he *then obtains a warrant of attorney from the defendant. Such a contrivance ought not to prevail. The rule must be made absolute.

LITLEDAL, J. I doubted whether we could interfere on behalf of third persons, who were not parties to the warrant of attorney, and certainly no instance has been given of the Court's interposing in such a case, but, on principle, I do not see why we should not.

TAUNTON, J. I also doubted whether we could interfere at the instance of a third person, but I think in this case the Court may do so by virtue of its general jurisdiction over warrants of attorney, and because this is a fraudulent transaction. Here, the trustees are, for the time being, in the situation of owners of the property, and then the plaintiff by his contrivance gets the distress delayed by which the landlord might have recovered his rent, procures a warrant of attorney to be executed, enters up judgment on it, and issues exe-

cution, and by that sweeps away what otherwise would have been the subject of distress. The landlord, by his lien, would have been quasi owner of the property, and in that respect he may be considered for the present purpose as representative of the debtor.

Rule absolute.

*The KING v. The Justices of MIDDLESEX. June 16. [938]

The statute 9 G. 4, c. 61, for regulating the granting of licenses to inn-keepers, &c., by section 27, enacts, "that any person who shall think himself aggrieved by any act of any justice done in execution of that act, may appeal against such act to the quarter sessions," &c.

Held, that the words, "*person who shall think himself aggrieved*," mean a person immediately aggrieved, as by refusal of a license to himself, by fine, &c., and not one who is only consequentially aggrieved; and, therefore, that where magistrates had granted a license to a party to open a public house not before licensed, within a very short distance of a licensed public house, the occupier of the latter house could not appeal against such grant.

ONE William Spicer had been for sixteen years the occupier of a public house called the Tower, in Tower Street, in the parish of Saint Giles in the Fields, in Middlesex, and annually licensed to sell exciseable liquors. On the 23d of May, 1832, one Robert Williams applied to the licensing magistrates of the Holborn division for authority to open a house (not before licensed to sell exciseable liquors) situate within seventeen yards of Spicer's, and the magistrates having granted Williams the license, Spicer, considering himself thereby aggrieved, appealed to the next quarter sessions. That Court being of opinion that he was not a party grieved within the meaning of the act 9 G. 4, c. 61, s. 27, refused to hear the appeal. A rule nisi having been obtained for a mandamus, commanding the defendants to hear the appeal, on a former day in this term,

The *Attorney-General*, *Campbell*, and *Adolphus*, showed cause. The sessions decided properly; Spicer was not a party aggrieved within the meaning of the statute 9 G. 4, c. 61, s. 27, which enacts that any person who shall think himself aggrieved by any act of any justice done in the execution of that act may appeal to the quarter sessions, and the Court are to hear and determine the appeal with or without costs, as to them shall seem meet, and in case the act appealed against shall be the refusal to grant or transfer a license, it shall be lawful for the Court to grant or transfer the license, &c. The refusal *to grant or [939] transfer a license to a party applying is clearly a matter of appeal, but there is nothing to show that the granting of a license to another is so. Spicer himself had only a license to continue till the end of the current year; he had a mere possibility of having it renewed.

Scarlett and *Clarkson*, *contrâ*. The object of the legislature in giving an appeal to the quarter sessions, was to prevent improper practices either in the granting or refusal of licenses. A man who had carried on the business of a publican for sixteen years might reasonably consider himself aggrieved by the granting of a license to another to sell exciseable liquors in the immediate neighbourhood, and he is within the words of the twenty-seventh section, "a person thinking himself aggrieved by an act of a justice done in execution of the act."

Cur. adv. vult.

LITTLEDALE, J., now delivered the judgment of the Court. The question in this case depends on the statute 9 G. 4, c. 61, entitled "an act to regulate the granting of licenses to keepers of inns, alehouses, and victualling houses in England," which enables justices at an annual special session, to license inn-keepers, &c., to sell exciseable liquors on their premises. Section 27, on which the question arises, enacts "that any person who shall think himself aggrieved

by any act of any justice done in or concerning the execution of that act, may appeal to the quarter sessions;" and the question is, whether the statute extends to a case like the present. We are of opinion, that it does not. We think the words "person who shall think himself aggrieved," mean a *person who is immediately aggrieved by the act done, as by the refusal of a license to himself, by fine, &c., and not one who is only *consequentially* aggrieved. Even if that were not so, it might be very questionable whether Spicer was a party grieved within the meaning of the statute; but this is not necessary for us to decide. The meaning of the words "party grieved," was much considered in the case of *Rex v. Taunton St. Mary*, 3 M. & S. 465. The question there arose on the statute 5 & 6 W. & M., c. 11, s. 3, which gives costs to the prosecutor, on certiorari, if he be the party grieved, and several persons were held entitled to costs as prosecutors of an indictment for not repairing a highway, they having used the way for many years in passing and repassing from their homes to the next market town, and being obliged by reason of the want of repair to take a more circuitous route. There, the prosecutors sustained a particular inconvenience; but I do not see that Spicer in this case can be considered, in any sense, as a party grieved. He had a mere license for a year, he had no vested right to sell exciseable liquors beyond that time. He might indeed be prejudiced by another person being permitted to carry on the same business in his neighbourhood, but that is not a grievance in point of law. In *Com. Dig., tit. Action on the Case for a Nuisance (C)*, it is said that such action "does not lie upon a thing done to the inconvenience of another;" as if a man erect a mill near to the mill of another (not being immemorial); or if a schoolmaster set up a school near to the school of another, or "if a foreigner use a trade within a borough to the prejudice of a freeman, *941] unless he be *restrained by a custom or by law." Section 21 authorizes the justices at quarter sessions for a third offence against the tenor of the license, under the circumstances therein mentioned, to adjudge the license granted under that act to be forfeited and void, and not only that, but the excise license is thereupon declared to be void. But there is no provision as to what would become of the excise license in case the justices at sessions were to deprive the party complained against of his license under this act; and it would be very hard if, after he had gone to the expense of obtaining an excise license, it were defeasible at the discretion of the justices.

Rule discharged.

The KING v. The Justices of ESSEX. June 16.

The overseers of W. were accustomed to divide the duty of collecting the rates, each performing it for half a year. A. and B. were appointed overseers, and A. having discharged his own half year's duty, offered his colleague to do, and did, the other likewise. He afterwards delivered in the annual overseers' account to the vestry, making no distinction between the half years. It being urged that both overseers should sign the account, B., after some objection subscribed, with A., a declaration that they believed it to be correct: but on passing the account at special sessions, B. refused to swear to its accuracy, saying that he knew nothing of it except having examined the vouchers, and it was passed on the oath of A. only. A balance remained unpaid to the parish:

Held, that the signature of B. was not an adoption of his colleague's acts during the latter half year; and, therefore, (Parke, J., dubitante), that A. could not be considered as B.'s agent during that half year; but (per Parke, J.), that at all events a distress could not issue against B., the precise arrear during that period not being ascertained.

A RULE nisi had been obtained for a mandamus, calling on two justices of Essex to issue a warrant for levying by distress on the goods of James Peppercorn, 319*l.* remaining in his hands and those of John Wood, as late over-

seers of the poor of the parish of Woodford, and due from them to the said parish. It appeared that Peppercorn and Wood were appointed joint overseers for the year commencing April 4th, 1831; that the custom of the parish was, for the overseers to divide *the duty between them by half years; and [*942 it was stated that when (as had frequently happened) one overseer had procured his co-overseer or any other person to do his half-year's duty for him, the overseer so relieved had been considered responsible for the rates during that period being duly collected and accounted for, and the other party had been looked upon as his agent. In this instance the first half-year's duty devolved on Wood, and he afterwards made an offer to Peppercorn to perform the duty for his term also, which the latter accepted. It was alleged, but denied in the affidavits in opposition to the rule, that Wood was promised, or expected, some remuneration for so doing. The account of the overseers with the parish at the end of the year was rendered by Wood, and no distinction was made in it between the two half years. It was submitted to a vestry meeting, and some person there insisting that the business could not proceed unless the accounts were signed by both overseers, Peppercorn, though he objected at first, consented to sign, as expressing his belief that the account was correct; and he and Wood subscribed the following declaration: "we the undersigned believe the above to be correct." In April, 1832, the account was submitted to the justices in petty sessions, pursuant to 50 G. 3, c. 49, s. 1, and Peppercorn was required to verify it on oath, but refused to do so on the ground that it was not his account, and he knew nothing of it beyond having examined it with the vouchers. The account was allowed on the oath of Wood alone. A balance, admitted to be due to the parish, remained unpaid at the time of this application.

Campbell and *Thesiger* now showed cause. One joint overseer is not liable for the defaults of the other. *Rex v. The Justices of Gloucestershire*, [*943 1 B. & Ad. 1. It is true Peppercorn signed the account, but he did it only sub modo, and not as a joint accountant. It is not made out by the affidavits that Wood was his agent. At all events a distress warrant could not issue till it was ascertained what portion of the balance was due from Peppercorn.

Sir James Scarlett and *Tomlinson*, *contrâ*. Peppercorn knew the duty that was cast upon him during the last half year of his office: he permitted Wood to transact the business for him, signed his account, and must be taken to have adopted his acts. As between Peppercorn and the parish, he was the overseer during the last half year. The parish is not to lose the benefit of his responsibility because he employed an agent. The statute does not render it necessary that either overseer should verify the account on oath: it only empowers the justices to administer an oath if they shall so think fit.

Lord TENTERDEN, C. J. I am of opinion that this rule cannot be made absolute. Where there are two overseers, it may be laid down generally that the one is not answerable for the malversation or misappropriation of the other. Here, the only ground for charging Peppercorn is, that he signed the account. But the signature was given under these circumstances. (His Lordship here stated them.) He was then called upon by the magistrates to verify the account on oath. I think that, by the first section of 50 G. 3, c. 49, it is not imperative on justices to compel overseers to verify on oath, if they are otherwise satisfied that the account *is correct. In this case Peppercorn, on being [*944 asked to swear to the account, very properly declined, saying that he knew nothing about it, the whole business having been done by Wood. It is said that Wood acted as Peppercorn's agent, at his instance, and in expectation of a recompense; but that is denied by the affidavits on the other side, and it is easy to suppose that Wood might be glad to receive the money during the remaining half year without any such offer on the part of Peppercorn as is suggested. The ground for this application then is, the fact that Peppercorn

signed the account, and I think that signature, coupled with his subsequent refusal to verify the account on oath, does not enable us to say that he is liable for the malversation of his brother officer.

LITLEDALE, J., concurred.

PARKE, J. I am of the same opinion. As to the joint liability of Peppercorn on the account in general, the only evidence to fix it upon him is his signature; but this is explained by the words to which it is subscribed, "we believe the above to be correct," and by the other matter stated in the affidavits. I have some doubt whether Wood might not be considered the agent of Peppercorn during the latter half year; but if so, I do not see how we could grant this rule before there was an account, showing how much he was answerable for in respect of that period. The rule must therefore be discharged.

TAUNTON, J., concurred.

Rule discharged.(a)

(a) See (as to an apportionment of duty by constables) the judgment of Lord Ellenborough in *Bex v. Taunton St. Mary*, 8 M. & S. 471.

*945]

*MILES v. The Inhabitants of BRISTOL.

A plaintiff having brought an action in this Court against the hundred, pursuant to 7 & 8 G. 4, c. 81 (which requires such action to be brought within three months), afterwards commenced another action in the Exchequer for the same cause. This Court, on motion, compelled the plaintiff to make his election in which suit he would proceed.

ACTION on the 7 & 8 G. 4, c. 81, to recover damages for injury done by a riotous assembly to the plaintiff's houses and property. The plaintiff after he had commenced his action in this Court, brought another in the Exchequer for the same cause, as appeared from the particulars delivered in both actions. A rule nisi having been obtained for discontinuing the present action,

Maule now showed cause. The proper course for the defendants was to plead in abatement to the action in the Exchequer the pendency of another action. In *Dicas v. Jay*, 6 Bing. 519, an application was made to the Court of Common Pleas to stay proceedings, on the ground that a former action for the same cause had been referred to an arbitrator by a rule of court, by which the plaintiff was precluded from bringing any new action; but that Court refused the application. Independently of that, the action in this Court having been first commenced, was properly brought; and if the second action is improper, the application should have been made to the Court of Exchequer.

Campbell, contrd. Two actions have been commenced in different courts for the same cause, for the evident purpose of defeating the provisions of this act *946] of *parliament, the third section of which requires, that an action shall be brought within three months after the commission of the offence; and, there being no dispute as to the facts, the Court will, on a summary application, interfere to prevent this. At all events, the plaintiff should be called upon to elect in which action he will proceed.

LORD TENTERDEN, C. J. This Court cannot interfere absolutely to prevent the plaintiff's proceeding in an action which was properly brought here; nor have we any control over the action of the Exchequer. But we have authority to say, in the action depending in our own Court, that he shall not proceed further in that, unless he abandon the one in the Exchequer. He must, therefore, make his election.

Maule. The plaintiff will elect to proceed immediately in the action in this Court.

Rule discharged on the plaintiff so undertaking.

*The KING v. CHARLES PINNEY, Esquire. Oct. 25 to Nov. 1. [947]

A justice called upon to suppress a riot, is required by law to do all he knows to be in his power, that can reasonably be expected from a man of honesty and of ordinary prudence, firmness, and activity, under the circumstances. Mere honesty of intention is no defence, if he fails in his duty.

Nor is it a defence that he acted upon the best professional advice that could be obtained on legal and military points, if his conduct has been faulty in point of law.

In suppressing a riot, he is not bound to head the special constables, or to arrange and marshal them; this is the duty of the chief constables.

Magistrates are not criminally answerable for not having called out special constables, and compelled them to act pursuant to 1 & 2 W. 4, c. 41, unless it be proved that information was laid before them on oath, of a riot, &c., having occurred or being expected.

A magistrate is not chargeable with neglect of duty for not having called out the posse comitatus, in case of a riot, if he has given the king's subjects reasonable and timely warning to come to his assistance.

Applying personally to some of the inhabitants of a city, calling at the houses of others, employing other persons to do the same, sending notices to the churchwardens, &c., (on a Sunday) to be published at the places of worship, requiring the people to meet the magistrates at a stated time and place, in aid of the civil power, and for the protection of the city, and posting and distributing other notices to the like effect, is reasonable warning, the riot having recently broken out.

A magistrate who calls upon soldiers to suppress a riot, is not bound to go with them in person; it is enough if he gives them authority.

THIS was an information filed by his Majesty's Attorney-General. The first count stated, that on the 29th of October, 1831, and before and afterwards, and at all and each of the several times hereinafter mentioned, Charles Pinney, late of the city of Bristol and county of the same city, Esquire, was mayor of the said city, and one of the justices of our said lord the king assigned, &c. That heretofore, to wit, on the said 29th of October, in the said city and county, there had been divers tumults, riots, routs, and unlawful assemblies of great numbers of evil disposed persons within the said city and county, and divers and violent breaches of the peace of our lord the king, and divers violent attacks and outrages had been committed in the said city and county, upon the persons and property of divers of his said majesty's subjects there; whereof the said C. P. so being such mayor and justice as aforesaid, then and there had notice;—that on the next day after the said 29th of October, to wit, on, &c., to wit, *in the city and county aforesaid, divers wicked and evil disposed persons to the number of 5000 and more, whose names are at present [948] unknown to the said Attorney-General, with force and arms unlawfully, riotously, routously, and tumultuously assembled themselves together in different parts of the said city and county, armed with iron bars, iron crows, pickaxes, hammers, pieces of wood and bludgeons, with intent to disturb the public peace, and to make riots, routs, tumults, and affrays in the said city and county, and to commit breaches of the peace and outrages upon the persons and property of his majesty's peaceable subjects there; of all which premises the said C. P. so being such mayor and justice as aforesaid then and there also had notice. That divers, to wit 3000, of the said persons, so being unlawfully, riotously, &c., assembled together armed as aforesaid, and divers other persons to the said Attorney-General also unknown, afterwards, to wit, on the day and year last aforesaid, at, &c., with force and arms wickedly and unlawfully attacked, and with the said hammers, pickaxes, &c., forced and broke open a certain common and public prison there called the Bridewell, and then and there made a great riot, noise, tumult and affray there, for a long space of time, to wit, for eight hours; and during that time unlawfully, wilfully, maliciously, and with force, burned, demolished, and destroyed the said prison, and rescued divers, to wit 100, prisoners, who were then and there lawfully confined in the

said prison, and suffered them to go at large. Averment, as before, that the defendant had notice. That afterwards, to wit, on the same day, &c., at, &c., a great number, to wit 3000, of the said persons so being riotously, &c., *949] assembled as aforesaid, armed as aforesaid, and divers other persons also to the said Attorney-General unknown, with force and arms wickedly and unlawfully attacked, and with the said hammers, pickaxes, &c., forced and broke open a certain other public and common prison in the city and county aforesaid, called the Gaol, and then and there made another great riot, noise, tumult and affray there, for a long space of time, to wit, for six hours; and during that time unlawfully, wilfully, maliciously, and with force partly burned, demolished, and destroyed the same, and rescued and set at large divers, to wit 100, prisoners, who were then and there lawfully confined in the said last-mentioned gaol. Notice to defendant, as before. That afterwards, to wit, on the same day, &c., at, &c., a great number, to wit 3000, of the said persons so being riotously, &c., assembled as aforesaid, armed as aforesaid, and divers other persons also to the said Attorney-General unknown, with force and arms wickedly and unlawfully attacked, and with the said hammers, pickaxes, &c., forced and broke open a certain messuage and dwelling-house in the city and county aforesaid, of and belonging to the Lord Bishop of Bristol, and then and there made another great tumult, riot, disturbance, and affray for a long space of time, to wit, for the space of eight hours; and then and there during that time unlawfully, wilfully, maliciously, and with force burned and demolished the said messuage and dwelling-house, and wholly destroyed the furniture, and other goods and chattels therein, to wit, at, &c. Notice, &c. That afterwards, to wit, on the same day, &c., at, &c., a great number, to wit 3000, of the said persons, so being riotously, &c., assembled as aforesaid, armed as aforesaid, and *950] divers other persons also to the said Attorney-General unknown, wilfully and maliciously, and with great force and violence attacked, forced, and broke open divers, to wit 100, messuages, and 100 dwelling-houses, of and belonging respectively to divers of his majesty's subjects, situate in a certain place in the said city and county, to wit, in a certain place there called Queen Square, and then and there made a great riot, &c., there for a long space of time, to wit, twelve hours; and during that time then and there unlawfully, wilfully, maliciously, and with force burned, demolished, and destroyed the said messuages and dwelling-houses, and the furniture and other goods and chattels therein, and stole, took, and carried away divers goods and chattels of and belonging to divers of his said majesty's subjects then and there being, and greatly terrified and alarmed the inhabitants of the said city and county. Notice, &c. Nevertheless, the said Attorney-General in fact saith that the said C. P., so then and there being such mayor and justice of the peace as aforesaid, and well knowing of the said riots, tumults, and affrays, and of the said burning, demolishing, and destroying of the said gaols and messuages, and of all other the premises aforesaid, but disregarding, and wilfully and wrongfully neglecting the duties of his said office as such justice of the peace as aforesaid, did not then and there suppress or put an end to, or endeavour to suppress, &c., or use due means or exertions to suppress, &c., the said riots, tumults, and affrays, and the said burning, demolishing, and destroying of the said gaols and messuages, and the violences, breaches of the peace and outrages as aforesaid, as he could and might, and ought to have done, or endeavour to execute the powers and authorities by the laws of this realm vested in him the *951] said C. P. as such justice of the peace as aforesaid in that behalf; but the said C. P. then and there, to wit, on the day and year first aforesaid, and from thence continually during all the time aforesaid, in the city and county aforesaid, wilfully and unlawfully neglected his duty in that behalf, and omitted to suppress and put an end to, and to endeavour to suppress, &c., the said riots, tumults, and affrays, and the said burnings of the said gaols and messuages, and the violences, breaches of the peace, and outrages aforesaid, and to provide and organize sufficient force for suppressing the same, although

he was, on the day and year first aforesaid, and frequently afterwards, during the time aforesaid, requested so to do, to wit, in the city and county aforesaid; but the said C. P., during all the time aforesaid, wholly refused and neglected so to do, or to give such orders and directions as were necessary for restoring peace and tranquillity in the said city and county, and as he, the said C. P., was of duty bound to have given; and did withdraw and conceal himself not only from the said persons so unlawfully, riotously, and tumultuously assembled as aforesaid, but also from all such of his majesty's loyal and peaceable subjects then and there being in the said city and county as stood in need of his the said C. P.'s orders and assistance; and did wilfully and unlawfully neglect and omit to execute or endeavour to execute any of those powers or authorities by the laws of this realm vested in him the said C. P., as such justice of the peace as aforesaid in that behalf; and did then and there wilfully and unlawfully permit and suffer the said persons so unlawfully, riotously, and tumultuously assembled as aforesaid to be and continue so unlawfully, &c., assembled in the commission of the *aforesaid violences, burnings, and destructions of property, breaches of the peace, and outrages, for a long space of [952] time, to wit, during all the time aforesaid, to wit, in the city and county aforesaid, contrary to the duty of his said office as justice of the peace as aforesaid, in contempt, &c., to the evil example, &c., and against the peace, &c. The second count stated, that the defendant was a justice of the peace for the city of Bristol and county of that city; and that on the 29th of October, divers evil disposed persons unlawfully and riotously assembled themselves, armed, &c., and continued so unlawfully, &c., assembled for two days and two nights then next following, and during that time made divers riots, and committed divers breaches of the peace, &c. (stating more shortly the unlawful and riotous acts related in the former count); of all which said premises the said C. P. so being such justice, &c., during the time aforesaid, to wit, on, &c., and from time to time whilst the said riots, &c., were proceeding, and being done and committed as last aforesaid, was informed and had notice, to wit, in, &c. Nevertheless, &c.: the breach of duty was then stated nearly as in the first count. The third count was like the second, only laying the commencement of the riots a day later, omitting the destruction of the bishop's palace, and in other respects slightly abridging the narrative. The breach of duty was alleged as before. Plea, not guilty.

The case was tried at bar, in the Court of King's Bench, at Westminster, by a special jury of the county of Berks. The trial began on the 25th of October, before Lord Tenterden, C. J., Littledale, J., Parke, J., and Taunton, J., and lasted seven days. After the 27th of October, Lord Tenterden was obliged to discontinue his attendance *by illness, under which he had been some [953] time labouring, and which in a few days terminated fatally. The trial proceeded before the other three Judges.

It appeared in evidence, that Sir Charles Wetherell, the recorder of Bristol, having appointed Saturday, the 29th of October, 1831, for holding the gaol delivery in the city, a riot was apprehended on that occasion; and upon the application of the magistrates to the Secretary of State, a party of soldiers was sent to Bristol, in addition to some troops already stationed there: 300 special constables were also sworn in, but of these only 100 served voluntarily; the rest were hired. Sir Charles Wetherell entered the town on the 29th and proceeded to the Guildhall, and afterwards to the Mansion House, the defendant's residence. A great riot took place; many acts of violence were committed; and the mob became so tumultuous in the neighbourhood of the Mansion House, that the special constables were unable to preserve order, and the military were called in. The riot act was several times read, and the defendant addressed the mob; the soldiers were at one time obliged to act in dispersing the rioters, but were not permitted to fire; and, about midnight, by the exertions of the special constables, marshalled and directed by a military officer, quiet was completely restored. The defendant remained all night in the Mansion House, and did not go to bed.

Early on Sunday, the riot was renewed with greater violence; about eight o'clock the Mansion House was attacked, and the defendant was obliged to leave it for the preservation of his life. One division of the military, with which the mob had become irritated, was sent out of the town by Colonel Brereton, the officer commanding the district, and the rest, though called upon by the *954] defendant and the other magistrates, gave no effectual assistance to the civil power. The mob went on alternately increasing and decreasing in violence till the middle of the day, when they attacked and burned the Bridewell; they afterwards released the prisoners at the city gaol, and destroyed the governor's house, a toll house, and a prison at Lawford's Gate without the city. They also, during that day and night, robbed and partly destroyed the Bishop's palace, demolished the Custom House, and plundered and burned the houses on two sides of Queen Square. The defendant, on leaving the Mansion House on Sunday morning, went to the Guildhall, and in his way endeavoured to induce several of the inhabitants to attend him there; he also desired other individuals to exert themselves in the same manner. Some magistrates and other persons having met him at the Guildhall (about ten o'clock), circular letters were there written, and forwarded to the churchwardens of the several parishes in these words:—"The magistrates feel it their duty earnestly to request that you will adopt immediate measures to assemble your parishioners in your church, in order that they may be formed into a constabulary force in aid of the civil power, for the protection of the city and its inhabitants; and as you form, to proceed to the Guildhall immediately. C. Pinney, Mayor." Similar notices were distributed at the houses, requesting attendance at the Guildhall, where the constables were also ordered to assemble; and bills, requiring the co-operation of the citizens (signed by the mayor), were posted about the town: it was also announced that the riot act had been three times read. Not more than 200 persons attended at the Guildhall; and no agreement could be obtained *955] in any plan for suppressing the riot. It was finally recommended, that those present should meet again at a later hour, each bringing with him such assistance as he could procure. At the second meeting still fewer persons attended, and nothing effectual was done. A great body of evidence was given as to the various proceedings of this day and night, on the one hand tending to show that the defendant had been unduly attentive to his own safety, and negligent of means in his power for the preservation of the city; on the other, that he had conducted himself with firmness and activity, and that all endeavours to arrange any plan of resistance to the mob had been defeated by the misconduct of the inhabitants and a portion of the military. On Sunday night measures were taken for more effectually calling out the posse comitatus, which, however, was considered to have been done as far as the circumstances allowed, by the circulation of notices in the morning. The city was divided into thirty districts, and an under-sheriff deputed for each, with written instructions for collecting and embodying the inhabitants. No proceeding of this kind was remembered to have taken place in Bristol before, and the making out of appointments and instructions, with other preparations, occupied the under-sheriff and other gentlemen during four or five hours of Sunday evening. On the following morning a force was raised by these means, the inhabitants having then become more generally willing to assist the magistrates, in consequence of the mischief that had occurred, and was still threatened, to private as well as public property. A reinforcement of troops also arrived. The commanding officer, Major Beckwith, went to the council-house, where the defendant was with several other *956] magistrates, and said that he would presently restore order, but requested that one or two magistrates would accompany him on horseback. They all refused to do so, alleging various reasons when individually called upon, as that they did not know how to ride, and that their going with Major Beckwith would expose them to unpopularity and endanger their property. He then required a written authority from the magistrates, to take such measures as might be expedient, and the following note was given to him, dated "Council-

house, Bristol, October 31st, 1831," and signed "C. Pinney, Mayor:" "Sir,—You are hereby authorized to disperse any mob which may assemble in this city in a riotous or tumultuous manner, in disturbance of the public peace." Major Beckwith then made several charges upon the mob with his troop, and suppressed the riot. (a)

LITTLEDALE, J., on Thursday, November 1st, summed up the case. He stated that there was no doubt in point of law, that a public officer guilty of a criminal neglect in the discharge of his duty was liable to an indictment or information; but he added, that the only instance he was aware of in which such information as this had been prosecuted, was the case of Mr. Kennett, who was lord mayor of London during the riots in 1780, and who was tried before Lord Mansfield at nisi prius at Guildhall. He was charged with specific offences (with not reading the riot act, and with releasing some prisoners), as well as with general neglect of duty; *whereas the present information only imputed general misconduct, and that extending over a part of three days: a more attentive consideration would therefore be requisite on the part of the jury. The learned Judge then shortly stated the history of the riot, and the substance of the information, and went on to observe that a party entrusted with the duty of putting down a riot, whether by virtue of an office of his own seeking (as in the ordinary case of a magistrate), or imposed upon him (as in that of a constable), was bound to hit the exact line between excess and failure of duty, and that the difficulty of so doing, though it might be some ground for a lenient consideration of his conduct on the part of the jury, was no legal defence to a charge like the present. Nor could a party so charged excuse himself on the mere ground of honest intention: he might omit acting to the extent of his duty from a perfectly good feeling, and that might be considered in apportioning punishment; but the question for a jury must be, whether or not he had done what his duty in point of law required. The subject of inquiry therefore in the present case would be:—"Has the defendant done all that he knew was in his power to suppress the riots, that could reasonably be expected from a man of honesty and of ordinary prudence, firmness, and activity, under the circumstances in which he was placed?" Honesty of intention, though not of itself sufficient to exculpate, would form an ingredient in the case, to be taken into consideration. The learned Judge then stated, as the two points upon which this inquiry would turn; whether the defendant used those means which the law requires, to assemble a sufficient force for suppressing the riot and preventing the mischief which occurred? *and whether he made such use of the force which was obtained, and also of his own personal exertion, to prevent mischief, as might reasonably have been expected from a firm and honest man? [957]

The learned Judge then went over the facts, examining them with reference to these questions; and he stated that, to convict the defendant, they must all be agreed that he had failed in his duty on some one particular point; it was not sufficient, if *part* of the jury thought him wrong in one instance, and *part* in another. He observed that the defendant during a great part of the transaction had been guided by the suggestions of a military officer, Major Mackworth, and of the town clerk, Mr. Serjeant Ludlow; and it was a circumstance in his favour that he had acted on the best military and best legal advice that could be obtained, although such advice could not shelter him if he had acted incorrectly in point of law. With respect to the charge of not providing sufficient force beforehand, he observed that the case must be considered as it presented itself to the defendant at the time, and not as if he could have foreseen the extent of calamity which resulted from the removal of part of the military and from other circumstances, in which case he might have been expected to

(a) The above statement, though not a complete outline of the case, will show the bearing of such observations as it has been thought desirable to select from Mr. Justice Littledale's summing up. The whole trial has been lately published, from Mr. Gurney's short-hand note.

make what, in a different state of things, would have been an *over-exertion*. It had been made a charge that on the first day of the riot the defendant did not head the special constables, but that was not, in point of law, any part of his duty; they were headed by the chief constables of the wards, whose duty it was, and who were more fitted for it. The defendant gave directions for them to act; and after having harangued the people (in doing which his life was *59] exposed to danger), *he remained in the Mansion House, where communication might be had with him if necessary. It was also stated in the indictment that he did not "organize" the special constables, (a new term in law language, probably substituted for the more usual term "array,") but neither was this any part of the duty of the mayor; it belonged rather to the chief constables; and the constables were in fact marshalled by Major Mackworth, who, as a military officer, was most competent to this kind of duty. The learned Judge, after commenting on some other facts of the case, proceeded as follows:—

The next charge, and in my mind the most important, is, that the defendant did not use those means which the law requires to assemble a sufficient force on the Sunday morning. On this point some reference has been made to the statutes, 1 G. 4, c. 37, and 1 & 2 W. 4, c. 41, authorizing magistrates in certain cases to call out special constables and compel their attendance. Now the information does not contain any charge against the defendant, founded on the provisions of either of these acts, of not calling out such constables; and if it had, there ought still to have been proof that some person had gone before the mayor and taken the proper steps to require him to call out the special constables, according to the direction of the act in force at the time. There was no evidence of such steps having been taken, and although it has been under our consideration whether the defendant was not bound at all events to do what the act prescribes, the majority of the Court has decided, and the jury are to take it as the law, that in the present case no question can arise upon these statutes, and they must be laid entirely out of *consideration. (a) The question *960] therefore will be, on this occasion, whether the defendant performed what the general rules of the common law required of him. The general duty of justices of the peace with regard to rioters is to restrain, and if necessary, to pursue, arrest, and take them: that is the obligation arising from the nature of the office; and that they may be able to fulfil this, the justices are in such cases to call upon the king's subjects to aid them; they have authority to do so, and the king's subjects are bound to be assistant to them in suppressing the riot, when reasonably warned. Now the material consideration in this case is, whether the common law obligation thus thrown upon justices of the peace has been fulfilled on the present occasion. It has been proved, that when the mob went to the Mansion House on the Sunday morning there was no civil power to resist them; and that at the meetings which afterwards took place at the Guildhall and at the Council House on Sunday morning and afternoon, no adequate *961] civil power was provided, which *one should think might have been done in so large a place as Bristol. It is also said, that on those occasions

(a) The statute 1 G. 4, c. 37, empowered justices to swear in special constables, upon the information on oath of five respectable householders, that tumult, riot, or felony had taken place or was reasonably to be apprehended. The act 1 & 2 W. 4, c. 41 (which received the royal assent on the 15th of October 1831), repealed the former statute, and gave powers for the appointing of special constables upon the representation on oath of any credible witness. On the fifth day of this trial, during the proof of the defendant's case, a question arose, whether or not it could be made a matter of charge, without having been expressly alleged in the information, that the defendant did not use the powers given by the latter act for appointing special constables; and there was some discussion on the bench as to this point; but Parke, J., and Taunton, J., were clearly of opinion (though Littledale, J., expressed some doubt) that at all events it ought to have been proved that an information on oath had been submitted to the defendant, before he could be made responsible for not having sworn in constables pursuant to 1 & 2 W. 4, c. 41.

the mayor and magistrates had no plan to propose to the people, that magistrates were not there to receive the people who attended, and that afterwards, at the demolition and burning of the Bridewell, the Gaol, the Bishop's Palace, and the other buildings that were destroyed, there was no adequate civil power to suppress the riots. There is, therefore, a sufficient *prima facie* case made out to call upon the defendant for an answer, and to put it upon him to show that he did what the law required of him. The answer given by the mayor is, that as soon as he left the Mansion House on Sunday morning he concerted measures to call out the civil power; that he directed the constables who had been on duty the day before to be summoned; that he personally called at several houses, and asked the inhabitants to attend him; that he required the same of people whom he accosted in the streets; and that he desired other persons both to go to the houses, and speak to people in the streets. It was Sunday, and it might be expected that the body of the people would not be scattered about in their private houses or shops, but attending their several places of worship: the mayor had therefore a better opportunity of getting the people together, after divine worship should be over, if they had been disposed to come forward, than he would have had at equally short notice on another day. He accordingly sent summonses to the churchwardens, and to the chapels, and these were received by the people assembled at the places of worship. Besides this, he had bills distributed and posted about the town. The notices addressed to the churchwardens not only requested *that the people should assemble, but also they should form themselves into bodies, and as soon as [962] they were formed come to the Guildhall. Now that is what the common law requires of the magistrates; he is to call the people together, and the defendant does call them, in a manner most likely to be attended to, and he tells them to form themselves into bodies, and come, when so formed, to an appointed place. If they had attended, the occurrences of that day might have been different. Was this, then, a reasonable warning on the part of the mayor? If it was, he has done all that lay in his power, provided he gave the warning in sufficient time.

Upon this point, the learned Judge observed that the riot had, to all appearance, ended on the Saturday night, and that, upon its renewal on Sunday, the defendant took the most expeditious course the occasion allowed to summon the inhabitants. He then pointed out the various causes (as the scanty attendance of the inhabitants in pursuance of the mayor's requisition, the differences of opinion among those who came, and the party feeling prevalent in the city) which frustrated the endeavours made to obtain a general co-operation against the rioters.

He observed, that a proposal to call out the posse comitatus had been made on the Saturday night, but not to the defendant. On the Sunday night, however, it was acted upon, and every exertion used; precepts were issued and summonses were sent, but the posse comitatus could not be called out in a moment; the mere arrangement for issuing those precepts took four or five hours. Though the posse comitatus may be called out by a justice, it is generally done by the sheriff; and in this case the under-sheriff says that no such *proceeding ever took place in Bristol to his knowledge, and he never [963] knew of it anywhere else. It would therefore be too much to impute a criminal neglect of duty to the mayor, because he did not adopt a course which must have been attended with so much delay. Besides which, the calling out of the posse comitatus is only giving notice to all the king's subjects to attend; and all are bound to attend the notice of the magistrate, as well as to attend upon the posse comitatus, therefore the warning given by the mayor, which has been already adverted to, was doing the same thing as raising the posse comitatus, only that the making out of precepts, and other formalities, were not gone through. After commenting on some other facts of the case, the learned Judge continued as follows:—

Another charge against the defendant is, that upon being required to ride

with Major Beckwith, he did not do so. In my opinion, he was not bound to do so in point of law. I do not apprehend it to be the duty of a justice of peace to ride along and charge with the military. A military officer may act without the authority of the magistrate, if he chooses to take the responsibility; but although that is the strict law, there are few military men who will take upon themselves so to do, except on the most pressing occasions. Where it is likely to be attended with a great destruction of life, a man generally speaking is unwilling to act without a magistrate's authority; but that authority need not be given by his presence. In this case, the mayor did give his authority to act: the order has been read in evidence; and he was not bound in law to ride with the soldiers, more particularly on such an occasion as this, when his presence *964] elsewhere might be required *to give general directions. If he was bound to make one charge, he ought to have made as many other charges as the soldiers made. It is not in evidence that the mayor was able to ride, or at least in the habit of doing so; and to charge with soldiers, it is not only necessary to ride, but to ride in the same manner as they do: otherwise it is probable the person would soon be unhorsed, and would do more harm than good; besides that, if the mob were disposed to resist, a man who appeared in plain clothes, leading the military, would be soon selected and destroyed. I do not apprehend that it is any part of the duty of a person who has to give general directions, to expose himself to all kinds of personal danger. The general commanding an army does not ordinarily do so, and I can see no reason why a magistrate should. A case may be conceived where it might be prudent, but here no necessity for it has been shown.

With respect to the conversation related by Major Beckwith, in which the defendant and some of the magistrates excused themselves from riding with the military, by saying that it would render them unpopular, and endanger their property, the learned Judge observed, that if there had been a failure in duty established, these words would deserve consideration, as showing the *quo animo*, and as proving that the parties were influenced, in such neglect, by the desire of saving their property: but unless there had been such failure in duty, no question could arise upon the words; and it appeared that on the occasion when they were used, the defendant gave Major Beckwith a written authority, which was all he was at that time bound to do.

The learned Judge, in the course of his summing up, adverted to many other *965] heads of charge against the *defendant, of which it is only necessary to notice the following: It was alleged that at the first meeting on Sunday, the defendant was requested to furnish fire-arms to some of the persons who attended, and that he refused. To this the answer was, that although he would have been justified by law in doing so, it appeared by the evidence of a military officer, that such a course would have been highly imprudent: he was not therefore blameable for avoiding it. It was also suggested, that the defendant ought to have called out the Chelsea pensioners, of whom there were many in and about the city; and that on the Sunday morning there was a considerable body of gentlemen at the Commercial Rooms in Bristol, whom the defendant should have summoned to attend him, but did not. To these objections, one answer (among others founded on the state of facts at the times referred to) was, that if the defendant had given warning to the king's subjects generally, as the law required, to attend him, he was not chargeable with an offence in not having, in some particular respect, gone beyond the general line of his duty to obtain such attendance. It was also objected, that the defendant did not keep a sufficient force to act together as occasion might require; but this was no part of the duty of a justice, and was a precaution rather to be expected from a military officer than a magistrate, who is not accustomed to provide for such occasions as that of a riot going on in several places at the same time. Besides, it did not appear that the defendant could have obtained such a force.

The learned Judge finally restated to the jury the two questions put to them in the former part of his charge, and directed them, if they thought there had

*been criminal neglect, to find the defendant guilty; if not, to acquit him. [*966]

PARKE, J., and TAUNTON, J., declined adding any observation.

The jury acquitted the defendant.(a)

Counsel for the crown, the *Attorney and Solicitor-General, Wilde, Serjt., Coleridge, Serjt., Shepherd, and Wightman*. For the defendant, *Sir James Scarlett, Campbell, Ludlow, Serjt., and Follett*.

(a) With respect to the power of one or more justices in suppressing riots, see *Burn's Justice, Riot, VI. VII. (26th ed.)*, and the books there cited, particularly *Hawk. P. C.*, book i., c. 65. As to the authority of private persons to act in suppressing a riot or affray, whether as assistants to the justices or peace-officers, or of their own accord, if necessary, see *Popham's Rep. 121, 2 Inst. 52, Foster's P. C. 809, 1 East's P. C. 297, 304, Burn's Justice, Riot, IV.*

"If there be a riot or breach of the peace in the presence of one or more justices, they may arrest the rioters themselves, or command any officers or others by word of mouth, without warrant, to arrest them, and they may, by virtue thereof, *flagrante crimine*, arrest them in the absence of the justice, by the true meaning of the statute of 34 E. 3, c. 1, and 18 H. 4, c. 7, *quod vide* adjudged, 14 H. 7, c. 9, s. 10." *Hale's P. C.*, Part II., c. 18, p. 114. The case referred to is *Sir Thomas Green's*, particularly the judgment of *Fineux, C. J.* And see, as to this case, *Lambard's Eirenarcha*, b. 2, c. 5, p. 185-7.

As to the power and duty of private persons witnessing a *felony*, to endeavour to prevent it, and apprehend the felon, and the penalty incurred by neglecting to do so, see, among other authorities, *Hale's P. C.*, Part I., pp. 587, 588; Part II., pp. 75, 76. *Handcock v. Baker*, 2 B. & P. 260. *Hawk. P. C.*, book ii., c. 12, v. 19. *Burn's Justice, Arrest, III.*, 5.

The law on several of the above subjects, and on the employment of the military in cases of disturbances, is very fully discussed by *Lord Mansfield* and *Lord Thurlow*, in the debates arising out of the riots in 1780. *Parliamentary History*, vol. xxi., pp. 694, 786. See also the opinion of *Mr. Law*, *Burn's Justice, Riot, II. note(a)*, 28d edition.

*In the report of *Prescott v. Boucher*, *antè*, p. 849, the following case should have been noticed, but was accidentally omitted:— [*967]

JONES v. JONES. June 5.

Same point as in *Prescott v. Boucher*, *antè*, p. 849.

REPLEVIN.—Avovery by the defendant, as executor, for arrears of rent due to the testator in his lifetime. Plea in bar, that the testator, being seised in fee, had demised to the plaintiff for years. General demurrer and joinder. On this case coming on for argument,

Corbett, in support of the demurrer, said that the point was precisely similar to that in *Prescott v. Boucher*, which was argued in Easter term and now stood for judgment.

J. Jervis, contrà, observed that *Crockerell v. Owerell*, *Cases temp. Holt*, 417, had not been cited in the argument in *Prescott v. Boucher*.

Lord TENTERDEN, C. J. All that can be urged on one side or the other may be found in *Mr. Williams's* book on the Law of Executors, where all the authorities on this point are collected and the law very ably stated. The judgment in this case must abide the event of *Prescott v. Boucher*. *Cur. adv. vult.*

The plaintiff afterwards had judgment.

*MEMORANDA.

[*968]

In the course of this term, *Mr. Serjt. Taddy* and *Mr. Serjt. Merewether* took their seats within the bar, having been appointed *Attorney and Solicitor-General* to the Queen, *vice* *John Williams* and *C. C. Pepys, Esquires*, who resigned.

AN
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1. The proprietor of lands contiguous to a stream, may, as soon as he is injured by the diversion of the water from its natural course, maintain an action against the party so diverting it; and it is no answer to the action, that the defendant first appropriated the water to his own use, unless he has had twenty years' undisturbed enjoyment of it in the altered course. *Mason v. Hill and Others*, H., 2 W. 4. page 304
2. The possessor of a house which is not ancient cannot maintain an action against the owner of adjoining land for digging away that land, so that the house falls in; and therefore where a declaration stated that A. was lawfully possessed of a dwelling house, adjoining to a dwelling house of B., and that B. dug into the soil and foundation of the last-mentioned house so negligently, and so near to the plaintiff's house, that the wall of the latter house gave way; on demurrer to so much of the declaration as

alleged the digging so near, &c. the defendant had judgment. But if it had appeared that the plaintiff's house was ancient; or if the complaint had been that the digging occasioned a falling in of soil of the plaintiff, to which no artificial weight had been added, quære whether an action would not have lain. *Wyatt v. Harrison*, T., 2 W. 4. 871

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ALIENATION.

A grammar school was founded and endowed by virtue of letters patent, which ordained that the school should be altogether of the patronage and disposition of the founder, and his heirs, by whom the schoolmasters and guardians should be nominated for ever: Held, that such right of nomination might lawfully be aliened. *The Attorney-General v. The Master, &c., of Brentwood School*, H., 2 W. 4. 59

ALTERATION.

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ANNUITY.

1. The grant of an annuity in consideration of government stock transferred from the grantee to the grantor, need not be registered under the statute 17 G. 3, c. 26. At least the want of a memorial is no objection, if it be not shown, by the party seeking to set aside the annuity, that the transfer was only a colour for an advance of money, to be raised by sale of the stock. *E., 2 W. 4.* 602
2. A. being indebted to B., it was agreed between them that, in lieu of payment, A. should, by bond, secure the payment of an annuity to B.'s widow, after his decease, during the joint lives of A. and the widow. B. died in 1825, and in 1828 A. executed an annuity deed pursuant to the agreement: Held, that the deed did not require enrolment under the statute 53 G. 3, c. 141. *Frost v. Frost, E., 2 W. 4.* 612
3. A. and B., brothers, were principal and surety in an annuity bond. By an agreement afterwards executed between them and a third brother, for the settlement of their affairs and the determination of their mutual claims, an apportionment of property and of debts was made among the three, and the annuity bond was declared to be B.'s (the surety's) debt:
Held, that this agreement (whether subsequently acted upon or not) was a binding accord between A. and B., and that B.'s administrator, having been obliged to pay arrears of the annuity, could not recover them from A. *Cartwright v. Cooke, T., 2 W. 4.* 701
4. Defendant gave a bond to A. and B. conditioned for the payment of an annuity to his wife, unless she should at any time molest him on account of her debts, or for living apart from her. By indenture of the same date between the above parties, and the wife, reciting that the defendant and his wife had agreed to live separate during their lives, and that for the wife's maintenance, defendant had agreed to assign certain premises, &c. to A. and B., and had given them an annuity bond as above mentioned; it was witnessed that the defendant assigned the premises, &c. to them in trust for the wife, and he covenanted to A. and B. to live separate from her, and not molest her, or interfere with her property; and power was given to her to dispose of the same by will, and to sell the assigned premises, &c. and buy estates or annuities with the proceeds. The wife covenanted with the defendant to maintain herself during her life out of the above property, unless she and the defendant should afterwards agree to live together again; and that he should be indemnified from her debts. The indenture (except as to the assignment), and also the bond, were to become void if the wife should sue the defendant for alimony, or to enforce cohabitation. And it was provided, that if defendant and his wife should thereafter agree to live together again, such cohabitation should in no way alter the trusts created by the indenture. There was no express covenant on the part of the trustees. The defendant and his wife separated, and afterwards lived together again for a time,

and this fact was pleaded to an action by the trustees upon the annuity bond, as avoiding that security:

Held, on demurrer to the plea, that the reconciliation was no bar to an action on this bond, since it did not appear that the bond, and the indenture of even date with it, were not really executed with a view to immediate separation; and although there might be parts of the indenture which a court of equity would not enforce under the circumstances, yet there was nothing, on a view of the whole instrument, to prevent this Court from giving effect to the clause which provided for a continuance of the trusts, notwithstanding a reconciliation *Wilson v. Mussett, T., 2 W. 4.* 743

5. A. beneficed clergyman granted an annuity by deed, and made it chargeable on his living, and gave a warrant of attorney in the common form to confess judgment at the suit of the grantee for 3,200*l.* By the annuity deed it was agreed that the judgment to be entered up on the warrant of attorney was to be a further security for the annuity, and that no execution or sequestration should be issued thereon, other than such sequestration as was therein mentioned, until the annuity should be in arrear; and the grantor covenanted that if the grantee should at any time deem it expedient to sequester the living, it should be lawful for him to issue a sequestration by virtue of the judgment for 3,200*l.* or any part thereof. Judgment having been entered up on the warrant of attorney, and the annuity being in arrear, the grantee issued a sequestration for 3,200*l.* (which sum greatly exceeded the arrears due) and entered into possession of the living.

On motion, the Court refused to set aside the annuity deed, warrant of attorney, and judgment, but directed that the writ of sequestration should continue in force only for the arrears that had become due on the annuity. *Britten v. Wait, T., 2 W. 4.* 915

APPEAL.

1. An order was made on the 21st of May, 1825, for the removal of a pauper to the parish of A., and suspended on the same day on account of the infirmity of the pauper. That parish had no notice of the order till the 12th of August, 1826, when it was served. Another order, dated the 24th of January, 1831, directed that the order for removal should be executed, and 80*l.* paid to the removing parish by parish A., and this order was served on and the pauper removed to parish A. on the 16th of February, 1831. A. appealed to the then next sessions, and the sessions found that the original order for removal was not served within a reasonable time:
Held, that it was not therefore void, but voidable only by appeal, and that parish A. ought to have appealed to the next practicable sessions after it had notice of the original order. *The King v. The Inhabitants of Peak-ridge, E., 2 W. 4.* 538
2. The appellant, against an order of filiation, moved the court of quarter sessions for a postponement of the appeal, on account of the absence of material witnesses. They rejected the application, upon which the appellant declined going into his case, and the

order was confirmed. On motion for a mandamus to the justices to hear the appeal, and affidavits tending to show that they had acted unjustly in not granting the postponement, this court refused to interfere, the matter being one peculiarly within the discretion of the magistrates. *Becke, ex parte, T., 2 W. 4.* 704

3. The statute 9 G. 4, c. 61, for regulating the granting of licenses to keepers of inns, ale-houses, &c., by sect. 27. enacts, "That any person who shall think himself aggrieved by any act of any justice done in execution of that act, may appeal against such act to the quarter sessions:" Held, that the words, "person who shall think himself aggrieved," mean a person who was immediately aggrieved, as by the refusal of the license to himself, by fine, &c., and not one who is only consequentially aggrieved; and, therefore, that where magistrates had granted a license to a party to open a house not before licensed, situate within a very short distance of a licensed public house, the occupier of the latter house could not appeal to the quarter sessions against the granting of such license. *The King v. The Justices of Middlesex, T., 2 W. 4.* 938

APPOINTMENT.

See EVIDENCE, 11.

APPROPRIATION OF PAYMENT.

See TROVER, 1.

ARBITRAMENT.

See PRACTICE.

1. An arbitrator awarded that the plaintiff had no cause of action, and that a verdict should be entered for the defendant, and then, by mistake, directed that the costs of the reference and award should be paid by the defendant, meaning the plaintiff: Held, that the arbitrator, having executed this award in this form, could not rectify it.

The plaintiff moved the Court for a taxation of his costs as adjudged; or that the award which had been executed in duplicate, and one copy afterwards corrected by the arbitrator, might be set aside. The defendant not agreeing to this latter proposal, the Court ordered a taxation. *Ward v. Dean, H., 2 W. 4.* 234

2. An indictment removed into K. B. by the defendant, and made a special jury cause by the prosecutor, came on to be tried, and was immediately referred. The order of reference stated, that if the arbitrator should be of opinion that the defendant was guilty and the prosecutor entitled to costs, the defendant agreed to pay the costs. The arbitrator did so find:

Held, that the prosecutor could not recover the costs of the special jury, since the Judge had not certified for those costs (pursuant to 6 G. 4, c. 50, s. 34), and the order of reference did not expressly give a power of doing so to the arbitrator. Also that the general term "costs" in this order did not include those of the reference and award. *The King v. Moate, H., 2 W. 4.* 237

3. Where a cause is referred to two arbitrators

and their umpire in case of dispute, and it is afterwards agreed to appoint an umpire, such appointment must in no case be decided by chance. And, therefore, where each of two arbitrators had named a person to be umpire, and neither was disapproved of, and it was thereupon proposed that the final choice should be determined by lot, which was accordingly done in the presence and with the concurrence of the arbitrators and parties, an award made by the umpire so chosen was set aside. *Ford v. Jones, H., 4 W. 4.* 248

4. An arbitrator, to whom a cause and all matters of difference were referred, directed a verdict to be entered for the plaintiff, and certain works to be done by the defendant. He then added, that as disputes might arise respecting the performance, the plaintiff, if dissatisfied with it, might (on giving notice to the defendant) bring evidence before the arbitrator of the insufficiency of the work, and the defendant might also give evidence on his part, in order that a final award might be made concerning the matters in difference; but if no proceeding were taken by the plaintiff within two months after the work was done, the award then should be final: and he enlarged the time for making his further and final award, if requested, to six months:

Held, that the latter part of this award was bad, as it assumed to reserve a power over future differences; but that it might be rejected, and the former part was final, and might stand. *Manser v. Heaver and Another, H., 2 W. 4.* 295

5. An agreement of reference stated that disputes had arisen between G. and a navigation company respecting certain goods shipped by G. on board the company's vessels, and which G. complained had not been delivered; that G. had commenced an action in Scotland against the company for the recovery of the goods or their value, of the damage sustained by the non-delivery, and of the costs incurred in the action; and that the parties agreed to refer the said differences to arbitrators, the costs of the reference and award, and also of the action to be in their discretion. The arbitrators awarded that 258l. were due from the company to G.; that the said sum, with 30l., the costs of the reference and award, should be paid by the company on a certain day; and that the company should keep the goods which were then in their possession: Held (Parke, J., dubitante), that this was a sufficient adjudication upon all the matters referred: Held, also, that the award of the goods to the company was not void as an excess of authority. *In the Matter of Gillon and the Mersey and Clyde Navigation Company, E., 2 W. 4.* 493

6. A verdict was taken for the plaintiff at the assizes, March 31st, subject to a reference, the award to be made on or before the first day of Easter term, April 16th. The attorney for the plaintiff left the assize town for his own residence, having first directed his agents at the assize town to obtain the order of reference, and send it him. On the 4th of April, having again written to his agents respecting the order, he left home on business, and returned on the 14th, when he found that the order of reference had not been sent, and in consequence he was not able to obtain it till the time for making the award had ex-

- pired. The defendant having declined submitting to a new order of reference on the former terms, this Court refused to grant a rule enabling the plaintiff to proceed upon his verdict in default of such submission. *Doe dem. Fisher v. Saunders, T., 2 W. 4.* 783
7. A dock company were authorized by statute to sue and be sued by their treasurer, but he was not to be liable in his own person or goods by reason of his being defendant in any such action; and all costs incurred by him in prosecuting or defending any action for the company, were to be defrayed out of the moneys applicable to the purposes of the act. Two actions between the treasurer and G., in one of which the treasurer was plaintiff, and in the other defendant, were referred to an arbitrator, who awarded against the treasurer in both, with costs. The costs and damages being unpaid, and an attachment being moved for against the treasurer, the Court held that he had not rendered himself personally liable by submitting to an order of reference; and they refused an attachment, but ordered a mandamus to the treasurer and directors to pay the sums awarded. *Corpe v. Glyn, Esq. Glyn, Esq. v. Corpe, T., 2 W. 4.* 801

ARCHDEACON.

See PREBEND, 1.

ARREST.

See SHERIFF, 2.

Suspicion that a party has on a former occasion committed a misdemeanour, is no justification for giving him in charge to a constable without a justice's warrant; and there is no distinction in this respect between one kind of misdemeanour and another, as breach of the peace and fraud. *Fox v. Gaunt, T., 2 W. 4.* 798

ASSETS.

See EXECUTOR, 1.

ASSIGNEE.

See BANKRUPT, 3.

ASSIGNMENT.

See COVENANT, 4.

ASSUMPSIT.

1. J., an attorney, who was accustomed to receive certain payments for the plaintiff, his client, went from home, leaving B., his clerk, at the office. B., in the absence of his master, received money on account of the above dues for the client (which he was authorized to do), and gave a receipt signed "B. for Mr. J." J. was in bad circumstances when he left home, and he never returned, but it did not appear that his intention so to act was known at the time of the payment to B. B. afterwards refused to pay the money over to the client, and on assumpsit brought against him for money had and received, it was held, that the action did not lie; for that the defendant received the money as the

agent of his master, and was accountable to him for it; the master, on the other hand, being answerable to the client for the sum received by his clerk; and, therefore, there was no privity of contract between the present plaintiff and defendant. *Stephens, Clerk, v. Badcock, H., 2 W. 4.* 354

2. Where the assignee of a bankrupt is removed, and a new one appointed, Quære whether a party having money in his hands, which he received on account of the bankrupt's estate, in the character of agent to the late assignee, be liable in assumpsit for money had and received to the use of the newly-appointed one?

But the former assignee having been insane when the money was received: Held, that such receiver was liable at all events: for he could not be the agent of an insane person, and therefore held the property as a mere stranger. *Stead, Assignee, v. Thornton, H., 2 W. 4.* 357

3. A ship outward bound with goods, being damaged at sea, put into a harbour to receive some repairs which had become necessary for the continuance of her voyage, and a shipwright was engaged, and undertook to put her into thorough repair. Before this was completed he required payment for the work already done, without which he refused to proceed; and the vessel remained in an unfit state for sailing:

Held, that the shipwright might maintain an action for the work already done, though the repair was incomplete, and the vessel kept from continuing her voyage, at the time when the action was brought. *Roberts v. Havelock, E., 2 W. 4.* 404

4. Assumpsit may be maintained by the owner of a market for stallage, and that without showing any contract in fact between him and the occupier of the stall. *The Mayor, Aldermen, and Burgesses of Newport v. Saunders, E., 2 W. 4.* 411

5. A. remitted a bill of exchange to B., to be paid to a third person on A.'s account. B. discounted the bill, but did not pay over the proceeds, upon which A. sued him in assumpsit for money had and received: Held, that in this action a set-off was admissible. *Thorpe v. Thorpe, E., 2 W. 4.* 580

6. A policy was effected by A. upon her own life with an insurance company; it was by deed, and executed by three trustees of the company. A. afterwards assigned it to B., and died. The money due on the policy was paid to B. by a check drawn by the trustees on the bankers of the company, and he gave an acknowledgment of having received the money from the trustees. By the deed of trust, the board of directors were to cause all moneys belonging to the company to be deposited with the bankers of the company, in the name of the trustees, and such moneys were not to be withdrawn but for the purposes of the company, and by checks signed by the trustees, or by three or more directors under some authority to be given by the trustees. After the payment to B., it was discovered that the policy was void on account of fraud: Held, that under these circumstances, the three trustees were the proper plaintiffs in an action to recover back the money so paid to B. *Lefevre and Others v. Boyle, T., 2 W. 4.* 877

ATTACHMENT.

See ARBITRAMENT, 7.

ATTORNEY.

1. An attorney, retained to conduct a cause at the assizes, cannot abandon it, on the ground of want of funds, without giving the client reasonable notice; and, therefore, where an attorney so retained gave notice to his client on the Saturday before the commission day (which was on a Thursday) that he would not deliver briefs, unless he was furnished with funds for counsel's fees, and they not being furnished, counsel were not instructed, and a verdict passed against the client; it was held in an action against the attorney for negligence, that the jury were properly directed to find for the plaintiff if they thought the attorney had not given reasonable notice to the client of his intention to abandon the cause. *Hoby v. Buitt, Gent.*, H., 2 W. 4. 350

2. J., an attorney, who was accustomed to receive certain dues for the plaintiff, his client, went from home, leaving B., his clerk, at the office. B., in the absence of his master, received money on account of the above dues for the client (which he was authorized to do), and gave a receipt signed "B., for Mr. J." J. was in bad circumstances when he left home, and he never returned, but it did not appear that his intention so to act was known at the time of the payment to B. B. afterwards refused to pay the money over to the client, and on assumption brought against him for money had and received, it was

Held, that the action did not lie; for that the defendant received the money as the agent of his master, and was accountable to him for it; the master, on the other hand, being answerable to his client for the sum received by his clerk; and there was no privity of contract between the present plaintiff and defendant. *Stephens, Clerk, v. Badcock, H.*, 2 W. 4. 354

3. In the city of York, which was incorporated before the time of memory, there had been a court from very ancient times, held first before the mayor and bailiffs, and, after a charter of Ric. 2, before the mayor and sheriffs. By a by-law made in the 3 & 4 Philip and Mary, by a select body of the corporation who had immemorially made rules and regulations as to the practice of the court, and who had, at their discretion, selected the persons admitted to practise as attorneys there; it was ordered, that from thenceforth there should be no more than four persons admitted to be attorneys in the sheriff's court, and from that time, it did not appear that any more than that number had ever been allowed to practise: Held, that the by-law was reasonable, and that the usage limiting the number of attorneys to four was sufficiently ancient to satisfy the statute 2 G. 2, c. 23, s. 11.

Semble, that a mandamus cannot issue to the judges of an inferior court, commanding them, in the first instance, to admit an attorney of K. B. to practise there; but that the mandamus, if any lies, must be to examine whether he is capable and qualified to be admitted, according to the statutes 2 G. 2, c.

- 23, and 6 G. 2, c. 27. *The King v. The Sheriffs of the City of York, T.*, 2 W. 4. 770
4. A party retained attorneys to prosecute an ejectment for D., and showed them, as his warrant for so doing, a power of attorney purporting to be executed by D. The attorneys believing it genuine, took the cause to the assizes, but were obliged to withdraw the record. D., who had been made lessor of the plaintiff, and was abroad during these proceedings, disavowed them on his return, alleging the power of attorney to be a forgery; and the court, on motion by him, ordered the attorneys to pay the costs, D. giving security to repay them the amount if they should succeed in an issue which the court directed, and in which the attorneys were to be plaintiffs and D. defendant, to try whether or not the ejectment was commenced or carried on with the privity of D. *Doe dem. Davies v. Eytton, T.*, 2 W. 4. 785

AVOWRY.

See PLEADING, 1.

BAIL.

See PRACTICE, 3.

BAILIFF.

By letters patent King James the First granted to A., his heirs and assigns, that he and they, by his or their bailiff or bailiffs, for that purpose by him and them from time to time to be deputed, should have the full return of all writs, mandates, and precepts within a certain district, and that no sheriff or other officer of the king, concerning the same returns within the said district, should in any manner intermeddle, &c., nor enter in execution of the premises, unless through the default of the bailiff or bailiffs of the said A., his heirs or assigns, or some of them:

Held, that under a grant containing this special provision, that the grantee might return writs by his bailiff for that purpose deputed, and an exception in case of default by such bailiff, the bailiff so deputed might return writs and mandates in his own name; but

Semble, that if there had been no such special provision and exception, the grantee then would be bound to make the return either by himself or his officer in his (the grantee's) name. *Newland v. Cliffe, E.*, 2 W. 4. 630

BANKING COMPANY.

See EVIDENCE, 13, 14.

BANKRUPT.

See BILL OF EXCHANGE, 1.

1. Covenant for rent. Plea, that before the rent became due, the defendants by deed assigned all their interest in the demised premises to A. B., subject to the payment of the rent, and performance of the covenants contained in the lease; and that he, by the assignment, covenanted to pay the rent and perform the covenants contained in the lease; that the defendants delivered the lease to him, and that he accepted the same, and entered on the premises by virtue of the as-

signment: the plea then stated that A. became bankrupt, and that the arrears of rent accrued after the date of the commission; that the assignee of his estate declined the lease, and that the bankrupt within fourteen days after notice of that fact, delivered up such lease to the plaintiff's devisees of the reversion:

Held, upon demurrer, that the plea was bad, inasmuch as the statute 6 G. 4, c. 16, s. 75, did not put an end to the lease, but merely discharged the bankrupt from any subsequent payment of the rent or observance of the covenants. *Manning v. Flight and Others*, H., 2 W. 4. 211

2. By 6 G. 4, c. 16, s. 126, a certificated bankrupt may plead his bankruptcy to any action for a debt which was provable under the commission. By s. 127, if he has been bankrupt before, and does not pay 15s. in the pound under the second commission, his person only is protected by the certificate, and his future effects vest in the assignees.

Semble, that s. 127, extends to cases where the former bankruptcy and certificate were anterior to the statute. But that section, where applicable, does not entitle a creditor to proceed against the bankrupt after a second certificate, for a debt which he might have proved under the commission. *Robertson v. Score*, H., 2 W. 4. 338

3. Where the assignee of a bankrupt is removed, and a new one appointed, quere, whether a party, having money in his hands which he received on the account of the bankrupt's estate, in the character of agent to the late assignee, be liable in assumption for money had and received to the use of the newly appointed one?

But the former assignee having been insane when the money was received: Held, that such receiver was liable at all events; for he could not be the agent of an insane person, and therefore held the property as a mere stranger. *Stephens v. Badcock*, H., 2 W. 4. 357

4. L. took a lease of a mill and iron forge, and bought the fixed and movable implements, &c., but it was agreed that they should be delivered up at the end, or other sooner determination of the term, at a valuation, if the lessor should give fifteen months' notice of their desire to have them. L. afterwards conveyed all his interest in the premises, implements, &c., to a creditor, in trust, if default should be made by L. in paying certain instalments, to enter upon and sell the same, and satisfy himself out of the proceeds, re-assigning the residue; and if the lessor should require a resale of the implements, &c., the proceeds of such resale were to go in discharge of the debt, if unsatisfied. L. made default, and subsequently became bankrupt, after which, and during the term, the creditor, who had not before interfered, entered upon the property: Held, on trespass brought by the assignees, that L. had at the time of his bankruptcy the reputed ownership of the movable goods, but not of the fixtures. *Clark and Another, Assignees v. Crownshaw*, T., 2 W. 4. 804

BILL OF EXCHANGE.

See STATUTE OF LIMITATIONS, 2.

1. H. accepted a bill for the accommodation of

B., the drawer, who endorsed it over as a security for a debt, and afterwards became bankrupt. The endorsee entered into an agreement with the assignees for purchasing part of the bankrupt's property, and for the arrangement of some claims which he, the endorsee, had upon the estate; and he afterwards gave them a release of all demands, no mention being made, during this transaction, of the bill, which had been dishonoured. He knew, at the time of the agreement, but not when he took the bill, that it was accepted for accommodation: Held, that notwithstanding the above release, the acceptor was still liable at the suit of the endorsee. *Harrison v. Courtauld*, H., 2 W. 4. 36

2. A. gave a promissory note payable to B. (for which A. had received no consideration), as a security for goods to be sold to B. on credit, and B. endorsed the note over to the creditors. B. afterwards executed a deed of composition with the creditors, by which he undertook to pay his debt to them by instalments, and it was stipulated that they should not be prevented by that arrangement from suing on any securities which they held, and that, on any default in paying the instalments, the deed should be void: Held, that the delay granted to B. by this agreement did not discharge A. *Nichols and Another v. Norris*, H., 2 W. 4. 41

3. A bill was presented for acceptance at the office of the drawee, when he was absent. A., who lived in the same house with the drawee, being assured by one of the payees that the bill was perfectly regular, was induced to write on the bill an acceptance as by the procurement of the drawee, believing that the acceptance would be sanctioned, and the bill paid by the latter. The bill was dishonoured when due, and the endorsee brought an action against the drawee, and on proof of the above facts was nonsuited. The endorsee then sued A. for falsely, fraudulently, and deceitfully representing that he was authorized to accept by procurement, and on the trial the jury negatived all fraud in fact:

Held, notwithstanding, that A. was liable, because the making of a representation which a party knows to be untrue, and which is intended, or is calculated from the mode in which it is made, to induce another to act on the faith of it, so that he may incur damage, is a fraud in law, and A. must be considered as having intended to make such representation to all who received the bill in the course of its circulation.

Held, also, that A. could not be charged as acceptor of the bill, because no one can be liable as acceptor but the person to whom the bill is addressed, unless he be an acceptor for honour. *Polhill v. Walter*, H., 3 W. 4. 114

4. A bill of exchange was drawn by A. on B., and endorsed to C. The bill was not satisfied when due, but part payments were afterwards made by the drawer and acceptor. Two years after it had become due, D. paid the balance to C., the holder, and the latter endorsed the bill and wrote a receipt on it in general terms: Held, that that receipt was not conclusive evidence that the bill had been satisfied either by the acceptor or drawer, but that parol testimony was admissible to ex-

plain it; and it appearing thereby that D. paid the balance, not on the account of the acceptor or the drawer, but in order to acquire an interest in the bill as purchaser, it might be endorsed by D. after it became due, so as to give the endorsee all the rights which C., the holder, had before the endorsement, and such endorsee might therefore recover from the drawer the balance unpaid by him. *Graves v. Key and Another*, H., 2 W. 4. 313

5. The vendee of goods paid for them by a bill of exchange drawn by him on a third person, and after it had been accepted, the vendor altered the time of payment mentioned in the bill, and thereby vitiated it: Held, that by so doing he made the bill his own, and caused it to operate as a satisfaction of the original debt, and consequently that he could not recover for the goods sold. *Alderson v. Langdale*, E., 2 W. 4. 660

BILL OF LADING.

See CONSIGNOR AND CONSIGNEE, 1.

BILL OF SALE.

A. being indebted to B. in the sum of 10*l*. for goods, applied for a further supply upon credit, and for a loan. B. refused to grant either without security; and it was then agreed that A. should give a bill of sale of his household furniture and fixtures, and that B. should give him credit for 200*l*. on that security. Before the bill of sale was executed, B., upon the faith of such agreement, advanced to A. 90*l*. in money and goods; and afterwards, on the 8th of May, 1828, A. executed a bill of sale, whereby, in consideration of the debt of 100*l*., he bargained and sold to B. all his (A.'s) household goods and furniture, &c., with a proviso, that if A. should pay the 100*l*. by instalments, the first of which was to be due on the 7th of June, the deed should be void; but in default of payment of any of the instalments at the times appointed, it should be lawful, although no advantage should be taken of any previous default, for B. to enter upon the premises, and take possession and sell off the goods. There was a further proviso, that until such default it should be lawful for A. to keep possession of them. In 1823, A. had given a warrant of attorney to C. and D. as security for a debt of 1100*l*., and they, in November, 1828, entered up judgment, and sued out a fi. fa., under which the sheriff seized the goods:

Held, in trespass brought by B. against the sheriff, that under these circumstances, the bill of sale was not fraudulent by reason of A.'s having continued in possession.

Semble, that after a conveyance of goods and chattels, want of possession does not constitute fraud as against creditors, but is only evidence of it. *Martindale v. Booth*, E., 2 W. 4. 498

BOND.

See INSOLVENT ACT. ANNUITY, 4.

An instrument executed in a foreign port by the master of a ship, reciting, that his vessel bound to London had received considerable damage, and that he had borrowed 1077*l*. to

defray the expenses of repairing her, proceeded as follows:—"I bind myself, my ship, her apparel, tackle, &c., as well as her freight and cargo, to pay the above sum, with 12*l*. per cent. bottomry premium; and I further bind myself, said ship, her freight and cargo, to the payment of that sum, with all charges thereon, in eight days after my arrival at the port of London; and I do hereby make liable the said vessel, her freight and cargo, whether she do or do not arrive at the port of London, in preference to all other debts or claims, declaring that this pledge or bottomry has now, and must have preference to all other claims and charges, until such principal sum, with 12*l*. per cent. bottomry premium, and all charges, are duly paid."

Held, upon error, that this was an instrument of bottomry, for an intention sufficiently appeared from the whole of it, that the lender should take upon himself the peril of the voyage; that the words *my arrival*, must be understood to mean *my ship's arrival*, and that the words, "*I make liable the said vessel, her freight and cargo, whether she do or do not arrive at London*," were intended only to give the lenders a claim on the ship, in preference to other claims, in case of the ship's arrival at some other than the destined port, and not to provide for the event of a loss of the ship. *Simons and Another v. Hodgson*, H., 2 W. 4. 50

BOTTOMRY.

See BOND.

BRIDGE.

1. By the statute 43 G. 3, c. 59, s. 5, no bridge thereafter to be built in any county, by or at the expense of any individual or private person, body politic or corporate, shall be deemed a county bridge, unless erected in a substantial and commodious manner, under the direction or to the satisfaction of the county surveyor, &c.

Trustees appointed by a local turnpike act are individuals or private persons within the meaning of this statute; and therefore, a bridge erected by such trustees after the passing of the statute, but not under the direction, or to the satisfaction of the county surveyor, &c., is not a bridge which the inhabitants of the county are liable to repair. *The King v. The Inhabitants of the County of Derby*, H., 2 W. 4. 147

2. To an indictment against the inhabitants of a county for the non-repair of a foot bridge, they pleaded that it was parcel of a carriage bridge which A. B. was bound to repair ratione tenuræ. Replication admitted the liability of A. B. to repair the carriage bridge, but denied that the foot bridge was parcel of the same; whereupon issue was joined. The evidence was, that the carriage bridge mentioned in the pleadings had been built before 1119, and that certain abbey lands had been ordered for the repairs of the same, and the proprietors of those lands (of which those mentioned to be held by A. B. were part) had always repaired the bridge so built.

In 1736, the trustees of a turnpike road, with the consent of a certain number of the proprietors of the abbey lands, constructed a

wooden foot bridge along the outside of the parapet of the carriage bridge, partly connected with it by brick-work and iron pins, and partly resting on the stone-work of the bridge.

Held, that this (being the foot bridge mentioned in the indictment) was not parcel of the carriage bridge which A. B. was bound by tenure to repair; and, consequently, that the county was liable to repair the foot bridge. *The King v. The Inhabitants of Middlessex*, H., 2 W. 4. 201

BY-LAW.

See ATTORNEY, 3. CORPORATION, 2.

CARRIER.

See INSURANCE, 2.

CERTIFICATE.

See SETTLEMENT BY HIRING AND SERVICE, 2.

CERTIORARI.

1. The statute 13 G. 2, c. 18, s. 5, requires that the party suing forth any certiorari shall have given notice thereof to the justices whose order is in question. A certiorari cannot be issued at the instance of any but the party who gave such notice, although he avowedly drops the proceeding, and although it is too late to give a fresh notice. *The King v. The Justices of Kent*, H., 2 W. 4. 250
2. A notice to justices of a motion to be made for a certiorari "on behalf of the church-wardens and overseers of S.," if signed only by one churchwarden, is not a sufficient notice by "the party or parties suing forth" the writ, within the statute 13 G. 2, c. 18, s. 5. *The King v. The Justices of Cambridgeshire*, T., 2 W. 4. 887

CHANCERY SUIT.

See EXECUTION, 1.

CHARITABLE INSTITUTION.

See RATE, 6.

CHARTER.

See CORPORATION, 1.

CHARTER-PARTY.

See FREIGHT, 1.

CHURCH.

See RATE, 6.

CLAY MINES.

See RATE, 4.

CLAUSE OF RE-ENTRY.

See COVENANT, 3.

CLERK TO GUARDIANS OF POOR.

See RATE, 7.

CODICIL.

See DEVISE, 2.

COGNOVIT.

See EXECUTION, 1.

COLLEGE.

See RATE, 2.

COMPOSITION DEED.

See BILL OF EXCHANGE, 2.

COMPROMISE.

See COVENANT, 4.

CONDITION.

See EXECUTION.

CONSEQUENTIAL DAMAGE.

See ACTION ON THE CASE, 2.

CONSIGNOR AND CONSIGNEE.

A consignee (not the owner) of goods, receiving them in pursuance of a bill of lading, whereby the ship-owner agrees to deliver them to the consignee by name, he paying freight, is not liable for general average, although he has had notice before he received the goods, that they have become subject to the charge.

Semble, that he would be so liable, if the consignor had, by the bill of lading, made the payment of general average a condition precedent to the delivery of the goods. *Scarf v. Tobin*, E., 2 W. 4. 523

CONSTABLE.

By an act of parliament for paving, lighting, and watching the streets of a parish, the rector, church-wardens, overseers of the poor, and vestrymen were appointed trustees for putting the act in execution. By a subsequent act the trustees appointed to put the first act in execution were appointed trustees for executing that act, and the said trustees, or any thirteen or more of them, were authorized to elect four constables for the parish annually: Held, that the presence of the rector at a vestry for the election of a constable was not necessary, if thirteen other trustees were present.

The trustees appointed four constables for the year, on the 21st December, 1829. One of the persons so appointed having in March, 1830, removed from the parish, and given notice of his removal to the trustees, they elected another: Held, that the trustees, having so appointed the four constables for the year, might also, on the removal from the parish of one of the persons so appointed, elect another person in his stead; for that they were not *functi officio*, and were the proper persons to supply the vacancy.

By the custom of the city of London, all persons appointed constables on Saint Thomas's Day attend at Guildhall on Plough Monday, and are sworn by the registrar, and those who, when vacancies occur, are appointed at any other period of the year, are sworn in before the registrar at the Lord Mayor's Court office: Held, that the custom applied to all constables in the city of London, in whatever manner appointed, and that a party elected constable by the trustees

under the local act was bound, after notice, to attend at the Lord Mayor's court office to be sworn in.

Indictment charged that the defendant being elected to the office of constable, had neglected and refused to take upon himself the execution of the office. The proof was that he refused to take the oath of office: Held, that that was *prima facie* evidence of a refusal to take upon himself the execution of the office:

Held, also, on motion in arrest of judgment, that the indictment charged an offence, by alleging that the defendant had wholly neglected and refused to take on himself the execution of the office, and that it was not necessary to state that he had refused to be sworn. *The King v. Brain*, E., 2 W. 4. 614

COPYHOLD.

See SETTLEMENT BY ESTATE, 3.

An heir at law may devise a copyhold estate descended to him, without having been admitted, and without previous payment of the lord's fine, where due on admission. *Right v. Banks*, T., 2 W. 4. 664

CORPORATION.

1. By letters patent, the king granted to the mayor and burgesses of Lyme Regis, the borough or town so called, and also the pier, quay, or cob, with all liberties and profits, &c., belonging to the same, and remitted also twenty-seven marks of their ancient rent, payable to the king; and he willed, that the mayor and burgesses, and their successors, all and singular the buildings, banks, sea shores, &c., within the said borough, or thereto belonging, or situate between the same and the sea, and also the said pier, &c., at their own costs and charges thenceforth forever, should repair, maintain, and support, as often as it should be necessary:

Held, first, that the mayor and burgesses of Lyme having accepted the charter, became legally bound to repair the buildings, banks, sea shores, and mounds.

Secondly, that this obligation being one which concerned the public, an indictment would lie, in case of non-repair, against the mayor and burgesses for their general default, and an action on the case for a direct and particular damage sustained in consequence by an individual. *The Mayor and Burgesses of Lyme Regis v. Henley, Esq.* (in error), H., 2 W. 4. 77

2. A gas light company was incorporated by act of parliament, which provided that eighteen shareholders should be directors, and as such should use the common seal, manage the affairs of the company, lay out money, purchase lands, &c., and make contracts for lighting and for the sale of materials. The company was empowered to make *by-laws under seal* for its government, and for regulating the proceedings of the directors, officers, servants, &c. At a meeting of the company, a resolution was passed, *not under seal*, that a remuneration should be allowed to every director for his attendance on courts, committees, &c., viz., one guinea for each time:

Held, that a director who had attended

courts, &c., could not maintain an action for payments according to the above resolution, for that it was not a by-law within the statute, nor a contract (if such could have been available) to pay the directors or any of them for their attendances, and the directors could not be considered as servants to the company, and, as such, entitled to remuneration for their labour according to its value.

Quære, whether a company incorporated for the purpose of manufacturing, can contract, otherwise than under seal, for service, work, and the supply of goods for carrying on the business. *Dunston and Clarke v. The Imperial Gas Light and Coke Company*, H., 2 W. 4. 252

3. By a chapter of Queen Elizabeth, the corporation of the Trinity House of Hull are authorized to take certain duties "in the port of the town of Kingston-upon-Hull, and in all places within the limits and liberties thereof, that is to say, in all havens, creeks, and other places where our customer of Hull by virtue of his office hath any authority to take any custom," &c.; and they are also empowered to exercise jurisdiction over certain disputes arising within the same limits and liberties; and moreover, to forbid any manner of the port of Hull, or the said limits, to take charge as pilot of any ship to cross the seas, except such as shall be first examined by them, whom, if they find sufficient, they shall receive into their guild, and give him a writing, signifying the countries, coasts, and places for which he shall be so found sufficient; and they are authorized to punish any person who shall take charge upon him as pilot to cross the seas without their allowance.

The limits in question extended many miles up the Humber and river Ouse. Goole, a place within those limits, situate on the Ouse, and where the customer of Hull had formerly exercised jurisdiction, was constituted a port in 1828. Till after that time the Trinity House had never licensed pilots to take charge of vessels upon the Ouse, or the Humber above Hull Roads, and they had on one or two occasions refused to interfere with the pilotage of those parts: but they had exercised the other powers given by the charter, both on the Humber and on the Ouse beyond Goole. Before the erection of that port scarcely any foreign trade was carried on with places above Hull Roads:

Held, that the power given by the charter to license, &c., in all places where the customer of Hull had authority to take custom, extended over all the limits within which the customer might so act at the time when the charter was granted, and was not confined to the jurisdiction of the customer for the time being: consequently that Goole, though now an independent port as to customs, was still subject to the charter in respect of the licensing of pilots.

Held also that, under the above circumstances, the forbearance of the corporation in former times to license pilots above Hull Roads could not affect their right to enforce the charter on this head, when it became necessary.

Held further, that it was not requisite, by the terms of the charter, that every license should be for crossing the seas; but that the

corporation might grant a more limited license; as from Google to Hull Roads.

Sec. 6 of the general pilot act, 6 G. 4, c. 125, which enacts, that it shall be lawful for the Trinity House of Hull and Newcastle to appoint sub-commissioners of pilotage to examine and license pilots, is permissive and not imperative. *Beilby qui tam v. Raper*, H., 2 W. 4. 284

4. In the city of York, which was incorporated before the time of memory, there had been a court from very ancient times held first, before the mayor and bailiffs, and after a charter of Ric. 2, before the mayor and sheriffs. By a by-law made in the 3 & 4 Philip and Mary, by a select body of the corporation, who had made rules and regulations as to the practice of the court, and who had at their discretion selected the persons admitted to practise as attorneys there, it was ordered, that from thenceforth there should be no more than four persons admitted to be attorneys in the sheriff's court; and from that time, it did not appear that any more than the number had ever been allowed to practise: Held, that the by-law was reasonable, and that the usage limiting the number of attorneys to four was sufficiently ancient to satisfy the statute 2 G. 2, c. 23, s. 11. *The King v. The Sheriffs of the City of York*, 2 W. 4. 770

COSTS.

See ARBITRAMENT, 1, 2. ATTORNEY, 4. COVENANT, 4. PRACTICE, 3, 4. TRESPASS, 1.

COUNTY BRIDGE.

See BRIDGE.

COUNTY COURT.

The cause assigned at the end of a writ of pone, for removing the plaintiff from the county court, is mere form, and not traversable by the sheriff. *Parkes v. Renton*, H., 2 W. 4. 105

COURT LEET.

See PLEADING, 6.

1. A custom in a manor for the leet jury to break and destroy measures found by them to be false is lawful.

In a plea of justification, grounded on such custom, it is enough to say that the measures were found by the jury to be false, without alleging that they were so.

A court leet holden on the 28th of April was adjourned, after the jury had been sworn in, till the 15th of December, which day was given them to make their presentments: Held, that an adjournment of such duration (which was admitted to be according to the custom of the manor) was not necessarily unreasonable. *Wilcock v. Windsor and Others*, H., 2 W. 4. 43

2. In trespass for seizing weights and measures, four defendants pleaded, that they were sworn with divers, to wit, twenty others, as a leet jury, according to the custom of the manor of Stepney; and that the custom was for the jury so sworn to examine weights and measures within the manor, and seize them if defective; and they alleged,

that they, the defendants, being on such jury so sworn as aforesaid, examined and seized the plaintiff's weights and measures, which they found defective. Replication de injuria. There was evidence at the trial that only five of the leet jurors were actually in the plaintiff's shop when the defendants made the seizure there, though the rest were close at hand; but the Judge refused to let any question go to the jury on this part of the case, being of opinion that the objection was on the record:

Held, that the objection was on the record, and was valid; it not appearing by the plea that the examination and seizure were made by the jury sworn at the court leet, according to the custom. *Sheppard v. Hall and Others*, E., 2 W. 4. 433

COVENANT.

See BANKRUPT, 1. PLEADING, 3, 5.

1. By indenture reciting a power vested in A. B. to dispose of certain premises, and that C. D. had contracted to purchase them, A. B. appointed and conveyed them to the use of C. D., his heirs, &c., and covenanted that the power in A. B. was then in force, and not executed; and also that he, A. B., then had in himself good right, title, power, and authority to limit and appoint, and to grant, bargain, sell, &c. the premises to the said uses; and further that the premises should be held and enjoyed to the said uses, without the let or interruption of A. B., or any claiming under or in trust for him; and also for further assurance by A. B., and all so claiming: Held, that the second covenant was absolute for good title against all persons, and not to be qualified by reference to the other covenants, inasmuch as there were no words, either in the second covenant itself, or in preceding or subsequent ones, to connect it with them. *Smith v. Compton and Others*, H., 2 W. 4. 189
2. Proviso in a lease, giving power of re-entry if the lessee "shall do or cause to be done any act, matter, or thing contrary to and in breach of any of the covenants," does not apply to a breach of the covenant to repair, the omission to repair not being an act done within the meaning of the proviso. *Dee dem. Sir W. Abdy v. Stevens*, H., 2 W. 4. 299
3. A lease contained a covenant, among others, that the tenant should not carry any hay, &c., off the premises, under a penalty of 5*l.* per ton, and a clause followed which enumerated all the covenants except the above, and provided, that upon breach of any of the covenants, the lessor might re-enter: Held, that the penalty of 5*l.* did not prevent the clause of re-entry from applying to the above covenant, the words of the proviso being large enough to comprehend it. *Dee dem. Antrobus v. Jepsen and Another*, E., 2 W. 4. 402
4. The defendant conveyed premises to the plaintiff, and covenanted for good title. An action of formedon was afterwards brought against the plaintiff by a party having better title, and the plaintiff compromised it for 550*l.*: Held, that the plaintiff, in an action for the breach of covenant, might recover the whole sum so paid, and his costs, as between attor-

ney and client, in the compromised suit, though he had given no notice of that suit to the defendant. For in an action on a general guarantee, the only effect of such want of notice to the indemnifying party is to let in proof on his part, that the compromise was improvidently made, and it lies on him to establish that fact, which was not done in the present case. *Smith v. Compton and Others, Executors, E., 2 W. 4.* 407

5. A lease was granted in 1759 for ninety-nine years, if certain parties should so long live. The lessees in 1818 demised the premises to P. for sixty-two years, from the 25th of March, 1821, if their interest should so long continue, subject to a rent of 42l. and various covenants, with a proviso for re-entry in case of default. P. had already the reversion in fee, subject to a mortgage granted by him before the last-mentioned demise. By lease and release executed in 1820, to which the mortgagee was a party, P. in consideration of a sum of money (part of which went to discharge the mortgage), conveyed the premises in fee to a purchaser, to whom the mortgagee also assigned his term; and it was stipulated that the purchaser should retain 300l. of the purchase-money, upon trust that if P. should pay the 42l. rent, and perform the covenants contained in the lease of 1818, the purchaser should pay over to him the 300l. at the expiration of the term, or extinguishment of the lease of 1759, and interest in the mean time: Held, that the deed of 1818 was an assignment of all the interest of the then lessees to P., and that by the conveyance of 1820 that interest, as well as the reversion in fee, passed to the purchaser, and (the mortgage being at the same time put an end to) the term became merged in the inheritance; and consequently, that as soon as the term became vested in the purchaser, P. was discharged from the rent and covenants, and entitled to the 300l. *Thorn v. Woolcombe, E., 2 W. 4.* 586

CUSTOM.

See EVIDENCE, 8. MANDAMUS, 2.

By ancient custom, a select vestry was to consist of the rector, churchwardens, and those who had served the office of upper churchwarden, and other parishioners, to be elected by the vestrymen. The practice in modern times had been to elect as vestrymen those parishioners only who had been fined for not serving the office of upper churchwarden: Held, that they were good vestrymen.

By the custom of the city of London, all persons appointed constables on St. Thomas's day, attend at Guildhall on Plough-Monday, and are sworn by the registrar, and those who, when vacancies occur, are appointed at any other period of the year, are sworn in before the registrar at the lord mayor's court office: Held, that that custom applied to all constables in the city of London, in whatever manner appointed. *The King v. Brain, E., 2 W. 4.* 614

DAM.

See RATE, 1.

DEED.

See ANNUITY, 2. BILL OF SALE. COVENANT, 1.

DETERMINATION OF SUIT.

See EVIDENCE, 5.

DEVISE.

See COPYHOLD, 1.

1. Devise of "all my messuages situate at, in, or near a street called Snig Hill, in Sheffield, which I lately purchased of the Duke of Norfolk's trustees." The testator had four houses in Sheffield, about twenty yards from Snig Hill, and two houses about 400 yards from it, in a place called Gibraltar Street, also in the town of Sheffield. He purchased all the houses by one conveyance, and re-deemed the land-tax upon all by one contract. He had no other houses in Sheffield:

Held, that the terms "at, in, or near Snig Hill," did not apply to the houses in Gibraltar Street; and that, there being four houses which answered all the terms of the devise, it must be understood as meant to pass those, and not the two to which only part of the description applied. *Doe dem. Ashforth v. Bower, E., 2 W. 4.* 453

2. Testator devised all his real estates in Jamaica, and all the residue of his real estate, to trustees in fee, for the benefit ultimately, to his heirs at law. By a codicil he bequeathed to another party 1200l. (the amount of a bond debt), and further devised as follows:—"I also bequeath to him my chambers in Albany, for which I paid 600 guineas, with all my furniture, except such articles as I may particularly except from this donation." The testator had bought the fee simple of these chambers (of which he died seized) for 600 guineas; and he had no other chambers in Albany: Held, that the devisee under the codicil took only a life estate. *Doe dem. Sewell v. Parratt, E., 2 W. 4.* 469

3. Testator being seized in fee of the premises after mentioned, devised as follows:—"I give and bequeath to my wife my freehold estate called Pouncette, during her natural life. I give to my son Richard, my heir, after the death of my wife, 10l. Item, all the above bequeathed lands, goods, and chattels, after the death of my wife. I give and devise to my son Richard, to my son Thomas, to my son Robert, and to every other of my children then in being, share and share alike, equally to be parted between them:" Held, that under this devise the children only took life estates, in their respective shares, after the death of the wife. *Doe dem. Norris and Others v. Tucker, E., 2 W. 4.* 473

4. J. C. devised a dwelling-house to his brother and sister for their lives, and the life of the survivor, and after their decease to John H., E. C., and S. H. (their children), share and share alike, they paying out of the same unto four persons therein named, the sum of 10l., to be paid to them when they should attain their several ages of twenty-one years, by the testator's executrixes; and he appointed E. C. and J. H., two of the devisees in remainder, his executrixes: Held, that the 10l. was a charge on the devisees in remainder in respect of the estate, and that they took a fee. *Doe dem. Thorn v. Phillips, T., 2 W. 4.* 753

5. Testator devised lands to trustees, and the survivor of them, and the heirs of such survivor, in trust for F. W., then an infant, till

he should arrive at the age of twenty-one years, upon his legally taking and using the testator's surname; and then, upon his attaining such age and taking that name, habendum to him for life; and from and after his decease, to hold to the trustees, and the survivor of them; and the heirs of such survivor to preserve contingent remainders, in trust for the heirs male of F. W. taking the testator's name, and the heirs and assigns of such male issue for ever; but, in default of such male issue then over: Held, that the trustees did not take the legal estate in the lands devised, but that F. W. took a legal estate tail in them on his coming of age, and adopting the testator's surname. *Nash and Others v. Coates, T.*, 2 W. 4. 839

DISTRESS.

See EXECUTOR, 5. REPLEVIN, 1.

The 42 G. 3, c. 116, s. 69, authorizes bodies corporate for the purpose of redeeming land tax charged on their lands, under the restrictions therein mentioned, to sell and convey any lands whereof they shall be in actual possession, or entitled beneficially to the rents or profits, or the fee simple or inheritance of any lands belonging to them which shall have been or shall be granted or demised for any beneficial lease for life or lives, or years, and also the rents and services, and other profits, reserved or payable in respect of such leasehold tenements.

Sect. 76 enacts, that no sale shall be valid unless two of the commissioners, appointed by sect. 72 of the act, shall certify their assent by signing and sealing the deed of sale as parties thereto.

A prebendary agreed by writing, but not by deed, in consideration of a sum in 3 per cent. stock (of the amount necessary for redeeming the land tax), to convey to a lessee then in possession, a part of the prebendal estate in reversion, such part to be set out and valued by A. B., and approved by the king's commissioners. The lessee furnished the sum required for purchasing the stock, and the prebendary concluded the necessary contract with the land tax commissioners, transferred the stock into the names of the commissioners for reducing the national debt, and had the contracts duly registered; the land was also set out and valued; but the lessee then refused to sign the necessary memorial for the purpose of obtaining the approbation of the king's commissioners, pursuant to sect. 76. The prebendary afterwards distrained upon an under tenant of the land for the amount of the redeemed land tax, as additional rent, pursuant to sect. 88: Held, that there had been no valid sale of the land for want of the assent of the commissioners, and because, in order to comply with the provisions of the 69th section, the prebendary ought to have sold not only the fee simple, and inheritance of the lands demised, but also the rents, services and other profits:

Held, also, that he had no right to distrain by sect. 88, until the precise quantity of land, and the portion of reserved rent to be sold, were ascertained by the commissioners. *Warner v. Petchett, Clerk, T.*, 2 W. 4. 920

DOCK COMPANY.

See ARBITRAMENT.

EJECTMENT.

See EVIDENCE, 11.

1. In ejectment under the statute 11 G. 4, and 1 W. 4, c. 70, s. 36, it is no ground for setting aside a verdict for the plaintiff, that he did not give six clear days' notice of trial, as required by that section; the defendant having appeared and made his defence. *Doe dem. Antrobus v. Jepson and Another, E.*, 2 W. 4. 402
2. Heir in tail brought ejectment against a defendant who had been in receipt of rents thirty years during the life of the ancestor in tail, and seven years after his death. The ancestor had had seisin: Held, that such possession by the defendant was no bar to the action, and that the lessor of the plaintiff was not bound to rebut the presumption arising from such possession by showing that the ancestor had not conveyed by fine and recovery. *Doe dem. Smith v. Pike and Another, T.*, 2 W. 4. 738

ELECTION.

See EXECUTOR, 3.

ENROLMENT.

See ANNUITY, 2.

ESCAPE OF DISTRESS.

See TRESPASS, 5.

EVIDENCE.

See BRIDGE, 2. COVENANT, 4. HIGHWAY, 2. HUNDRED, ACTION AGAINST, 1. PLEADING, 3, 4, 6. STAMP, 1. STATUTE OF LIMITATIONS, 2.

1. A notice to produce deeds was served on defendant's attorney, in Essex, on Saturday, the commission day of the assizes being Monday; the attorney went to London and fetched them. A notice was served on the Monday evening to produce another deed. The attorney stated he had been to town to fetch the deeds; and if the plaintiff would pay the expense of sending for this from town, where it was, it should be had. No offer to pay was made, and the trial was on Thursday: Held, that, under these circumstances, the plaintiff was not entitled to give secondary evidence of the last-mentioned deed. *Doe dem. Curtis v. Spitty, H.*, 2 W. 4. 152
2. Indictment charged the defendant with keeping certain enclosed lands near the king's highway for the purpose of persons frequenting the same to practise rifle shooting, and to shoot at pigeons with fire-arms; and that he unlawfully and injuriously caused divers persons to meet there for that purpose, and suffered and caused a great number of idle and disorderly persons, armed with fire-arms, to meet in the highways, &c., near the said inclosed grounds, discharging fire-arms, making a great noise, &c., by which the king's subjects were disturbed and put in peril.

At the trial it was proved that the defendant had converted his premises, which were situated at Baywater, in the county of Middlesex, near a public highway there, into a shooting ground, where persons came to shoot with rifles at a target, and also at pigeons; and that as the pigeons which were fired at frequently escaped, persons collected outside of the ground, and in the neighbouring fields, to shoot at them as they strayed, causing a great noise and disturbance, and doing mischief by the shot: Held, that the evidence supported the allegation, that the defendant caused such persons to assemble, discharging fire-arms, inasmuch as their doing so was a probable consequence of his keeping ground for shooting pigeons in such a place. *The King v. Moore*, H., 2 W. 4. 184

3. A bill of exchange was drawn by A. on B., and endorsed to C. The bill was not satisfied when due, but part payments were afterwards made by the drawer and acceptor. Two years after it had become due, D. paid the balance to C. the holder, and the latter endorsed the bill, and wrote a receipt on it in general terms: Held, that the receipt was not conclusive evidence that the bill had been satisfied either by the acceptor or drawer, but that parol testimony was admissible to explain it; and it appearing thereby that D. paid the balance, not on the account to the acceptor or drawer, but in order to acquire an interest in the bill as purchaser, it might be endorsed by D. after it became due, so as to give the endorsee all the rights which C. the holder had before the endorsement, and such endorsee might therefore recover from the drawer the balance unpaid by him. *Graves v. Key and Another*, H., 2 W. 4. 313
4. In trespass against the sheriff and an execution creditor for seizing goods of A., which the plaintiffs claimed as assignees under a joint commission against A. and B., the plaintiffs, in support of the joint commission, gave evidence of acts and declarations of B., for the purpose of showing that he had become bankrupt: Held, that this evidence was inadmissible; and that the Court, in granting a new trial on this ground, could not limit the inquiry on such second trial to the question of B.'s bankruptcy; for that, in cases where a bill of exceptions might be tendered, but an application for a new trial is made instead, the new trial must be granted generally, and cannot be restrained to a particular point. *Bernasconi and Others v. Forbrother*, H., 2 W. 4. 372
5. In an action for a malicious arrest, proof that no declaration was filed or delivered within a year after the return of the writ, is sufficient to show a determination of that suit. *Pierce v. Street*, H., 2 W. 4. 397
6. The master of an apprentice having had the indenture in his possession, failed in business, and an attorney took the management of his affairs, and custody of his papers, which he inspected, but did not find the indenture: Held, that this, after the master's death, was a sufficient case to let in secondary evidence of the indenture, though his widow was still living, and no inquiry had been made of her respecting it. *The King v. The Inhabitants of Piddlington*, E., 3 W. 4. 460
7. Testator bequeathed a term in premises to S. his executors, &c., in trust to sell and dispose

of the same, as might seem most advantageous, and apply the proceeds to the maintenance of testator's son during his life. He bequeathed the remainder, after the son's decease, to such uses as the son should by will appoint, and he appointed S. his executor. When the testator died, his journeyman was managing his business on the premises, as he had done for some years, and the testator's son resided there.

At the funeral S. said, in presence of the journeyman and other persons, "The house is young B.'s," (meaning the son); "T. must stay in the house and go on with the business, but young B. must have a bidding place." T. accordingly continued on the premises, carrying on the business, paying no rent, but maintaining the testator's son, who was weak in intellect, and unable to provide for himself. S. lived twenty years afterwards, and did not interfere further with the property: Held, that this was sufficient evidence of a disposal of the property by S. according to the trusts in the will, and that he had assented to take under the will as legatee in trust, and not as executor. *Doedon. Sturges v. Tatchell*, T., 2 W. 4. 675

8. In a lease, inter alia, of a rabbit warren, lessee covenanted that, at the expiration of the term, he would leave on the warren 10,000 rabbits, the lessor paying for them 60l. per thousand: Held, in an action by the lessee against the lessor for refusing to pay for the rabbits left at the end of the term, that parol evidence was admissible to show, that by the custom of the country where the lease was made, the word thousand, as applied to rabbits, denoted twelve hundred. *Smith and Another v. Wilson*, T., 2 W. 4. 728
9. In trespass for cutting lines of the plaintiff, and throwing down linen thereon hanging; defendant pleaded that he was possessed of a close, and because the linen was wrongfully in and upon the close, he removed it. Replication, that J. G. being seised in fee of the close, and of a messuage with the appurtenances contiguous to it, by lease and release conveyed to W. H. the messuage, and all the easements, liberties, privileges, &c. to the said messuage belonging, or therewith then or late used, &c.; that before and at the time of such conveyance, the tenants and occupiers of the messuage used the easement, &c., of fastening ropes to the said messuage, and across the close to a wall in the said close, in order to hang linen thereon, and of hanging linen thereon to dry as often as they had occasion so to do at their free will and pleasure, and that the plaintiff, being tenant to W. H. of the said messuage, did put up the lines, &c. Rejoinder took issue on the right as alleged in the replication: Held, that proof of a privilege for the tenants to hang lines across the yard, for the purpose of drying the linen of their own families only did not support the alleged right. *Drewell v. Towler*, T., 2 W. 4. 735
10. Heir in tail brought ejectment against a defendant who had been in receipt of the rents thirty years during the life of the ancestor in tail, and seven years after his death. The ancestor had had seisin: Held, that such possession by the defendant was no bar to the action, and that the lessor of the plaintiff was not bound to rebut the presumption

arising from such possession, by showing that the ancestor had not conveyed by fine and recovery. *Doe dem. Smith v. Pike and Another*, T., 2 W. 4. 738

11. J. C. devised a dwelling-house to his brother and sister for their lives, and the life of the survivor, and after their decease to John H., E. C., and S. H. (their children), share and share alike, they paying out of the same unto four persons therein named, the sum of 10l., to be paid to them when they should attain their several ages of twenty-one years by the testator's executrixes, and he appointed E. C. and J. H. two of the devisees in remainder, his executrixes: Held, that the 10l. was a charge on the devisees in remainder, in respect of the estate, and that they took a fee.

The survivor of the devisees for life died in 1777, and S. H., one of the devisees in remainder, continued afterwards to reside on the premises devised John H., another of the devisees in remainder, died in November, 1790, having devised his freehold estates to his wife for life, and after her decease, to his three daughters.

By indentures made in the years 1791 and 1792, James H., described as heir at law of John H., his brother deceased, and the two other devisees in remainder named in the will of J. C., covenanted to levy a fine of the devised premises, to enure to such person as they should by deed appoint; and afterwards, by indenture, reciting that a fine had been levied, appointed the premises to P. in fee, who in 1792 entered thereupon, and continued from thenceforth in undisturbed possession of the whole:

Held, in ejectment brought against P. by the heir at law of one of James H.'s daughters, which daughter on the death of her mother, the tenant for life under the will of James H., was under coverture, that the deeds of 1791 and 1792, under which P. claimed, were, as against him, evidence of the seisin of James H. at the time of making his will and of his death; and that, independently of those deeds, the seisin of S. H., the co-tenant in common, being the seisin of John H., there was no ground for presuming an ouster of John H. *Doe dem. Thorn v. Phillips*, T., 2 W. 4. 753

12. In assumpsit for use and occupation, 4l. were paid into court on the account stated. The plaintiffs proved, that the defendant being indebted to them as surviving executors of T., and having no other account with them, was called upon by them for payment, and refused, saying that he had a cross demand on the funds of the testator. The plaintiffs gave evidence of a debt exceeding 4l., and contended that these facts, with the admission implied by the payment into court, merely showed that upon that accounting, which alone was in question, the defendant was found indebted 4l. *Kennedy v. Withers*, T., 2 W. 4. 767

13. By 7 G. 4, c. 46, empowering certain corporations or copartnerships to carry on the business of banking, it is enacted, that before any such corporation, &c., shall issue bills or notes, or take up money on such bills, &c., an account shall be made out by the secretary, or other person being one of the public officers next mentioned, containing, among

other things, the names and places of abode of two or more members of such corporation, &c., who shall have been appointed public officers thereof, and in whose names the corporation shall sue and be sued; such account to be annually returned to the stamp office between certain days, and a copy thereof to be evidence of the appointment of such officers. In an action brought by such officer on behalf of a banking company, the return to the stamp office is not the only admissible evidence of his being one of the public officers, but it may be proved aliunde. *Edwards v. Buchanan*, T., 2 W. 4. 788

14. To entitle a banking company to sue by its public officer, pursuant to 7 G. 4, c. 46, it is sufficient if, in the return made to the stamp office, he be described as A. B., Esq., of, &c., a "public officer" of the copartnership: at least in the absence of proof that he had any specific office, it will not be presumed that he was more than an officer appointed for the purpose of suing and being sued. The right of such company to sue by its public officer is not defeated if it appear that, on the return to the stamp office, the places of abode of one or more partners are omitted, there being no evidence that the return varies in this respect from the company's books. And if such proof were given, semble that the return, if correct as to the public officers, would still be sufficient to maintain the action. *Armitage v. Hamer*, T., 2 W. 4. 793

15. By act of parliament reciting that a certain tract of land, daily overflowed by the sea, and to which the king in right of his crown claimed title, might be rendered productive if embanked, and that his majesty had consented to such embankment, a part of said land, called Lipson Bay, was granted to a company for that purpose. On one side of the bay was the northern side of an estate called Lipson Ground, forming an irregular declivity, in parts perpendicular, and in parts sloping down to the sea-shore, and overgrown with brushwood and old trees. The company, in embanking the bay, made a drain on this side in the same direction with the cliff, cutting through it in parts, but leaving several recesses of small extent between the projecting points. These recesses used to be overspread with sea-weed and beech, and were covered by the high water of the ordinary spring tides, but not by the medium tides: Held, in the absence of proof as to acts of ownership, that the soil of these recesses must be presumed to have belonged to the owner of the adjoining estate, and not to the crown; and did not, therefore, pass to the embankment company by act of parliament. Quære, whether upon issue joined on a plea of liberum tenementum, the plaintiff may prove twenty years' adverse possession; or whether, it must be specially replied to. *Lowe and Another v. Govett*, T., 2 W. 4. 863

16. Where it was the usual course of practice in an attorney's office for the clerks to serve notices to quit on tenants, and to endorse on duplicates of such notices the fact and time of service; and on one occasion, the attorney himself prepared a notice to quit to serve on a tenant, took it out with him, together with two others prepared at the same time, and returned to his office in the evening, having

endorsed on the duplicate of each notice a memorandum of his having delivered it to the tenant, and two of them were proved to have been delivered by him on that occasion: Held, on the trial of an ejectment after the attorney's death, that the endorsement so made by him was admissible evidence to prove the service of the third notice. *Doe dem. Patteshall v. Turford*, T., 2 W. 4. 890

EXECUTION.

A cognovit was given, with a condition that if the ultimate decision of certain chancery suits between the parties should be for the plaintiff, the defendant should pay him 500*l.* within one month after such decision, or else execution should issue. The Vice-Chancellor made his decree in those suits for the plaintiff, who at the end of a month, issued execution, the 500*l.* being unpaid. The decree had not been passed by the registrar, though the minutes had been settled; and the defendant had lodged a caveat, intending, as he stated, to appeal to the Lord Chancellor:

Held, that the chancery suits had not been ultimately decided within the meaning of the condition, and that the execution, consequently, was irregular. *Dummer v. Pucker*, H., 2 W. 4. 347

EXECUTOR.

1. *Seemle*, that to render a conveyance fraudulent within the statute 13 Eliz. c. 5, the party at the time of making it must be indebted to the extent of insolvency. But where a person owing 102*l.* on a bond, wrote to the obligee that he and his wife were bound down by pecuniary embarrassments, and that the obligee's proceeding to extremities would render the debtor's wife after his death perfectly destitute, and a month afterwards, for a nominal sum of ten shillings, and in consideration of natural love and affection, assigned a lease (of the value of 206*l.*) to A., in trust for his own benefit for life, and after his death for that of one of his daughters-in-law; and he soon afterwards died, having by will made the assignee of the lease his executor; by which assignment of the lease, the residue of his property became insufficient to discharge the bond-debt: Held, that the assignment was within the meaning of the statute, and utterly void against creditors, and that the lease was assets in the hands of the executor. *Shears v. Rogers*, H., 2 W. 4. 362

2. To *scire facias*, upon a judgment, the defendant, an executrix, pleaded that she fully administered before she had notice of the recovery, and that she had had no assets since. Replication, that the defendant had notice of the recovery, on, &c., and had assets afterwards: Held, that the mention of notice in the plea was surplusage, and the replication bad, as leading to an immaterial issue; for a judgment, to be entitled to preference in administration, must be docketed pursuant to 4 & 5 W. & M. c. 20; and notice of it in any other way is of no consequence. *Hall v. Tupper, Executrix*, E., 2 W. 4. 655

3. Testator bequeathed a term in premises to S., his executors, &c., in trust to sell and dispose of the same, as might seem most advantageous, and apply the proceeds to the maintenance of testator's son during his life. He bequeathed the remainder after the son's decease to such uses as the son should by will appoint, and he appointed S. his executor. When the testator died, his journeyman was managing his business on the premises, as he had done for some years, and the testator's son also resided there. At the funeral S. said, in the presence of several persons, "The house is young B.'s" (meaning the son). "T." (the journeyman) "must stay in the house and go on with the business, but young B. must have a bidding place." T. accordingly continued on the premises, carrying on the business, paying no rent, but maintaining the testator's son, who was weak in intellect, and unable to provide for himself. S. lived twenty years afterwards, and did not interfere further with the property: Held, that this was sufficient evidence of a disposal of the property by S. according to the trusts in the will, and that he had assented to take under the will as legatee in trust, and not as executor. *Doe dem. Sturges v. Tatchell*, T., 2 W. 4. 675

4. A. and B., brothers, were principal and surety in an annuity bond. By an agreement afterwards executed between them and a third brother, for the settlement of their affairs and the determination of their mutual claims, an apportionment of property and of debts was made among the three, and the annuity bond was declared to be B.'s (the surety's) debt:

Held, that this agreement (whether subsequently acted upon or not) was a binding accord between A. and B., and that B.'s administrator, having been obliged to pay arrears of the annuity, could not recover them from A. *Cartwright, Administrator, v. Cooke*, T., 2 W. 4. 701

5. The executor of a person who was seised in fee of land, and demised it for a term of years, reserving a rent, cannot distrain for arrears of rent accrued in the testator's lifetime, for the latter was not a tenant in fee simple of a rent within the meaning of the statute 32 Hen. 8, c. 37, s. 1. *Prescott v. Boucher*, T., 2 W. 4. 849

FACTOR.

See TROVER, 1.

FIERI FACIAS.

See PRACTICE, 5.

FINE.

See EJECTMENT, 2.

A fine with proclamations was levied in the great sessions for the county of Denbigh. The proclamations endorsed on the fine were headed with the words "according to the form of the statute." The second proclamation was stated to be made at Ruthin, in the county of Denbigh, without stating that it was made at the great sessions, as required by the 34 & 35 Hen. 8, c. 26, s. 41: Held, that that was sufficient, and that, from the

previous words, the proclamation must be understood to have been made at great sessions. *Doe dem. Jones v. Harrison, T., 2 W. 4.* 764

FIXTURES.

See TRESPASS, 6.

FRANCHISE.

See BAILIFF, 1. SHERIFF, 2.

FRAUD IN LAW.

See BILL OF EXCHANGE, 3.

FRAUDS, STATUTE OF.

A landlord who had demised premises for a term of years at 50l. a year, agreed with his tenant to lay out 50l. in making certain improvements upon them, the tenant undertaking to pay him an increased rent of 5l. a year during the remainder of the term (of which several years were unexpired), to commence from the quarter preceding the completion of the work: Held, that the landlord having done the work, might recover arrears of the 5l. a year against the tenant, though the agreement had not been signed by either party; for that it was not a contract for any interest in or concerning lands within the statute of frauds, nor was it, according to that statute, an agreement "not to be performed within one year from the making thereof," no time being fixed for the performance on the part of the landlord. *Donnellan v. Read, T., 2 W. 4.* 899

FRAUDULENT CONVEYANCE.

Semble, that to render a conveyance fraudulent within the stat. 13 Eliz., c. 5, the party at the time of making it must be indebted to the extent of insolvency. But where a person owing 102l. on a bond, wrote to the obligee that he and his wife were bound down by pecuniary embarrassments, and that the obligee's proceeding to extremities would render the debtor's wife, after his death, perfectly destitute, and a month afterwards, for a nominal sum of 10s., and in consideration of natural love and affection, assigned a lease (of the value of 206l.) to A., in trust for his own benefit for life, and after his death for that of one of his daughters-in-law; and he soon afterwards died, having by will made the assignee of the lease his executor; by which assignment of the lease, the residue of his property became insufficient to discharge the bond-debt: Held, that the assignment was within the meaning of the statute, and utterly void against creditors, and that the lease was assets in the hands of the executors. *Shears v. Rogers, H., 2 W. 4.* 362

FREIGHT.

By a charter-party of affreightment for a voyage from the port of London to Calcutta, and back, on the usual terms, it was further agreed, that the freighter, if he thought proper, might hire the vessel for an intermediate voyage, within certain limits, for not less than six months; that the master, in that event, should refit the vessel for such voyage;

and that the complement of men should be kept up, and all necessaries provided: in consideration of which, the freighter agreed to pay the owner at the rate of 1l. a ton, per month on the ship's tonnage, and to pay four months of such hire in advance, and at the end of six months two further months' pay, and so in every succeeding two months; and the balance due at the termination of such hiring, in cash or approved bills.

It was further stipulated, that if the vessel should be lost or captured, the freight by time should be payable up to the period when she should be so lost or captured, or last heard of:

Held, that under the former clauses of this agreement, the freighter could not claim a return of any part of the four months' advance, on the vessel being lost within that period; but that the advance, being in respect of freight, was absolute. And that the stipulation on this head was not qualified by the subsequent clause. *Saunders v. Drew, E., 1 W. 4.* 445

GAME.

The statute 2 G. 3, c. 19, s. 1 and 4, enacted that no person should take, kill, destroy, carry, sell, buy, or have in his possession or use, any partridge between the 12th of February and the 1st of September, in any year (altered by the 39 G. 3, c. 34, to the 1st of February and the 1st of September), or any pheasant between the 1st of February and the 1st of October, under a penalty: Held, that a qualified person, who had in his possession on the 9th of February, partridges and a pheasant killed before the 1st, was not guilty of any offence against the statute. *Simpson v. Unwin, H., 2 W. 4.* 134

GAS LIGHT AND COKE COMPANY.

See CORPORATION, 2. RATE, 3.

GRAMMAR SCHOOL.

See ALIENATION.

GRANT.

See BAILIFF.

HEIR AT LAW.

See COPYHOLD, 1.

HEREDITAMENTS.

See RATE, 3.

HIGHWAY.

1. Where by an act of parliament, trustees are authorized to make a road from one point to another, the making of the entire road is a condition precedent to any part becoming a highway, repairable by the public; and, therefore, where trustees empowered by act of parliament to make a road from A. to B. (being in length twelve miles), had completed eleven miles and a half of such road, to a point where it intersected a public highway, it was held that the district in which the part so completed lay, was not bound to repair it. *The King v. The Inhabitants of Cumberworth, H., 2 W. 4.* 108

2. On indictment for encroachment on a public highway, it appeared that in 7771, commissioners under an enclosure act had been empowered to set out public and private roads, the former to be repaired by the township, the latter by such persons as the commissioners should direct. The public roads were to be sixty feet wide between the fences. The commissioners in their award described a road as private, and eight yards wide; but in setting it out, they left a space of sixty feet between the fences; and they directed both the public and private roads to be repaired by the township. The centre only of the sixty feet was ordinarily used as a carriage road, and the township repaired it. The space said to be encroached upon was at the side of this road, and there was a diversity of evidence as to the use made of this space by the public, and its condition, since the time of the award:

Held, that the commissioners had exceeded their authority in awarding that private roads should be repaired by the township; but that on the whole of this evidence it was a proper question for the jury, whether or not the road in question, though originally intended to be private, had been dedicated to, and adopted by, the public.

Semble, per Lord Tenterden, C. J., that when a road runs through a space of fifty or sixty feet between enclosures set out by act of parliament, it is *prima facie* to be presumed that the whole of that space is public, though it may not all be used or kept in repair as a road. *The King v. Wright*, T., 2 W. 4. 681

HUNDRED, ACTION AGAINST.

The servant or servants who, in the absence of a master, have the general care and superintendence of property, and who represent him in his absence, and not all who have the special care under them of particular parts of the property contained in a dwelling-house or manufactory, are the servant or servants who, by the 7 & 8 G. 4, c. 31, s. 3, are required, before any action be brought against the hundred for damage by rioters, to go before a justice, and state upon oath the names of the offenders, and submit to examination touching the circumstances of the offence.

The swearing before a justice to a deposition previously prepared, is a sufficient submission to examination within the meaning of the act, if the justice require nothing further.

Declaration, after stating the felonious demolition of premises, alleged that the person who went before the justice, submitted himself to examination, and became bound to prosecute the offenders when apprehended, *such offenders being then and there unknown* to the plaintiff, or to the party bound: Held, after verdict, that assuming any allegation on this point to be necessary under the present statute, this was sufficient, as it could only be sustained by proof that all the offenders were unknown. *Love v. The Inhabitants of the Hundred of Broxtowe*, E., 2 W. 4. 550

HUSBAND AND WIFE.

Defendant gave a bond to A. and B., conditioned for the payment of an annuity to his wife, unless she should at any time molest him on

account of her debts, or for living apart from her. By indenture of the same date, between the above parties and the wife, reciting that the defendant and his wife had agreed to live separate during their lives, and that for the wife's maintenance, defendant had agreed to assign certain premises, &c., to A. and B., and had given them an annuity bond as above mentioned, it was witnessed that defendant assigned the premises, &c., to them, in trust for the wife, and he covenanted to A. and B. to live separate from her, and not molest her, or interfere with her property; and power was given to her to dispose of the same by will, and to sell the assigned premises, &c., and buy estates or annuities with the proceeds. The wife covenanted with the defendant to maintain herself during her life, out of the above property, unless she and the defendant should afterwards agree to live together again; and that he should be indemnified from her debts. The indenture (except as to the assignment), and also the bond, were to become void if the wife should sue the defendant for alimony, or to enforce cohabitation. And it was provided, *that if defendant and his wife should thereafter agree to live together again, such cohabitation should in no way alter the trusts created by the indenture.* There was no express covenant on the part of the trustees. The defendant and his wife separated, and afterwards lived together again for a time; and this fact was pleaded to an action by the trustees upon the annuity bond as avoiding that security:

Held, on demurrer to the plea, that the reconciliation was no bar to an action on this bond, since it did not appear that the bond, and the indenture of even date with it, were not really executed with a view to immediate separation; and although there might be parts of the indenture which a court of equity would not enforce under the circumstances, yet there was nothing on a view of the whole instrument to prevent this Court from giving effect to the clause which provided for a continuance of the trusts notwithstanding a reconciliation. *Wilson v. Mushett*, T., 2 W. 4. 743

ILLEGAL CONTRACT.

See SETTLEMENT BY APPRENTICESHIP, 1. SPIRITS.

INCLOSURE ACT.

See HIGHWAY, 2.

An inclosure act recited that the Duke of N. was lord of a barony, and of manors in which certain wastes were situate, and, as such lord, was entitled to the soil and royalties belonging to the said manors; and that he and other owners of lands within the barony were also entitled to right of common on the wastes. It then directed the commissioners to set out to the duke an allotment in respect of his right of soil, and afterwards to allot the residue of the wastes to him, and the said other persons entitled to common, in certain proportions according to a rate already charged upon the lands in respect of which such common was claimed. Allotments were made to the duke accordingly. The lands, in respect of which in part his allotments were given, were exempted from all tithe by a modus. In an

action brought for tithes of corn grown upon the allotment given in lieu of the duke's right in the waste, it was left to the jury whether the modus had extended to that right; and they found that it had:

Held, that the question was properly left, for that the duke's right upon the waste, though it could not strictly be a right of common appurtenant or appendant to land which was the duke's own, was yet treated by the act as a quasi right of common annexed to the land, and it might, as such, be legally comprehended within the same modus:

Held, also, that the modus, as it covered all tithes, both on the demesne land and common before the inclosure, covered likewise the tithe of any crop (as grain) raised afterwards upon the allotment given in lieu of common. *Askew, Clerk, v. Wilkinson, H., 2 W. 4. 152*

INDICTMENT.

See ARBITRAMENT, 2. BRIDGE, 2. CONSTABLE, 1. CORPORATION, 1. HIGHWAY, 2.

1. Indictment charged the defendant with keeping certain inclosed lands near the king's highway, for the purpose of persons frequenting the same to practise rifle-shooting, and to shoot at pigeons with fire-arms; and that he unlawfully and injuriously caused divers persons to meet there for that purpose, and suffered and caused a great number of idle and disorderly persons armed with fire-arms to meet in the highways, &c., near the said enclosed grounds, discharging fire-arms, making a great noise, &c., by which the king's subjects were disturbed, and put in peril.

At the trial it was proved, that the defendant had converted his premises, which were situate at Bayswater, in the county of Middlesex, near a public highway there, into a shooting ground, where persons came to shoot with rifles at a target, and also at pigeons; and that as the pigeons which were fired at frequently escaped, persons collected outside of the ground and in the neighbouring fields, to shoot at them as they strayed, causing a great noise and disturbance, and doing mischief by the shot: Held, that the evidence supported the allegation, that the defendant caused such persons to assemble, discharging fire-arms, &c., inasmuch as their so doing was a probable consequence of his keeping ground for shooting pigeons in such a place. *The King v. Moore, H., 2 W. 4. 184*

2. An indictment for a nuisance in keeping a common gaming-house was preferred by a private prosecutor, who, after removing it by certiorari, proceeded no further. Another party then caused a venire to be issued, and other steps taken for bringing the case to trial, though desired by the original prosecutor to forbear. On motion by the latter for a stay of proceedings (he alleging that the offence had been discontinued), this court refused to interfere, the prosecution being for a public nuisance. *The King v. Wood, E., 2 W. 4. 657*

INDORSEE.

See BILL OF EXCHANGE, 2, 3, 4.

INDUCTION.

See PREBEND, 1.

INSOLVENT ACT.

A bond to replace stock at a certain day, and in the mean time pay dividends, became forfeited by non-payment of the dividends. The arrears were afterwards paid. The obligor became insolvent, and being in prison, petitioned for his discharge under the then existing insolvent act, 53 G. 3, c. 102. The time for replacing the stock not having yet arrived, and there being no dividend in arrear: Held, that he might insert the bond in his schedule of debts, and was entitled to be discharged from it under the act. *Samson v. Miller, E., 2 W. 4. 596*

INSPECTION OF PARISH BOOKS.

See TRESPASS, 3.

INSPECTION OF PARISH RATE.

See RATE, 7.

INSURANCE.

1. A ship having on board goods which were insured on a voyage from London to Hull, but "warranted free from average, unless general, or the ship should be stranded," arrived in Hull harbour, which is a tide harbour, and proceeded to discharge her cargo at a quay on the side of it: this could be done at high water only, and could not be completed in one tide. At the first low tide the vessel grounded on the mud, but on a subsequent ebb, the rope by which her head was moored to the opposite side of the harbour, stretched, and the wind blowing from the east at the same time, she did not ground entirely on the mud, which it was intended she should do, but her forepart got on a bank of stones, rubbish, and sand, near to the quay, and the vessel having strained, some damage was sustained by the cargo, but no lasting injury by the vessel:

Held, by Lord Tenterden, C. J., Little Dale and Taunton, J., Parke, J., dissentiente, that this was a *stranding* within the meaning of that word in the policy. *Wells v. Hopwood, H., 2 W. 4. 20*

2. Carriers on a canal effected an insurance for twelve months upon goods on board of thirty boats named between London, Birmingham, &c., backwards and forwards, with leave to take in and discharge goods at all places on the line of navigation. The insurance was agreed to be 12,000*l.* on goods, as interest might appear thereafter; the claim on the policy warranted not to exceed 100*l.* per cent.: and 3000*l.* only were to be covered by the policy in any one boat on any one trip. The premium was 30*s.* per cent.: Held, that an insurance "on goods" was sufficient to cover the interest of carriers in the property under their charge; for, in general, if the subject-matter of insurance be rightly described, the particular interest in it need not be specified:

Held, also, that the policy was not exhausted, when once goods to the value of 12,000*l.* had been carried by all the boats, or by each of them, but that it continued,

throughout the year, to protect all the goods afloat at any one time, up to the amount insured:

Held, further, that upon the loss of goods on board one of the boats, the assured was entitled to recover that proportion of such loss, which 12,000*l.* bore to the whole value of the goods afloat at the time; and not the proportion of 12,000*l.* to the whole amount carried during the year. *Crowley v. Cowen*, E., 2 W. 4. 478

3. Plaintiff effected an insurance on freight, &c., by a ship, subject to certain regulations, which provided that vessels should not sail from ports in Ireland after the 1st of September; and that the time of clearing at the custom-house should be deemed the time of sailing, *provided the ship were then ready for sea*. The plaintiff's ship being in the port of Sligo, dropped down the river before the 1st of September, in readiness for sea, except that she had not her full quantity of ballast, there being a bar at the mouth of the river, which the ship could not have crossed with that quantity on board. Boats were in waiting on the outside, on the 1st of September, to ship the remainder of the ballast, and the vessel crossed the bar on that day, but struck in doing so, and the master, to ascertain what damage she had received, put into an adjacent port, without taking the rest of his ballast, which was not done till the 4th, and the vessel proceeded on her voyage on the 8th: Held, that the ship's dropping down the river, and crossing the bar without her full ballast, was not a sailing; and that, until the ballast was completed, she was not ready for sea within the rule referred to by the policy. *Pittgreav v. Pringle*, E., 2 W. 4. 514

JOINT STOCK COMPANY.

See ASSUMPSIT, 6.

JUDGES OF ASSIZE.

See SHERIFF, 1.

JUDGMENT.

See EXECUTOR, 2.

JURY.

See PRACTICE, 4.

JUSTICES.

See CERTIORARI, 2. RIOT.

1. Trespass lies against magistrates for granting a warrant to levy poor rates, if the party distrained upon has no land in the parish in which the rate was made. *Weaver v. Price and Another*, E., 2 W. 4. 409
2. Two magistrates having, at a landlord's request, given possession of a dwelling-house as deserted and unoccupied, pursuant to the 11 G. 2, c. 19, s. 16, the judges of assize of the county, on appeal, made an order for the restitution of the farm to the tenant, with costs. The latter brought an action of trespass for the eviction against the magistrates, the constable, and the landlord: Held, that the record of the proceedings before the magistrates was an answer to the action on behalf of the defendants. *Askcroft v. Bourn and Others*, T., 2 W. 4. 684

JUSTIFICATION.

See ARREST.

LAND TAX.

See DISTRESS.

LANDLORD AND TENANT.

See TRESPASS, 4.

LEASE.

See BANKRUPT, 1. COVENANT, 2, 3, 5. EVIDENCE, 8. STAMP, 1.

LEET JURY.

See PLEADING, 6.

LEGATEE.

See EVIDENCE, 7.

LIBERUM TENEMENTUM, PLEA OF.

See EVIDENCE, 15.

LIEN.

See TROVER, 1.

LIFE ESTATE.

See DEVISE, 2.

LUNATIC.

See BANKRUPT, 3.

MALICIOUS ARREST.

See EVIDENCE, 5.

MANDAMUS.

See ARBITRAMENT, 7. ATTORNEY, 3. OVERSEER.

1. In the absence of any precedent, the Court refused a rule nisi for a mandamus calling on the mayor of a town to propose a resolution to the burgesses in the guild assembled, for repealing certain by-laws; though it was alleged that by-laws and ordinances might, by charter, be made, and had formerly been made, at such guilds. *Ex parte Garrett and Clark v. The Mayor of Newcastle*, H., 2 W. 4. 252
2. To a mandamus to the lord mayor and aldermen of London, to admit and swear in A. B. to the office of alderman, they returned that the court of mayor and aldermen had, from time immemorial, the authority of examining and determining whether or not any person returned to them by the court of wardmote as an alderman was, according to the discretion and sound consciences of the mayor and aldermen, a fit and proper person, and duly qualified in that behalf, whensoever the fitness and qualification of the person so returned had been brought into question by the petition of any person interested therein; and that it was a necessary qualification of the person to be admitted to the office of alderman, that he should be a fit and proper person to support the dignity and discharge the duties of the office: that A. B. having been returned to them by the court of wardmote as duly elected, a petition by persons

interested in the election was presented to them, charging circumstances which rendered A. B. an unfit person to be admitted to the office of alderman; and that they took the petition into consideration, and having heard witnesses, did adjudge, according to their discretion and sound consciences, that A. B. was not a person fit and proper to support the dignity and discharge the duties of the office :

Held, that the custom set out in the return was good and valid in law :

Held, secondly, that as the fitness of the person to be admitted was to be determined according to the discretion of the mayor and aldermen, it was sufficient for them to state in the return that they had exercised their discretion, and adjudged that A. B. was unfit, without giving particular reasons.

The prosecutor of a mandamus, to which a return has been made, having moved for a concilium, and the Court, having upon argument adjudged that the return is sufficient in point of law, cannot afterwards traverse the facts contained in the return.

Quere, whether after an issue in fact found in favour of the party making the return, the prosecutor can question the legality of the return. *The King v. The Mayor and Aldermen of London, H., 2 W. 4.* 255

3. The appellant, against an order of filiation, moved the court of quarter sessions for a postponement of the appeal on account of the absence of material witnesses. They rejected the application, upon which the appellant declined going into his case, and the order was confirmed. On motion for a mandamus to the justices to hear the appeal, and affidavits tending to show that they had acted unjustly in not granting the postponement, this Court refused to interfere, the matter being one peculiarly within the discretion of the magistrates. *Becke, ex parte, T., 2 W. 4.* 704

MEASURES.

See COURT LEET, 1.

MERGER.

See COVENANT, 5.

MILLS.

See RATE, 5.

MINES.

See RATE, 4.

MISDEMEANOUR.

See ARREST.

MODUS.

See INCLOSURE ACT, 1.

MONEY HAD AND RECEIVED.

See ASSUMPSIT, 2, 5.

MORTGAGOR AND MORTGAGEE.

An estate was conveyed in 1803, by J. B. to W. H., who in 1812 conveyed it to A. H., and he sold it in 1826 to the plaintiff. The original vendor did not deliver up the title

deeds. In 1824 he was sued by the then owner of the estate for the deeds, and a verdict was recovered against him, but the judgment was not docketed. He absconded, and in 1825 obtained a sum of money, as on a mortgage of the estate, from one of the defendants, with whom he deposited the deeds. On trover brought in 1829 by a party claiming through the conveyance to W. H., it was held, that the legal owner of the estate might recover the deeds from the mortgagee, without tendering the mortgage money. *Harlington v. Price and Another, H., 2 W. 4.* 170

NEW TRIAL.

See EVIDENCE, 4.

NON OMITTAS CLAUSE.

See SHERIFF, 2.

NOTICE.

See ATTORNEY, 1. CERTIORARI, 1. EVIDENCE, 1. PLEADING, 7.

NOTICE OF SUIT.

See COVENANT, 4.

NOTICE OF TRIAL.

See EJECTMENT, 1.

NUISANCE.

See INDICTMENT, 1.

OUSTER.

See EVIDENCE, 11.

OVERSEER.

The parish of H. consisted of three townships in the county of W., and certain townships and districts in the county of S. The townships in W. had always had their own overseers, and relieved their own poor; but four overseers had been appointed for the division of the parish lying in S. and rates collected and applied for the relief of the poor of that division indiscriminately. On application by a township in the latter division, for a mandamus to the justices to appoint overseers for that township, pursuant to the 13 & 14 Car. 2, c. 12, s. 21, on the ground that the parish had not enjoyed, and could not enjoy the benefit of the statute 43 Eliz. c. 2, facts being also stated to show the expediency of a separate appointment :

Held, that the divisions of the parish in W. and in S. could not be considered, with reference to the statute of Charles, as distinct parishes; and the mandamus was granted. *The King v. The Justices of Salop, T., 2 W. 4.* 910

PARISH, DIVISION OF.

See OVERSEER.

PATENT.

A patent was taken out for improvements in making buttons. The specification stated the improvement to consist in the substituti-

tion of a flexible material for metal shanks, and it described the mode in which this material might be fixed to the intended button, and made to project from it in the necessary condition for use, by the help, among other things, of a metal collet, or ring with teeth. Neither the construction of the button, nor the application of a flexible shank was new; the use of the toothed ring, as described in the specification, was so, but this was not stated to be the subject-matter of the invention, and it appeared by the specification that the effect produced by it might be brought about in other modes, which the plaintiff had also used:

Held, that the patent was not maintainable, since the invention consisted only in combining two things which were not new, and the use of the toothed ring in forming the flexible shank, though new, was not the object of the invention, but only a mode, among others which were already known, of carrying it into effect. *Saunders v. Aston*, T., 2 W. 4. 881

PATRONAGE.

See ALIENATION.

PAVING ACT.

See RATE, 2.

PENAL ACTION.

See RATE, 8.

PENAL STATUTE, CONSTRUCTION OF.

See GAME.

PERMIT.

See SPIRITS.

PILOT ACT.

See CORPORATION, 3.

PLEA IN BAR DE INJURIA.

See PLEADING, 1.

PLEADING.

See ACTION ON THE CASE, 2. BANKRUPT, 1. HUNDRED, ACTION AGAINST, 1. TRESPASS, 5.

1. An avowry in replevin stated that the plaintiff was an inhabitant of a parish, and rateable to the relief of the poor in respect of his occupation of a tenement situate in the place in which, &c., that a rate for the relief of the poor of the said parish was duly made and published, in which the plaintiff was in respect of such occupation duly rated in the sum of 7l.; that he had notice of the rate, and was required to pay, but refused; that he was duly summoned to a petty sessions to show cause why he refused; that he appeared and showed no cause, whereupon a warrant was duly made under the hands of two justices of the peace, directed to the defendant, requiring him to make distress of the plaintiff's goods and chattels; that the warrant was delivered to the defendant, under which he as collector justified taking the goods as a distress and prayed judgment and

a return. Plea in bar de injuria, &c., special demurrer, assigning for cause, that the plea offered to put in issue several distinct matters, and was pleaded as if the avowry consisted merely in excuse of the taking and detaining, and not in a justification and claim of right:

Held, by Parke and Patteson, J., Lord Tenterden, C.J., dissentiente, that the plea in bar was good. *Selby v. Bardons and another*, H., 2 W. 4. 2

2. In a plea of justification grounded on a custom in a manor for the leet jury to break and destroy measures found by them to be false, it is enough to say that the measures were found by the jury to be false without alleging that they were so. *Wilcock v. Windsor and Others*, H., 2 W. 4. 43

3. To an action of covenant brought by N. S. against J. J. and another, a release was pleaded which began by reciting "that various disputes were subsisting between N. S. and J. J. and actions had been brought by them against each other, which were still depending, and that it had been agreed between them that, in order to put an end thereto, J. should pay S. 150l. and each of them should execute a release to the other of all actions, causes of action, and claims, brought by him, or which he had against the other;" and then proceeded in the usual general words to release all actions, &c., whatsoever: Held, that the effect of the general words was confined by the recital to actions then commenced, and in which S. was the party on one side, and J. on the other, and that it could not be pleaded in bar to an action brought by S. against J. and others jointly; and that parol evidence was admissible to show that, at the time of executing the release, there were mutual actions depending between S. and J. for other causes than that of the present suit, and for such causes only. *Simons, Clerk, v. Johnson and Moore*, H., 2 W. 4. 175

4. In pleading a prescriptive right of way, it is not necessary to describe all the closes intervening between the two termini; and therefore where to trespass for breaking and entering the plaintiff's closes the defendant pleaded "that he was seised in fee of land next adjoining to one of the said closes in which," &c., and then claimed in respect of the said land a way from the said land unto and into, through, over, and along the said closes in which, &c., and unto and into a certain common king's highway; and at the trial the defendant proved a prescriptive right of way from his land into and over the land of third persons, and thence into and over the plaintiff's closes, and thence into a common highway: Held, that the plea was sufficiently proved; and this though it appeared that part of the defendant's land did adjoin to one of the plaintiff's closes, and that by permission of the latter the defendant had sometimes used a way from that part of his land over the plaintiff's adjoining close, as well as the way to which the plea was meant to refer. *Simpson v. Leathwaite*, H., 2 W. 4. 226

5. In covenant by lessor against lessee on an indenture of demise, it is no variance if the plaintiff in his declaration makes profert of the "said indenture," and at the trial produces the counterpart executed by the lessee. *Pearse v. Morrice*, E., 2 W. 4. 396

6. In trespass for seizing weights and measures four defendants pleaded, that they were sworn with divers, to wit, twenty others, as a leet jury, according to the custom of the manor of Stepney; and that the custom was for the jury so sworn to examine weights and measures within the manor, and seize them if defective; and they alleged, that they, the defendants, being on such jury, so sworn as aforesaid, examined and seized the plaintiff's weights and measures, which they found defective. Replication, *de injuria*. There was evidence at the trial that only five of the leet jurors were actually in the plaintiff's shop, when the defendants made the seizure there, though the rest were close at hand; but the Judge refused to let any question go to the jury on this point, being of opinion that the objection was on the record:

Held, that the objection was on the record, and was valid; it not appearing by the plea that the examination and seizure were made by the jury sworn at the court leet, according to the custom. *Sheppard v. Hall*, E., 2 W. 4.

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7. To scire facias on a judgment the defendant, an executrix, pleaded that she fully administered before she had notice of the recovery, and that she had had no assets since. Replication, that the defendant had notice of the recovery on, &c., and had assets afterwards: Held, that the mention of notice in the plea was surplusage, and the replication bad, as leading to an immaterial issue, for a judgment to be entitled to preference in administration must be docketed pursuant to 4 & 5 W. & M. c. 20; and notice of it in any other way is of no consequence. *Hall v. Tapler*, Executrix, E., 2 W. 4.

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8. In trespass for cutting lines of the plaintiff, and throwing down linen thereon hanging, defendant pleaded that he was possessed of a close, and because the linen was wrongfully in and upon the close he removed it. Replication that J. G. being seised in fee of the close and of a messuage, with the appurtenances contiguous to it, by lease and release conveyed to W. H. The messuage, and all the easements, liberties, privileges, &c., to the said messuage belonging, or therewith then or late used, &c.; that before and at the time of such conveyance the tenants and occupiers of the messuage used the easement, &c., of fastening ropes to the said messuage, and across the close, to a wall in the said close, in order to hang linen thereon, and of hanging linen thereon to dry, as often as they had occasion so to do, at their free will and pleasure, and that the plaintiff being tenant to W. H. of the said messuage, did put up the lines, &c. Rejoinder, took issue on the right as alleged in the replication: Held, that proof of a privilege for the tenants to hang lines across the yard, for the purpose of drying the linen of their own families only did not support the alleged right. *Drewell v. Towler*, T., 2 W. 4.

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9. In assumpsit for use and occupation, 4l. were paid into Court on the account stated. The plaintiffs proved that the defendant being indebted to them as surviving executors of T., and having no other account with them, was called upon by them for payment, and refused, saying that he had a cross demand on

the funds of the testator. The plaintiffs gave evidence of a debt exceeding 4l., and contended that these facts, with the admission implied by the payment into Court, entitled them to recover the larger sum on the account stated, the other counts proving inapplicable: Held, that they could not so recover, for that the averment of an account stated could only refer to a single occasion; and the above-mentioned answer of the defendant, with the subsequent payment into Court, merely showed that, upon that accounting which alone was in question, the defendant was found indebted 4l. *Kennedy v. Withers*, T., 2 W. 4.

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10. The West India Dock Act, 39 G. 3. c. 69, provides that twenty-one persons shall be directors of the affairs of the company, and that all suits for any cause of action against the company shall be brought against the treasurer for the time being. In assumpsit against the treasurer, the declaration stated that, by order of the court of directors, the defendant put up goods to sale subject to certain conditions; and that in consideration that the plaintiffs, at the request of the directors, had promised them to perform the conditions of sale, they, the directors, promised to perform the same on their part. The declaration then alleged a breach of the conditions by the directors, and concluded that the plaintiffs brought their suit against the treasurer according to the statute. At the trial it appeared that the goods had been put up and sold by order of the directors on account of the company: Held, first, that there was no variance between the declaration which charged the directors, and the evidence which showed that the contract was the company's; and, secondly, on motion in arrest of judgment, that the declaration was sufficient, because the contract alleged was, in legal effect, a contract by the company, for breach of which an action was maintainable against the treasurer. *Souby and Another v. Smith*, T., 2 W. 4.

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PONE.

See COUNTY COURT.

POOR.

See RATE, 1. 7. TRESPASS, 2.

POWER OF ATTORNEY.

See ATTORNEY, 4.

PREBEND.

An archdeacon of Rochester, when instituted and inducted into that office, is ipso facto inducted into the prebend annexed to it by royal grant, and may claim to be sworn in as prebendary without being installed. *The King v. The Dean and Chapter of Rochester*, H., 2 W. 4.

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PRACTICE.

See EVIDENCE, 4. MANDAMUS.

1. Order of the Court under the statute 1 & 2 W. 4. c. 58, where goods had been taken by the sheriff under a fi. fa. and sold by him, another fi. fa. having issued in the mean time

against the same goods; and where a party claimed title to the property against both the plaintiffs, the defendant and the sheriff, and complained that the goods had been sold imprudently and in spite of notice from the owner. *Sloman v. Back*, H., 2 W. 4. 103

2. A defendant may move to set aside a judgment entered up on an irregular award, though the time for setting aside the award itself has elapsed, if the defect insisted on be apparent on the face of the award; and an objection grounded on such defect need not be stated in the rule nisi. *Manser v. Haaver and Another*, H., 2 W. 4. 295

3. Rule of Court, Trinity term, 1 W. 4, directs, that if the notice of bail shall be accompanied by an affidavit of each of the bail, and if the plaintiff afterwards except to the bail, he shall, if they are allowed, pay the costs of justification:

Held, where the plaintiff was served with notice of bail, and with a copy of the affidavit of the bail, which did not purport on the face of it to be a copy, or state where the original was filed, and he afterwards excepted to them, he was not bound, on the bail being allowed, to pay the costs of justification. *West v. Williams*, H., 2 W. 4. 345

4. Discharging a jury by consent does not terminate the suit, but is the same, in this respect, as withdrawing a juror. And where the plaintiff, instead of going on with such suit, brought a new action for a cause admitted to be the same, the Court stayed the proceedings, but would not grant the defendant his costs of the latter suit. *Everett v. Youells*, H., 2 W. 4. 349

5. In a bill of Middlesex; the act etiam clause was on promises: the affidavit to hold to bail stated that the defendant was indebted to the plaintiff on a judgment:

Held, this was an irregularity, which entitled the defendant to be discharged on entering into a recognisance of bail for 40*l*.:

Held, secondly, that it was no ground for setting aside the proceeding for irregularity that the plaintiff had issued two writs of *f. fa.*, and caused part of the debt to be levied under the second; and that no return had been made to either. *Green v. Elgie*, E., 2 W. 4. 437

6. A. being indebted for rent to her landlord, the latter proposed to C., her son-in-law, to take as security for the same, his (C.'s) promissory note payable in twelve months. C. said he would give an answer in a week or ten days. The landlord then asked him, whether A. owed him anything; he replied, she did not, or what she did owe he considered as a gift. Within the ten days, A. executed a warrant of attorney to C., upon which judgment was entered up, execution issued, and C. took possession of the goods. The Court, considering the representations and conduct of A. to have been intended to defraud the landlord, set aside the warrant of attorney at his instance. *George Martin v. Mary Martin*, T., 2 W. 4. 934

PREMIUM.

See SETTLEMENT BY APPRENTICESHIP, 3.

PRESUMPTION.

See EVIDENCE, 10.

PRINCIPAL AND AGENT.

See ATTORNEY, 2. BANKRUPT, 3. TROVER, 1.

PRIVITY OF CONTRACT.

See ATTORNEY, 2.

PROCLAMATION.

See FINE, 5.

PROFERT.

See PLEADING, 4.

PROMISSORY NOTE.

See BILL OF EXCHANGE, 2.

PROMOTIONS.

See page 1, 394.

RABBITS.

See EVIDENCE, 8.

RATE.

1. Persons in whom the navigation of a river is vested, but who have no interest in the soil, are not rateable to the poor for a dam which upholds the water of such river, and renders it navigable. *The King v. The Undertakers of the Aire and Calder Navigation*, H., 2 W. 4. 139

2. By statute 28 G. 3, c. 64, for paving the town of Cambridge, it was enacted in sect. 23, that commissioners were annually to ascertain the sums to be paid by rate on the inhabitants for the purposes of the act, and levy the same by rate upon the tenants and occupiers of all houses, buildings, gardens, tenements, and hereditaments within the town. By sect. 113, the amount so ascertained was to be notified to the vice-chancellor of the university and the mayor of the town, and two-fifths were to be paid "by or on account of the said university," 10*l*. by the corporation, and the residue out of certain tolls granted to the commissioners, and out of the above-mentioned rates. By sect. 114, the chancellor or vice-chancellor of the university, and the heads of colleges and halls within the said university, were to meet, upon such notice given, and apportion the respective sums to be paid towards the rate out of the university chest, and by the several colleges and halls. By 34 G. 3, c. 104, s. 17, it was provided, that no person or persons should be rated under that or the former act for any farm, meadow, pasture, or arable land, rented or occupied by any inhabitant of the town, except as to the value of his dwelling house, yards, gardens, out-houses, and all other buildings rented and occupied by any of the said inhabitants, situated in the said town.

Downing college was founded and incorporated with the university after the passing of these acts. It was built on land within the town, but which had not before paid paving rate:

Held, that the college was liable to be rated as a part of the university for a portion of two-fifths payable by that body, and was not rateable as a part of the town; for that sect. 23 of the paving act was not applicable to colleges, and sects. 113, 114, extended to

- all colleges forming part of the university, whether erected before or since the act. *Downing College, Cambridge v. Parckas, H.*, 2 W. 4. 162
3. By an act for paving, lighting, and watching, the trustees for carrying it into effect were empowered to rate the tenants and occupiers of all the houses, shops, malt-houses, coach-houses, yards, garden ground, stables, cellars, vaults, wharfs, and other buildings and hereditaments, within certain limits, meadow and pasture ground excepted :
Held, that this exception showed the word hereditaments to be used not merely with reference to things ejusdem generis with those before enumerated, but in a more extended sense, comprehending land in general; and, therefore, that a gas-light company were rateable under the act for the ground occupied by their pipes and other apparatus. *The King v. The Trustees for paving Shrewsbury, H.*, 2 W. 4. 216
4. Appellants were rated to the poor for clay pits, which were excavations under ground, from whence glass-house pot clay and fine brick clay were extracted. A perpendicular shaft was sunk from the surface of the land for the purpose of raising the clay out of the strata, which was done by a steam engine, and other mining apparatus; the excavations were like those which are made for working coal and metallic mines, and the mode of using the clay was the same as that used in a coal mine: Held, that the pits so assessed were clay mines, and, therefore, not rateable. *The King v. Brettell, E.*, 2 W. 4. 424
5. The statute of Marlbridge extends to goods distrained for a poor's rate, and the sheriff must replevy such goods on plaint. *Sabourin v. Marshall, E.*, 2 W. 4. 440
6. The owners of mills in the township of H., in compensation for the loss of water occasioned to them within the township by an adjoining navigation, were allowed, by act of parliament, to take certain tolls at a lock situate on the line of navigation, but in a different township: Held, that they were not rateable at their mills in H., in respect of the tolls so taken. *The King v. Aire and Calder Navigation Company, E.*, 2 W. 4. 533
7. Lands purchased by voluntary contribution were conveyed to trustees for the purpose of erecting thereon a lunatic asylum, and for such other purposes relative thereto as should be determined by the subscribers. The asylum was originally designed for parish paupers, or other indigent persons, but the funds being insufficient, a limited number of affluent persons were afterward admitted at certain rates of payment in proportion to their abilities. From this and other sources of revenue, the trustees, after paying all the expenses of the establishment, had accumulated in five years profits to the amount of 2000*l.*, part of which had been laid out in buildings and purchases for the institution, and part continued to accumulate. All benefactors of 20*l.* or upwards were governors, and they exercised the entire control over the asylum and its funds. The trustees derived no personal benefit from the institution: Held, that as the building produced a profit, it was rateable, and that the trustees, who were the owners and in actual receipt of the profits, were the persons liable to be rated. *The King v. The Inhabitants of St. Giles, York, E.*, 2 W. 4. 573
8. Where the inhabitants of a parish have made an application to the commissioners for building new churches, conformably to 58 G. 3, c. 45, s. 60, and 59 G. 3, c. 134, s. 24, and have in consequence obtained a loan for the purpose of building churches within the parish, the churchwardens may make a rate for repaying the interest and principal (as directed by the first-mentioned act) without any further consent of the parishioners to such rate. The making of such rate is not a matter of ecclesiastical cognizance. *The King v. The Churchwardens of St. Mary Lambeth, E.*, 2 W. 4. 651
9. By a local act for certain incorporated parishes, guardians of the poor were appointed, and were authorized to appoint a clerk, and to make rates; and all poor rates and books purporting to be rates made for the said parishes, and all papers relating to the settlement of the poor, were to be delivered by the churchwardens and overseers to the clerk of the guardians for the time being, who was to cause the same to be preserved and filed. The clerk to the guardians paid the casual and out poor weekly, and transacted some other matters relating to the poor, and had the custody of the books: Held, that he was not a person liable to the penalties imposed by the 17 G. 2, c. 3, s. 3, upon churchwardens, overseers, or other persons authorized to take care of the poor, for not permitting an inhabitant to inspect the rates. *Whitchurch v. Chapman, T.*, 2 W. 4. 691

RECEIPT.

See EVIDENCE, 3.

RECTIFIER OF SPIRITS.

See SPIRITS.

REGULÆ GENERALES,
374, 394.

RELEASE.

See PLEADING, 3.

RETAINER.

See ATTORNEY, 4.

REPLEVIN.

See PLEADING, 1.

The statute of Marlbridge extends to goods distrained for a poor-rate, and therefore the sheriff must replevy such goods on plaint. *Sabourin v. Marshall and Another, E.*, 2 W. 4. 440

RESIDENCE.

See SETTLEMENT BY APPRENTICESHIP, 2, 6.
SETTLEMENT BY LIVING AND SERVICE, 1, 2.

RIGHT OF WAY.

See PLEADING, 4.

RIOT.

A justice called upon to suppress a riot is re-

quired by law to do all he knows to be in his power, that can reasonably be expected from a man of honesty and of ordinary prudence, firmness, and activity, under the circumstances. Mere honesty of intention is no defence, if he fails in his duty.

Nor will it be a defence that he acted upon the best professional advice that could be obtained, on legal and military points, if his conduct has been faulty in point of law.

In suppressing a riot, he is not bound to head the special constables, or to arrange and marshal them; this is the duty of the chief constables.

Magistrates are not criminally answerable for not having called out special constables, and compelled them to act pursuant to the 1 & 2 W. 4, c. 41, unless it be proved that information was laid before them, on oath, of a riot, &c., having occurred, or being expected.

A magistrate is not chargeable with neglect of duty for not having called out the posse comitatus in case of a riot, if he has given the king's subjects reasonable and timely warning to come to his assistance.

Applying personally to some of the inhabitants of a city, calling at the houses of others, employing other persons to do the same, sending others to the churchwardens, &c. (on a Sunday), to be published at the places of worship, requiring the people to meet the magistrates at a stated time and place, in aid of the civil power, and for the protection of the city, and posting and distributing other notices to the like effect, is reasonable warning, the riot having recently broke out.

A magistrate who calls upon soldiers to attack a mob, and suppress a riot, is not bound to go with them in person; it is enough if he gives them his authority. *Re v. Pinney*, 946 Eqq.

ROAD.

See HIGHWAY.

ROCHESTER, ARCHDEACON OF.

See PREBEND, 1.

SAILING.

See INSURANCE, 3.

SEA-SHORE.

See CORPORATION, 1. EVIDENCE, 15.

SECOND COMMISSION.

See BANKRUPT, 2.

SECONDARY EVIDENCE.

See EVIDENCE, 1, 6.

SELECT VESTRY.

Where an ancient select vestry existed in a parish, having and exercising certain powers in the management and care of the poor, but not all the powers required by the statute 59 G. 3, c. 12, to be exercised by select vestries, the Court granted a mandamus, calling on the parish officers to convene a meeting pursuant to the act, for the purpose of establish-

ing a new select vestry, to perform those functions under the act which the former vestry could not discharge; but not otherwise to interfere with it. *The King v. The Churchwardens and Overseers of St. Martin in the Fields, T., 2 W. 4.* 907

SET OFF.

See ASSUMPSIT, 5.

SETTLEMENT—by Apprenticeship.

1. The statute 10 G. 2, c. 31, s. 5, after reciting the inconvenience which happens by watermen, &c., taking apprentices before they are housekeepers, or have any settled habitation for themselves or their apprentices, enacts, that it shall not be lawful for any waterman, though a freeman of the (waterman's) company, or his widow, to take or keep any person, as his or her apprentice, unless he or she shall be the occupier of some house or tenement wherein to lodge him or herself and such apprentice; and that he or she shall keep such apprentice in the same house or tenement wherein he or she shall lodge or lie, on pain of forfeiting 10l. for every offence.

By section 4, it is provided, that no such freeman or freeman's widow shall take or retain more than two apprentices at the same time, under a penalty:

Held, that by section 5, any contract to take an apprentice, entered into by such freeman or widow, not being an occupier of some house, &c., or having already two apprentices, was prohibited; and, therefore, that where a pauper bound himself by indenture of apprenticeship to serve the widow of a waterman, she not having such house, &c., but it being understood that he was to live at the house of a freeman of the company (which he did), and serve him conformably to the indenture, he having two other apprentices at the time, such indenture was absolutely void, and no settlement was gained by serving under it. *The King v. The Inhabitants of Gravesend, H., 2 W. 4.* 240

2. A pauper was duly apprenticed to a farmer residing in parish A., and served him there, but before the expiration of the apprenticeship, the farmer, having failed in business, placed the pauper with another farmer in parish B., and the pauper served the latter in parish B. for nine months, when becoming ill and disabled from service, he returned to his first master in parish A.: the latter, having no accommodation for him, told him to go to his mother, who lived in that parish. The pauper did so, and his first master, a few days after, promised his mother to remunerate her for taking care of the pauper. The pauper continued to reside with his mother in parish A. for about eight weeks, his first master being resident there, but did not perform any actual service for him: Held, that the pauper resided in parish A. in the character of apprentice, and thereby gained a settlement in that parish. *The King v. The Inhabitants of Linkinhorne, E., 2 W. 4.* 413
3. The consideration expressed in an indenture of apprenticeship was 4l. to be paid to the master by a public charity; but the apprentice's mother privately agreed to pay, and

- did pay, the master, after execution of the indenture, 11. in addition: Held, that the indenture (though stamped) was void by 8 Ann. c. 9, s. 39, the full sum contracted for, with, or in relation to the apprentice, not being inserted. *The King v. The Inhabitants of Baidon, E.*, 2 W. 4. 427
4. The master of an apprentice, having had the indenture in his possession, failed in business, and an attorney took the management of his affairs, and custody of his papers, which he inspected, but did not find the indenture: Held, that this, after the master's death, was a sufficient case to let in secondary evidence of the indenture, though his widow was living, and no inquiry had been made of her respecting it. *The King v. The Inhabitants of Piddlehinton, E.*, 2 W. 4. 460
5. A pauper was bound apprentice by the trustees of a public charity. The master covenanted to find him meat, drink, apparel, washing, &c. Before the execution of the indenture, the father of the pauper, who was not a party to it, agreed with the master to find the pauper clothing and washing during the term; and he did so. It did not appear that the trustees were privy to this engagement: Held, that the indenture did not require to be stamped, because either the agreement by the father to provide clothes was not a thing secured to be given to or for the benefit of the master within the 55 G. 3, c. 184, schedule, part 1. tit. *Apprenticeship*, or, assuming that it was, then it was void as being a fraud on the trustees, who had bound out the apprentice on the faith that the master was to provide clothes. *The King v. The Inhabitants of Aylesbury, E.*, 2 W. 4. 569
6. G. S. was bound apprentice to a cork-cutter in parish B., to serve him for seven years. After serving for seven weeks in that parish, the apprentice having a weakness in his eyes, his master told him to go back to his father, and it was afterwards agreed that the master should give the pauper two gross of corks per week, of the value of 2s., to maintain him; he went and lived with his father in parish K. for two years, during which time he received the corks from his master and sold them, and slept more than forty nights at his father's house in K., but did no work for his master. At the expiration of two years, in consequence of the master giving him bad corks, he was taken back to the master in B. with whom he lived ten days, and during that time he went out hawking corks for sale for his master. He then went home again, his master agreeing to let him have a gross of the best corks per week, which he did, and the apprentice disposed of them as before, doing no work for the master, and residing in K. with his father till his indentures were discharged by an order of two justices: Held, that the apprentice being maintained by his master in K., in pursuance of the indenture, resided there as an apprentice and gained a settlement. *The King v. The Inhabitants of Banbury, T.*, 2 W. 4. 706
7. Lands were devised for the relief of the poor of H.; one half of the revenue to be employed for the relief of widows, the other half towards binding out apprentices. The rents were received by the churchwardens, and not mixed with the poor's rates, but kept in a distinct account. A parishioner of H., not receiving parish relief, applied to the churchwardens to provide him with means of apprenticing his son. The son was apprenticed and the churchwardens paid the premium, costs of indenture, and expense of clothing the apprentice out of the charity fund: Held, that this was not an indenture by which an expense was incurred by public parochial funds, within 56 G. 3, c. 139, s. 11, and therefore not void for want of the approval of two justices according to that statute.
- And in a similar case, where lands were devised to the churchwardens and overseers of L. and their successors, upon trust, to apply the rents towards educating twenty poor children, and a part thereof yearly towards apprenticing eight of such children, to be chosen out and allowed by the said churchwardens and overseers and the principal inhabitants: Held, that this also was not a public parochial fund within the meaning of the act. *The King v. The Inhabitants of Halesworth.* 717
8. The master of a parish apprentice being resident abroad (where he had remained some years), his steward assigned the apprentice by a written instrument signed Lord Viscount, C. (the master), by J. P. his steward. J. P. had no special authority to assign this or any apprentice, but he had occasionally made such assignments during Lord C.'s absence, and been allowed the expenses in his account. The assignment in other respects was regular. The steward paid the new master 5*l.* which was allowed in his account by Lord C., as usual: Held, (assuming that a master can delegate power of assigning an apprentice, as to which *quære*), that the master must at all events give his express authority to the assignment; that in this case there was no sufficient authority; and, consequently, that no settlement was gained by service under the assignment.
- Quære*, whether a parish apprentice can be bound to a person living abroad? *The King v. The Inhabitants of Spreyton, T.* 2 W. 4. 819

SETTLEMENT—by estate.

1. A father in consideration of natural love and affection, and of 2*l.* which he owed his son, made over to him premises in the parish of S. by verbal agreement only, and the son received the rents for three years, residing in S.: Held, that the son was a purchaser for less than 30*l.* within the 9 G. 1, c. 7, s. 5, and gained no settlement. *The King v. The Inhabitants of Piddlehinton, E.*, 2 W. 4. 460
2. A man marrying a woman, who, after the passing of the 59 G. 3, c. 50, has become a yearly tenant of premises at a rent of less than 10*l.* per annum, gains a settlement by forty days' residence thereon. *The King v. The Inhabitants of North Cerney, E.*, 2 W. 4. 463
3. A. being in possession of a copyhold estate of inheritance, offered to give it up to his son and heir, if he would pay off 15*l.* which he,

A., had borrowed on the estate, and would permit A. and his wife to reside on it rent free during their lives. The son paid off the 15l., and was admitted to the copyhold estate upon the surrender of his father. The admittance recited the verbal agreement between A. and his son, and the payment of the 15l. A. and his wife continued afterwards to reside on the estate with their son: Held, that from the terms of the conveyance, and the state of the family, natural love and affection must be taken to have formed an ingredient in the consideration, and, therefore, this was not the purchase of an estate or interest whereof the consideration did not amount to 30l. within the 9 G. 1, c. 7, s. 5. *The King v. The Inhabitants of Hatfield Broad Oak, E.*, 2 W. 4. 566

4. A real estate was devised to C. B., who, on the death of the testator was sixteen years old. Her father, considering himself her guardian, resided with her on the estate: Held, that as the estate came to the daughter by devise, and not by descent, and she was above fourteen years of age, the father was not a guardian in socage, but natural guardian only; and that having, as such, no interest in the land, he gained no settlement by residing on it. *The King v. The Inhabitants of Sherrington, T.*, 2 W. 4. 714

5. A. enclosed an acre of land, and built a house upon it, for which the parish gave him materials. Fourteen years after he gave by parol part of the land so enclosed to B., who built a cottage on it, and afterwards enclosed a further portion of the common, and B. occupied the whole premises for about sixteen years. The copyholders, who were accustomed every seven years to break down the fences of encroachments on the common, twice broke down the fences between the common and the new land thus enclosed by B., the fence between the new and old enclosure having been previously removed, and passed over that part of the land which had been newly enclosed by B.: Held, that B. gained a settlement by estate. *The King v. The Inhabitants of Pensax, T.*, 2 W. 4. 815

6. Appellants against an order of removal proved that J. J., the father of the pauper's wife, being seised in fee of land, and having several children, it was in his lifetime agreed between them, that part of the land should be allotted to each child, in pursuance of which agreement, on the marriage of the pauper in 1808, a portion of the land was allotted to him, upon which he built a house, and resided in it for sixteen years, and then sold the whole for 60l. to a party who held it ever since. The respondents then produced a conveyance to the pauper of the land in question in 1815 by S. J., the eldest son and heir at law of J. J. It recited that the pauper had agreed to purchase the above parcel of land of S. J., and had paid him two guineas for the same, but no conveyance thereof had yet been made; and then expressed, that in consideration of that sum, S. J. bargained and sold. &c.: Held, that the appellants were not estopped by the recital of this deed from giving parol evidence that the consideration stated in the deed was never paid or intended to be paid, and that the deed was made for the purpose of confirming the pauper's title to the land allotted

to him in virtue of the above parol agreement. *The King v. The Inhabitants of Cheadle, T.*, 2 W. 4. 833

SETTLEMENT—by Hiring and Service.

1. A hired servant is settled in that parish in which he last completes a forty days' residence, although he performs no service there for his master. *The King v. The Inhabitants of Dremerchion, E.*, 2 W. 4. 420

2. A., a certificated man, was hired by a farmer residing in parish B. as his shepherd to go into his service at midsummer. It was agreed between them, that A. should have a cottage in B. rent free, and the going of 105 sheep with his master's flock. The term "going" in the country where the contract was made meant that the sheep should be pasture fed, and the feeding on pasture in B. was worth 10l. per annum. At the same midsummer A. hired C. to serve him for a year as shepherd's page, and he did so serve in parish B. till the following midsummer: Held, upon a special case stating these facts as found by the sessions, that C. gained a settlement by hiring and service with A., because the latter never resided in parish B. by virtue of the certificate; for having come there to settle on a tenement of 10l. per annum, he was irremovable as soon as he came into the parish, although he could not gain any settlement there until he resided forty days. *The King v. The Inhabitants of Nacton, E.*, 2 W. 4. 543

3. To gain a settlement by hiring and service, the whole forty days' residence need not be within the compass of a year from the time of the yearly hiring. A servant was hired for a year on the 17th of April, 1825, and served in parish A. till the 11th of April, 1826, when he made a fresh agreement with his master as a weekly servant, and continued to serve under that agreement for upwards of two months. He resided in parish A. from the 17th of April to the 3d of May, 1825, when he accompanied his master to and resided in another parish till the 6th of April, 1826. He then returned with his master to parish A. and resided there during the remainder of his service, viz., under the first agreement from the 6th to the 11th of April, and under the second for two months: Held, that he gained a settlement in A. *The King v. The Inhabitants of Child Okeford, T.*, 2 W. 4. 809

4. A. hired himself for a year, but stated to his master, at the time of the hiring, that he had been called upon to serve in the local militia in the course of the preceding year, and that he expected to be called out again in the May following; and it was agreed between them that the master should deduct out of his wages 1s. a day for as many days as he should be absent on service in the militia. A. having served under that contract for a year, fourteen days only excepted, during which he was absent on service in the militia, it was held, that he thereby gained a settlement. *The King v. The Inhabitants of Elmley Castle, T.*, 2 W. 4. 826

SETTLEMENT—by renting a Tenement.

1. The second section of the 1 W. 4, c. 18, by which it is provided, that where the yearly

rent shall exceed 10*l.* payment to the amount of 10*l.* shall be deemed sufficient for the purpose of gaining a settlement under the recited act 6 G. 4, c. 57, is retrospective, and therefore where a pauper in 1829 hired a house at a yearly rent exceeding 10*l.*, occupied it for more than a year, and paid not a whole year's rent, but above 10*l.* it was held that he thereby gained a settlement. *The King v. The Inhabitants of Dursley, E.*, 2 W. 4. 465

2. A., a certificated man, was hired by a farmer residing in parish B. as his shepherd, to go into his service at midsummer. It was agreed between them, that A. should have a cottage in B. rent free, and the feeding on pasture in B. was worth 10*l.* per annum. At the same midsummer, A. hired C. to serve him a year as shepherd's page, and he did so serve in parish B. till the following midsummer: Held, upon a special case, stating these facts as found by sessions, first, that it was to be inferred from the case, that the feeding of the cattle was to be in parish B., and therefore that there was a taking of a tenement of 10*l.* per annum in that parish by A. *The King v. The Inhabitants of Nacton, E.*, 2 W. 4. 543

SHERIFF.

See COUNTY COURT. PRACTICE, 1. REPLEVIN, 1.

1. The statute 55 G. 3, c. 50, abolishes all fees payable to sheriffs on liberate granted to a debtor upon his discharge from prison, and authorizes the justices of the peace for each county, &c., assembled in quarter sessions, subject, however, to the approbation of the justices of assize, to make such compensation to the sheriff, out of the county rate, as shall to them seem fit. The justices of Middlesex have jurisdiction to award compensation to the sheriff of Middlesex under this clause, the Judges of the Courts of King's Bench and Common Pleas being judges of assize for that county. *The King v. The Justices of Middlesex, H.*, 2 W. 4. 100
2. A sheriff, to whom a bailable latitat not containing a non-omittas clause was directed, is not bound, for the purpose of arresting the party named in it, to enter a franchise, within which the lord has the return and execution of writs. *Adams v. Osbaldeston, Eq.*, E., 2 W. 4. 489

SPECIAL JURY.

See ARBITRAMENT, 2.

SPIRITS.

The statute 6 G. 4, c. 80, s. 124 enacts, that no dealer in British spirits shall sell, send out, &c., any plain British spirits exceeding the strength of twenty-five above proof, or any compounded spirits (except shrub) of seventeen under proof, on pain of forfeiting such spirits: Held, that this section does not apply to a distiller or rectifier, and, therefore, that where a rectifier had sold and sent out plain British spirits of the strength of twenty-seven and a half, such contract of sale was not illegal, nor were the spirits prohibited goods, and the seller might recover the price.

By sections 115 and 117 it is enacted, that no spirits shall be sent out of the stock of

any distiller, rectifier, &c. without a permit first granted and signed by the proper officer of excise, truly, specifying the strength of such spirits, and by

Section 119, if any permit granted for spirits shall not be sent and delivered with such spirits to the buyer, such spirits shall, if not seized in the transit for want of a lawful permit, be forfeited to the buyer, and the seller shall be rendered incapable of recovering the same, or the price thereof, and shall incur other penalties:

Held, that this latter section applied to cases only, where the permit granted by the officers of excise has not been delivered with the goods to the buyer, and not to a case where the permit, though irregular, was delivered to him; and, therefore, where a rectifier of spirits had sent to the buyer spirits of the strength of twenty-seven and a half above proof, with a permit in which they were described as of seventeen below proof, it was held that, although the irregularity was the seller's own fault, and was a violation of the law by him, it still did not preclude him from suing for the price, the contract of sale being legal. *Wetherell v. Jones, H.*, 2 W. 4. 231

STALLAGE.

See ASSUMPSIT, 4.

STAMP.

1. By an agreement of demise, the land was to be farmed according to covenants contained in an expired lease. The expired lease being produced in an action brought for not farming the land according to those covenants; it was held, that it was not a schedule catalogue or inventory containing the conditions or regulations for the management of a farm within the statute 35 G. 3, c. 184, tit. Sched. pt. 1, and therefore did not require a stamp of 2*s.* *Strutt v. Robinson, E.*, 2 W. 4. 395
2. A pauper was bound apprentice by the trustees of a public charity. The master covenanted to find him meat, drink, apparel, washing, &c. Before the execution of the indenture, the father of the pauper, who was not a party to it, agreed with the master to find the pauper clothing and washing during the term; and he did so. It did not appear that the trustees were privy to this engagement:

Held, that the indenture did not require to be stamped, because either the agreement by the father to provide clothes was not a thing secured to be given to or for the benefit of the master, within the 55 G. 3, c. 184, Sched. pt. 1, tit. *Apprenticeship*, or, assuming that it was, then it was void, as being a fraud on the trustees, who had bound out the apprentice on the faith that the master was to provide clothes. *The King v. The Inhabitants of Aylesbury, E.*, 2 W. 4. 569

STAMP OFFICE RETURN.

See EVIDENCE, 13, 14.

STATUTE OF LIMITATIONS.

1. The statute of limitations is not barred by a letter in which the defendant states "that family arrangements have been making to

enable him to discharge the debt; that funds have been appointed for that purpose, of which A. is trustee; and that the defendant has handed the plaintiff's account to A.; that some time must elapse before payment, but that the defendant is authorized by A. to refer the plaintiff to him for any further information."

For, by the statute 9 G. 4, c. 14, s. 1, the acknowledgment in writing to bar the statute must be signed by the party chargeable thereby; and such letter does not charge the defendant. *Whippy v. Hillary, E.*, 2 W. 4.

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2. A. and B. being joint owners of a ship, and indebted to C. for repairs, B. gave two bills to C. which were dishonoured, and afterwards sold his interest and became bankrupt. A. proved under B.'s commission for 3000*l.*, and in 1822 drew on his assignee a bill of exchange payable to C., which the assignee accepted, and which A. then delivered to C. on account of the sum due to him for the repairs and on the bills. It was agreed that payment of this latter bill should not be demanded of the acceptor until he should have funds on account of dividends of B.'s estate. The bill was paid in March, 1827. In 1830, C. brought an action against A. for the sum remaining due on account of repairs, and A. pleaded the statute of limitations: Held, that the drawing of the bill (supposing it to be evidence of a fresh promise) on the original demand was only evidence of a promise at the time when it was drawn, and not when it was paid, and, therefore, did not take the case out of the statute. *Gowan v. Forster, E.*, 2 W. 4.

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STATUTE OF MARLBIDGE.

See REFLEVIN, 1.

STATUTE, 1 W. 4, c. 18, s. 2.

See SETTLEMENT BY RENTING A TENEMENT, 1.

STRANDING.

See INSURANCE, 1.

SUSPENSION OF ORDER OF REMOVAL.

See APPEAL, 1.

THOUSAND (meaning of the word according to the custom of the country).

See EVIDENCE, 8.

TITHES.

See INCLOSURE ACT, 1.

TITLE DEEDS.

See MORTGAGOR AND MORTGAGEE, 1.

TOLLS.

See RATE, 5.

TREASURER.

See ARBITRAMENT, 7.

VOL. XXIII.—29

TRESPASS.

See ARREST. PLEADING, 8.

1. A defendant, on whose application a judgment has been set aside for irregularity, without costs, cannot afterwards recover those costs as damages in an action of trespass against the plaintiff's attorney, for taking his goods under colour of the supposed judgment. *Loton v. Devereux, H.*, 2 W. 4.

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2. Trespass lies against magistrates for granting a warrant to levy poor rates, if the party distrained upon has no land in the parish in which the rate was made. *Weaver v. Price and Another, E.*, 2 W. 4.

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3. In trespass for entering to distrain for poor rates, the defendant (who had acted on behalf of the parish officers) averred in justification that the plaintiff's house was within the parish, which the plaintiff denied: Held, that the plaintiff could not demand an inspection of the parish books, on the ground that the defendant alleged him to be a parishioner. *Burrell v. Nicholson, E.*, 2 W. 4.

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4. Two magistrates having, at a landlord's request, given possession of a dwelling-house as deserted and unoccupied, pursuant to the 11 G. 2, c. 19, s. 16, the judges of assize of the county on appeal made an order for the restitution of the farm to the tenant with costs. The latter brought an action of trespass for the eviction against the magistrates, the constable, and the landlord: Held, that the record of the proceedings before the magistrates was an answer to the action on behalf of all the defendants. *Ascroft v. Bourne and Others, T.*, 2 W. 4.

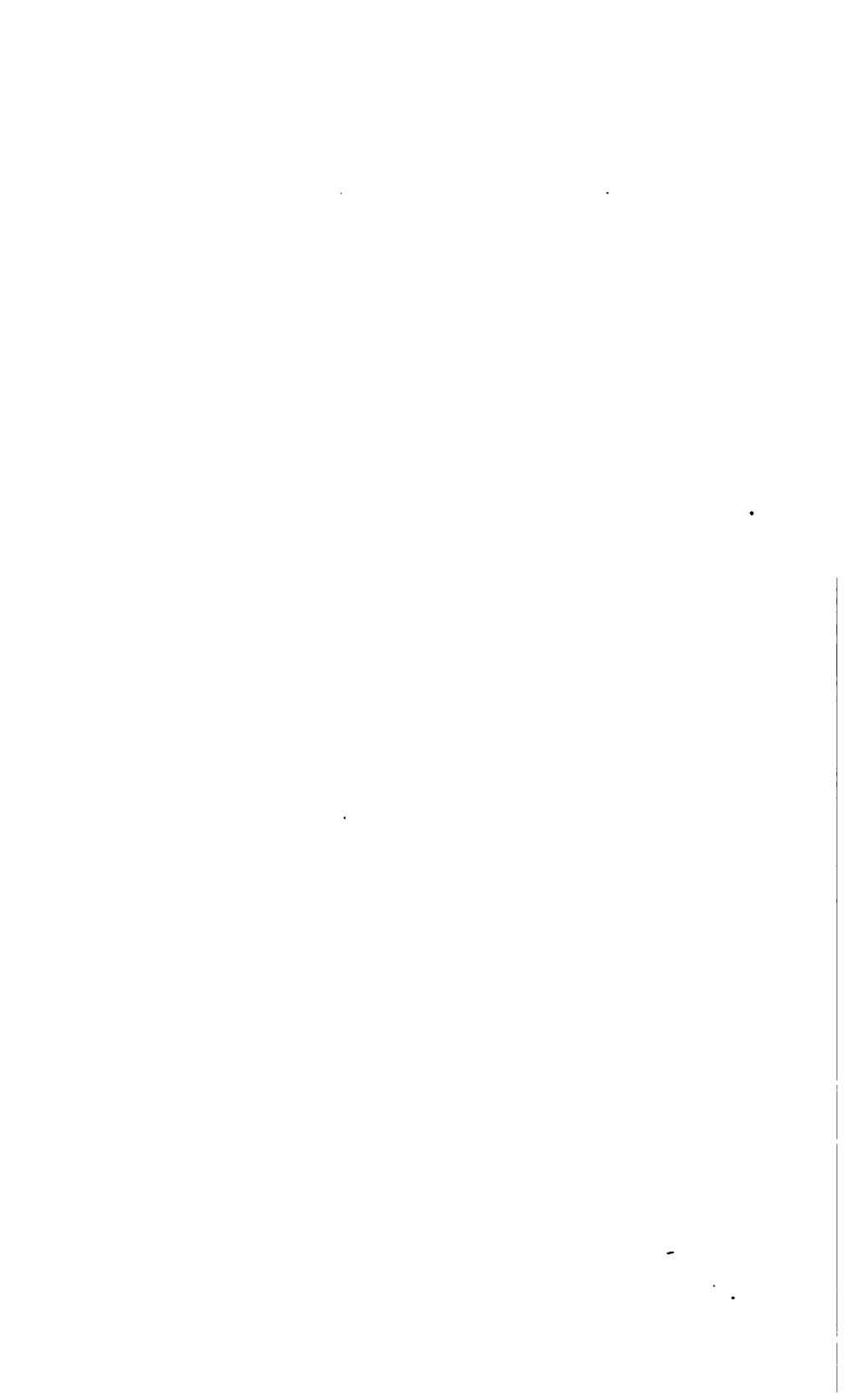
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5. Where a defendant in trespass pleads that he tendered the plaintiff a certain sum, being a sufficient amends, the plaintiff should reply that the defendant did not tender the sum named, or that that sum was insufficient, and not that he did not tender sufficient amends.

Where cattle are distrained damage feasant, and put into a sufficient pound, and escape without default or neglect of the distrainer, he may bring trespass for the damage. And although the defendant plead that the cattle were taken damage feasant, and impounded, and escaped without his default, a replication stating that the distress was put into a proper pound, and escaped without neglect or default of the plaintiff, is a sufficient answer. *Williams, Clerk v. Price, T.*, 2 W. 4.

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6. L. took a lease of a mill and iron forge, and bought the fixed and movable implements, &c., but it was agreed that they should be delivered up at the end or other determination of the term, at a valuation, if the lessors should give fifteen months' notice of their desire to have them. L. afterwards conveyed all his interest in the premises, implements, &c., to a creditor, in trust, if default should be made by L. in paying certain instalments, to enter upon and sell the same, and satisfy himself out of the proceeds, re-assigning the residue; and if the lessor should require a resale of the implements, &c., the proceeds of such resale were to go in discharge of the debt, if unsatisfied. L. made default and subsequently became bankrupt, after which, and during the term, the creditor, who had not before interfered, entered upon the property: Held, on trespass brought by the assignees,



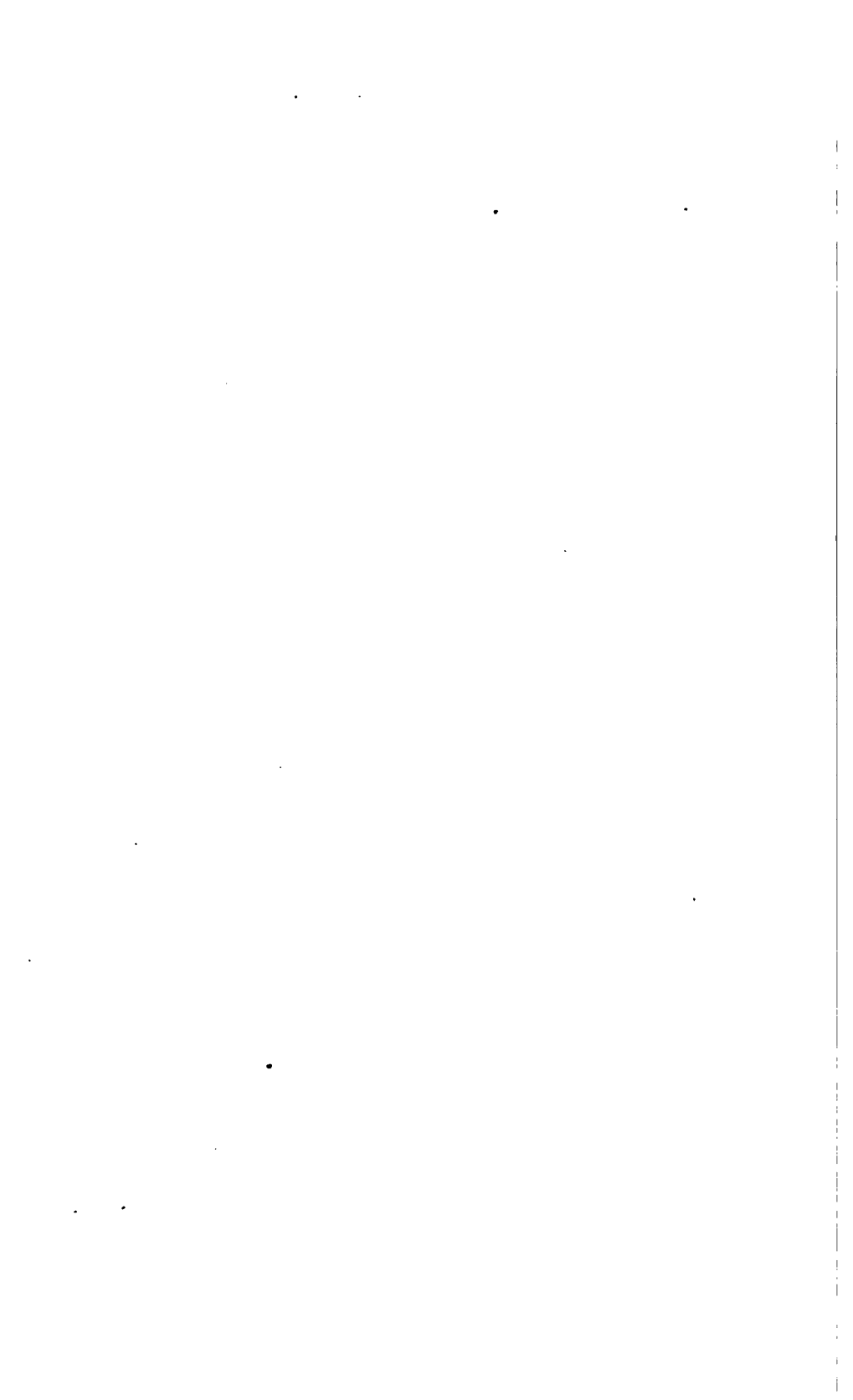
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OF THE

C O U R T O F C O M M O N P L E A S ,

DURING THE PERIOD CONTAINED IN THIS VOLUME.

The Right Hon. Sir NICHOLAS CONYNTHAM TINDAL,
Knt., Ld. C. J.
Hon. Sir JAMES ALLAN PARK, Knt.
Hon. Sir STEPHEN GASELEE, Knt.
Hon. Sir JOHN BERNARD BOSANQUET, Knt.
Hon. Sir EDWARD HALL ALDERSON, Knt.



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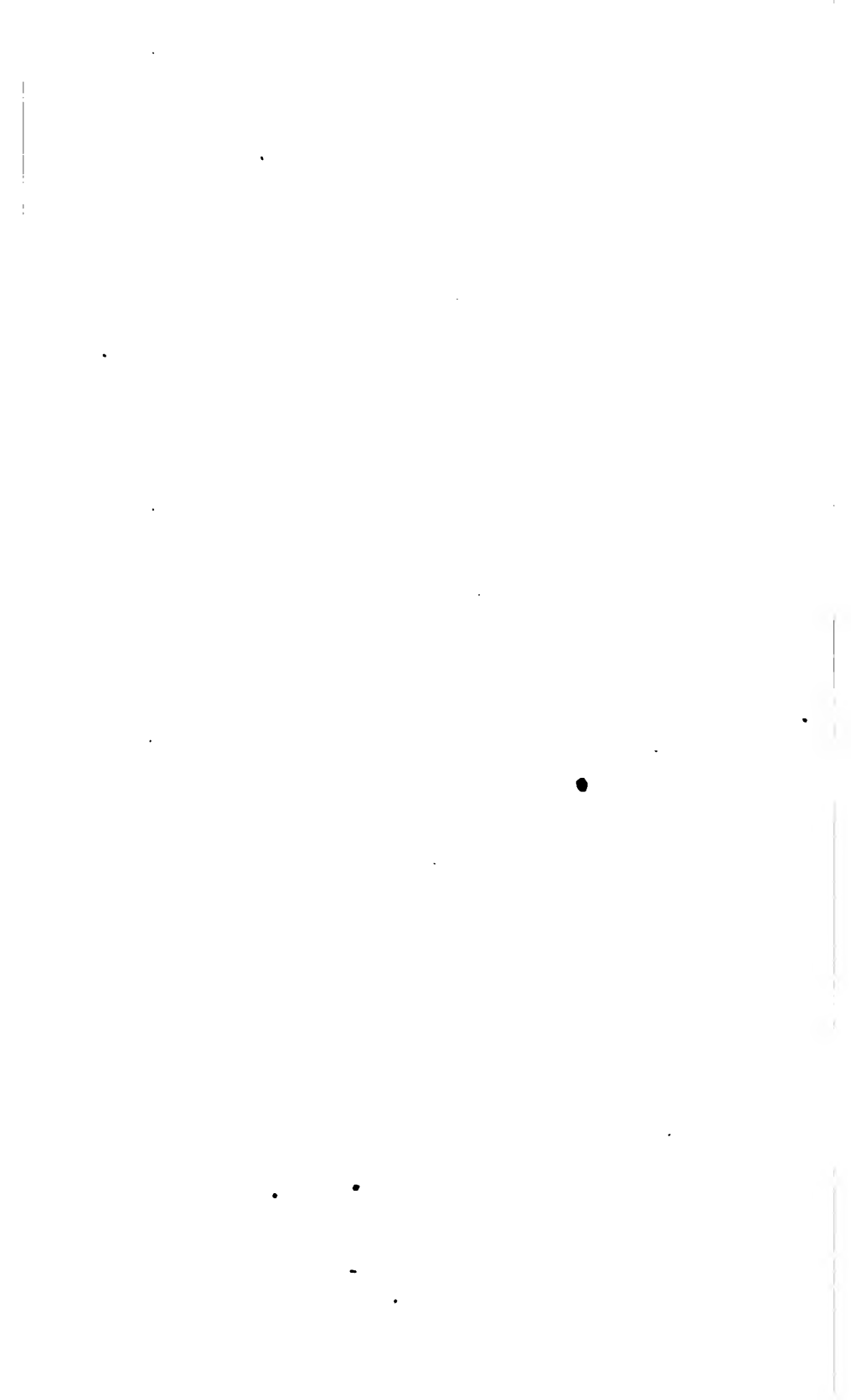
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CASES
ARGUED AND DETERMINED
IN THE
COURT OF COMMON PLEAS,
AND
OTHER COURTS.

Trinity Term,

AND THE VACATION ENSUING,

IN THE SECOND YEAR OF THE REIGN OF WILLIAM IV.

GRISSELL and Others, Executors of W. PETO, *v.* J. PETO. *May 26.*

THE Court refused to restrain the defendant's attorneys from acting in the cause, on the ground that they had obtained a knowledge of the plaintiff's case in the course of a Chancery suit, in which they had been acting in conjunction with the plaintiff, and in which the defendant had no interest; the defendant's attorneys deposing, that, in that suit, they acted also for the defendant.

THE plaintiffs sued as the executors of W. Peto, who had directed his property to be distributed among certain of his relations in five portions.

There had been, on the subject of this distribution, a suit in Chancery, in which the plaintiffs' attorneys had appeared for the parties interested in three-fifths of the property, and Lake and Wilkinson, the defendant's attorneys, for the parties interested in the other two-fifths. Upon affidavit of these facts, and that the defendant in this action had not been interested in the Chancery suit,

*2] **Wilde*, Serjt., obtained a rule *nisi* to restrain Lake and Wilkinson from acting as attorneys for the defendant in this action, upon the ground that in the Chancery suit they had obtained a knowledge of the plaintiffs' case, of which they ought not now to be permitted to avail themselves.

Coleridge, Serjt., who showed cause, relied upon an affidavit in which Lake and Wilkinson deposed, that in the Chancery suit they had acted for the defendant as well as for others, and had obtained little more information than would have been furnished by the plaintiffs' bill of particulars. He deprecated depriving the defendant of the assistance of an agent who was best acquainted with the whole of the transactions.

Wilde. It is not deposed that the defendant was interested in the Chancery suit; and it would be prejudicial to the administration of justice, if his agents should be permitted to turn against the plaintiffs, knowledge obtained in a matter in which the defendant was not a party interested, and in which his agents were acting in conjunction with the plaintiff.

TINDAL, C. J. I am far from saying that a case of this sort may not arise, in which the circumstances may be sufficiently strong to induce the Court to interfere; but the circumstances disclosed in this case would not authorize us to interpose in the manner required. The attorneys depose that in the Chancery suit they were concerned for the defendant, and if we were not to give them credit for proper conduct in the business of the suit, we should be meting out too nicely the modes by which they are to obtain the information necessary for the interest of their client, particularly when they state that they have obtained little more than would have *been furnished by a bill of particulars [73 in this action. Without any allegation of misconduct, the application for [73 the interference of the Court is at least premature. And it could not be of any great advantage to the plaintiff if another attorney were named for the defendant, since nothing could prevent his present attorneys from communicating the knowledge they possess.

PARK, J. The motion is a novelty, and the Court ought not to interfere prematurely; particularly as the attorneys are amenable to the jurisdiction of the Court if any improper conduct be alleged against them.

GASELEE, J. So many persons attend the Master's office and take copies of proceedings in the course of a Chancery suit, that it would be difficult to draw any line to interference on the ground suggested.

BOSANQUET, J. I am of the same opinion; but I by no means wish it to be thought a case may not occur in which the Court may think it right to interfere.
Rule discharged.

ALSTON and Others v. SCALES. May 28.

Surveyor of highway is liable in case to reversioner, for subtraction of a portion of his bank by the roadside, although the property is the better for what the surveyor has done.

CASE for injury to the reversion. The plaintiff's property was separated from a carriage highway by a ragged bank, with elder bushes growing on the top. The highway, which led to London, was not twenty feet wide.

The defendant, surveyor of the highway, pared the *bank, the whole [*4 of which belonged to the plaintiff, and made it straight in divers places; but in so doing, took away a little of the soil. The occupier, however, stated that the premises were the better for what had been done. And the defendant relied on this, as well as on the 13 G. 3, c. 78, s. 15, by which it is enacted, "That the surveyors of the highways shall, and they are hereby required to make, support, and maintain, or cause to be made, supported, and maintained, every public cart-way leading to any market-town, twenty feet wide at least; and every public horse-way or drift-way, eight feet wide at the least, if the ground between the fences inclosing the same will admit thereof."

Alderson, J., before whom the cause was tried at the last Middlesex sittings told the jury that the question was, whether permanent injury had been done to the land; that, in his opinion, the removal of soil was a permanent injury; and that the projecting sides of the bank formed a portion of the plaintiff's fence, as well as the bushes on the top.

A verdict having been found for the plaintiff, for nominal damages,

Taddy, Serjt., moved for a new trial, on the ground that the jury had been

misdirected on the subject of damage, and the boundary of the plaintiff's fence; contending that injury to the land could not be occasioned by that which improved the property, although it might remove a portion of the soil; and he put the case of a drain: and that, at all events, the defendant was justified by the highway act, according to which he had a right to cut away the soil as far as the bushes, which must be taken to be the proper fence.

The Court, however, held that the direction to the jury was correct on both points; that the removal of the *smallest portion of soil must, in general, be esteemed an injury to the land, because it tends to alter the evidence of title; and that, as to the supposed case of a drain, it was so foreign to the question before the jury, that it was not necessary to caution them on the subject. Taddy, therefore, Took nothing.

DAVIS v. BLACKWELL, Executor. May 29.

An executor who pays legacies six months after probate, cannot plead such payment in discharge of his testator's liability on a covenant.

COVENANT.—Breach, non-repair of a house demised to testator by a lease which expired in December, 1831.

The testator died in March, 1829. Probate was taken out in May, 1830, and this action was commenced in November, 1830. The defendant pleaded, *plene administravit*; *plene administravit* before notice of the covenant; *plene administravit* before notice of breach of covenant. On which pleas issue was joined.

At the trial it appeared that the defendant, after discharging some debts, made over the residue of the assets to the residuary legatee within six months after the date of the probate. No notice had been given to him of the state of the house in question, which had never been occupied by the testator.

A verdict having been found for the plaintiff,

Spankie, Serjt., obtained a rule *nisi* for a new trial, on the ground that the defendant was discharged by having paid over all the assets to the legatee before notice of the plaintiff's claim. He cited *Brooking v. Jennings*, 1 Mod. 174, where, on *plene administravit*, it was held that the defendant might give in evidence that he was *administrator *durante minore etate*, had paid certain debts, and had delivered over the residue: and *The Governor and Company of the Chelsea Waterworks v. Cowper*, 1 Esp. 275, where it was held, that, on *plene administravit*, the defendant might show he had paid over the residue to the residuary legatee, after discharging debts and legacies the year after the testator's death.

Wilde, Serjt., showed cause. The defendant must be presumed to be aware of a lease to the testator which did not expire till after his death. If so, he was not warranted in paying legacies till he had ascertained and discharged all outstanding liabilities. At all events, payment of the legacies within six months was premature. *Brooking v. Jennings* only decides, that an executor *durante minore etate* may pay over the residue to the executor who comes of age; and in *The Governor and Company of Chelsea Waterworks v. Cowper*, the creditor did not make his claim till thirty years after the executor had paid over the assets: after such a lapse of time, it is a presumption that even a bond has been discharged. In *Wilkins v. Pry*, 1 Meriv. 265, the Master of the Rolls laid it down, "That an executor to the extent of assets is liable to be sued upon his testator's covenants, without regard to his having, or not having the possession of the lease. Even if the testator had, before his death, assigned the lease, the executor would not be the less liable to be sued upon the covenants. He cannot, by assigning it away himself, get rid of his liability to be sued. There is, therefore, a reason why he should require a covenant of indemnity, just as much as there was, why the testator himself should have required such

a covenant, the executor is bound to the extent of the assets by the same covenant." The *lessor has no remedy except on his covenant, while the executor might have required an indemnity before paying the legatees. [*7] *Plene administravit*, is a plea not established by mere payment of legacies; the defendant must show that they were paid in proper order; so that even a verdict for the defendant could not have been sustained on this evidence.

Spunkie. The replication raises no issue of a *devastavit*, which it should have done, if the plaintiff meant to rely on the objection that the legacies were paid out in their due order. It is the duty of an executor to pay legacies, and the defendant ought not to suffer for discharging that duty promptly. By the statute of distributions, 22 & 23 Car. 2, c. 10, administrators may proceed to wind up the intestate's affairs at the expiration of a twelvemonth from his death. The same practice may properly be prescribed to executors: and here the testator had been dead more than a twelvemonth before the defendant paid the legacies. Where an executor has no notice of bonds, he is justified in paying simple contract debts. *Harman v. Harman*, 3 Mod. 115. And the same principle ought to be applied with respect to the payment of legacies. The defendant here received no actual notice, and he cannot be presumed to have implied notice of his testator's liability, for the testator did not occupy the house in question, and, upon assignment, the lease would pass out of his hands.

TINDAL, C. J. The only question is, whether the defendant has shown by evidence that he has duly administered the effects of his testator; for it lies on him to show affirmatively that he has done so, and it is not necessary for the plaintiff to reply a *devastavit*. Now, *it appears that the will was proved [*8] in May, 1830, and that after some debts had been paid, the defendant, in November, 1830, made over all that remained to the residuary legatee; thus allowing only six months to elapse before he so disposed of the whole of the assets. That cannot be deemed an administering of the assets in due course of law, so as to afford an answer to the plaintiff's demand. It is not clear, indeed, that payment of legacies would in any case be an answer to a demand of a debt; for all the text books lay it down, that "after the payment of debts, it is the duty of the executor to pay legacies," and if he pays legacies first, he does it at his own hazard. I am not, however, prepared to say that after such a length of time as elapsed in the case of the Chelsea Waterworks Company v. Cowper, the *laches* of the creditor might not be deemed a waiver of his right against the executor; it is not necessary here to decide that point: it is certain, however, that in the case of administrators, the statute 22 & 23 Car. 2, c. 10, leads us to infer that no payment of legacies would be a discharge against a claim of debt. By s. 8 of that statute it is enacted, "That no such distribution of the goods of any person dying intestate be made till one year be fully expired after the intestate's death; and that each and every one to whom any distribution and share shall be allotted, shall give bond and sufficient sureties in the said courts, that if any debt or debts truly owing by the intestate shall be afterwards sued for and recovered, or otherwise duly made to appear, then and in every such case he or she shall respectively refund and pay back to the administrator, his or her rateable part of that debt or debts, and of the costs of suit and charges of the administrator by reason of such debt, out of the part and share so as aforesaid allotted to him or her, thereby to enable the said administrator to pay and satisfy the said *debt or debts so discovered after [*9] the distribution made as aforesaid." That section leads to the inference [*9] that payment of legacies would not be a bar in an action against an administrator for a debt due from the intestate: if it would not in an action against an administrator, there is no reason why it should in an action against an executor; for, though an executor should not provide himself with a bond of indemnity, as an administrator is enjoined to do, the spiritual court would decree that the legacy should be refunded, if debts were afterwards discovered. I will not say that such a defence might not be made if the debt were claimed after a great

lapse of time, but six months does not appear to me to be a reasonable time for ascertaining the existence of debts; and the legacies having therefore been paid prematurely, this rule must be discharged.

PARK, J. I am of the same opinion. It is admitted that there is no case precisely in point, and perhaps that is because executors seldom pay so precipitately. But I do not agree that the twelvemonth from the time of the death pointed out by the statute of distribution in the case of administrators, affords any guide for the case of executors; for if so, an executor might defer taking out probate with a view to elude the creditor. *Brooking v. Jennings*, and *Harman v. Harman*, only decide that the executor may pay simple contract debts where he has no notice of a specialty creditor; and in a note to the case of *Harman v. Harman*, the editor says, the court were of opinion, that where the payment of a simple contract debt is compulsive, it is a good payment without a notice, but not where the payment of such debt is voluntary. But in the *Chelsea Water Works Company v. Cowper*, Lord Kenyon, as to other payments, puts in a qualification, which applies expressly to this case: "Provided it be not done too precipitately;" that is the question. I think the executor has been *10] too *precipitate in this case, and that, therefore, the rule must be discharged.

GAZLEE, J. I think the executor has been premature in paying the legacies. In the *Chelsea Water Works Company v. Cowper*, thirty years elapsed before the creditor preferred his claim. Without saying what is the proper time for the payment of legacies, or whether in any case the payment of them before debts can be justified, I think the payment here was too soon.

BOSANQUET, J. I think the rule must be discharged. The executor is to pay specialty debts, simple contract debts, and legacies, and to pay them in that order. Cases may occur in which he may be justified in paying a simple contract debt first, because when the simple contract creditor proceeds before the executor has notice of the specialty, he cannot plead the specialty debt in bar. But the demand of a legatee stands on a different footing, because, in the language of courts of equity, he is no more than a volunteer, who cannot be satisfied till all debts are discharged. No precise time has been fixed for the payment of legacies; but in the case of the *Chelsea Water Works Company*, Lord Kenyon thought that after a great lapse of time the *laches* of the creditor might justify the executor in paying them, provided he was not too precipitate. With respect to administrators, they are required by the statute not to pay over the residue in less than twelve months after the death of the intestate; but that period cannot be applied to the case of an executor, so as to justify him in paying over when a twelvemonth has expired from the death of the testator, for by deferring the taking out of probate he might mislead the creditors, and give them little or no opportunity of giving notice of their claims. *11] The real question, *therefore, is, whether or not the executor has been precipitate in paying legacies. I think he has been so in this case, and is, therefore, responsible to the plaintiff. Rule discharged.

SPARLING v. HADDON. May 29.

The Stamp Office certificate, countersigned by a Master of the Court of King's Bench, is sufficient *prima facie* evidence to satisfy an allegation that the party is an attorney of that court.

In an action for libel the plaintiff alleged in his declaration that he was an attorney of the Court of King's Bench; and in proof of that allegation, after calling a witness who stated that he knew the plaintiff to have acted as an attorney, produced the stamp office certificate of his having paid the annual

duty imposed upon attorneys by 37 G. 3, c. 9. This certificate was countersigned by a Master of the Court of King's Bench as having been duly entered, and a witness proved the signature of the master, and that he discharged the duties of that office.

A verdict having been found for the plaintiff,

Spankie, Serjt., obtained a rule nisi for a new trial, on the ground that though the evidence above showed the plaintiff to be an attorney, it did not satisfy the allegation that he was an attorney of the Court of King's Bench, the stamp office certificate being delivered to any one who chooses to pay the tax, and the entry of it in the Court of King's Bench being only required to insure such payment. The plaintiff should have produced a certificate from the master, or the roll of attorneys. 2 Phillips' Evid. 243.

Wilde, Serjt., who showed cause, argued that the stamp certificate, countersigned by the master, was *sufficient *prima facie* evidence that the plaintiff was an attorney of the Court of King's Bench; for it might be presumed that the master would not have entered it unless the plaintiff were an attorney of that court. He relied on *Berryman v. Wise*, 4 T. R. 366, and *Pearce v. Whale*, 5 B. & C. 88. [*12]

Spankie. In *Pearce v. Whale* there was sufficient evidence to satisfy the allegation, independently of the stamp office certificate.

TINDAL, C. J. The present case is not sufficiently distinguishable from *Pearce v. Whale* to lead us to a different conclusion. In this case there was no evidence of the plaintiff's having acted as an attorney in actions in the Court of King's Bench; but there was evidence of his having taken out the usual annual certificates at the stamp office, and that it had been countersigned by the Master of the Court of King's Bench. It was proved further, that the person who had signed as such was the master, and that the signature was his handwriting. And the question is, whether that was not sufficient *prima facie* evidence to satisfy the allegation that the plaintiff was an attorney of the Court of King's Bench. In *Pearce v. Whale*, indeed, there was other evidence; but the objection was, that it did not appear that the party was an attorney on the roll of the court; and the answer to that was evidence of a series of certificates countersigned in the same manner as the present. It was then held, that though not conclusive, this was sufficient *prima facie* evidence that the party was an attorney of the Court of King's Bench. I think, therefore, that this rule must be discharged.

The other judges concurring,

The rule was discharged.

*BRUNSKILL v. GILES. May 30.

[*13]

After a trial has been had, the Court will not grant *venire de novo*, on an allegation that the jury has been convened by the partner of the plaintiff's attorney; at least without proof that the party who objects was not aware of the fact at the trial.

BOMPAS, Serjt., on the part of the defendants, moved for a *venire de novo*, on the ground that the jury had been convened by the partner of the attorney for the plaintiff.

The objection had been made at the trial; but the learned serjeant not being furnished with the evidence to support it, the cause proceeded, and a verdict was found for the plaintiff. The affidavit in support of this application did not state that the knowledge of the circumstance had come to the defendant by surprise at the trial, or that due diligence had been then used to establish the fact; but it was now contended, that no verdict could be supported under such circumstances.

TINDAL, C. J. The law has appointed a particular time for taking this objection,—when the jury come to the book to be sworn. The defendant was not

in a condition then to tender his formal challenge. I am not prepared to say that a case may not occur in which, if the party be not aware of the objection at the time, he may not afterwards come and require the assistance of the Court: but upon this affidavit there is nothing to show that the defendant was taken by surprise, or that he used due diligence to establish the fact at the trial.

PARK, J. There is not the shadow of a pretence for this application. The cause proceeded at the trial because no ground of challenge had been established. Instead of withdrawing, the counsel for the defendant chose to address the jury, *¹⁴] and take his chance of a *verdict: he cannot be allowed now to defeat it without even an affidavit of surprise.

The rest of the Court concurring, Bompas

Took nothing.

SMITH and Another, Assignees of ROBERTS, a bankrupt, v. SCOTT.
May 30.

The keeper of a private lodging house, who also seeks a profit by furnishing her guests with provisions, is subject to the bankrupt laws as an hotel keeper, although the provisions are set apart as the separate property of each guest.

TRÖVER.—The plaintiffs sought to recover the value of certain furniture in the possession of Mrs. Roberts at the time of her bankruptcy. Mrs. Roberts was described as a lodging-house keeper in the commission of bankrupt under which the plaintiffs claimed; and the principal question in the cause was, whether she had been subject to the bankrupt laws as an hotel keeper. As to which, the witnesses stated that she gained her livelihood by letting lodgings in a house in Pall Mall East, to which there was no public sign or name; that she received families or single men for long or short periods; that if required to do so, she found and cooked provisions for them, charging more than she paid, or, as the witness termed it, "the market penny;" but that the provisions so found did not form any general stock of her own, but were kept separately for the individuals for whom they were respectively procured; that she took her orders every Monday morning, and was usually paid once a week, although some of her guests staid only a single night. She had no license; her name was not on the door; and "Lodgings to let" usually appeared on the window.

The lease of the house and the furniture had been originally assigned by *¹⁵] Mrs. Roberts to the defendant, *for money advanced by him, and then the house had been let ready furnished by the defendant to Mrs. Roberts; upon which it was contended, that there could be no apparent or reputed ownership of a furnished house within the meaning of the 72d section of 6 G. 4, c. 16; and *Storer v. Hunter*, 3 B. & C. 368, *Walker v. Burnell*, Dougl. 308, *Jarman v. Woolloton*, 3 T. R. 618, *Horn v. Baker*, 9 East, 215, and *Earl of Shaftesbury v. Russell*, 1 B. & C. 666, were cited: but *Tindal, C. J.*, before whom the cause was tried, overruled the objection; and as to the trading, directed the jury to consider whether Mrs. Roberts sought her livelihood by a profit derived from the provisions she furnished to her lodgers, or only furnished the provisions incidentally, looking to the lodgings as her means of livelihood. A verdict having been found for the plaintiffs,

Jones, Serjt., moved to set it aside on the above objection, and on the ground that Mrs. Roberts was not an hotel keeper within the meaning of the bankrupt act. Her house was without any public sign or name; and the profit by which she sought her livelihood was the profit of letting lodgings: if she obtained any profit from furnishing provisions, that was only accidental or accessory, and not the principal object of her business. To bring her within the description of an hotel keeper, the profit to be derived from furnishing provisions should have been her principal object; the provisions should have constituted part of her

stock in trade, and not have been kept apart as the separate property of her guests.

The Court granted a rule on this point only.

Wilde, Serjt., showed cause. The house having been opened at all times for the reception of lodgers, the *business of its mistress was in effect that of an hotel keeper, to which it is not essential that a house should be known [*16 by any public sign or name, or that the guests should be furnished with provisions by the landlord. These are mere accidents of the business, which may exist with or without them. There are some acknowledged hotels, as Warren's, without external name or sign; and others, as the Old Hummums, which the guests frequent for the purpose of lodging only.

Jones. If the keeper of a private lodging-house is held subject to the bankrupt law as the keeper of an hotel, the law must include those who only let lodgings occasionally, as to the barristers on a circuit. Such persons could not have been contemplated by the legislature under the designation of hotel keepers, but persons who obtain a stock of provisions upon credit. The question is, whether the profit from furnishing provisions is a principal or only an accessory object of the business. In *Patten v. Brown*, 7 Taunt. 409, it was held, that a person who buys pigs or other stock with a view to a resale of them, as auxiliary to the profitable occupation of his farm, and in the interval feeds them wholly or principally on the produce of his farm, does not thereby become a trader.

TINDAL, C. J. The question turns on the construction of the late bankrupt act, which for the first time has rendered subject to the bankrupt laws persons following the vocation of "victuallers, keepers of inns, taverns, hotels, or coffee houses." These words were not all intended to mean the same thing, or so many would scarcely have been employed. Nor is it necessary that we should define them all: but it is manifest *that the word *hotel* is not used in the [*17 sense of the old word *hostel*, for that means what is now termed an inn; and as the word *inn* immediately precedes, it could scarcely have been intended to designate the same thing by both. The modern word is introduced from the French, and rather implies a house to which people resort for lodging, than for the sort of entertainment which is to be procured only at an inn. The question therefore is, whether Mrs. Roberts was the keeper of a lodging house or hotel within the meaning of this statute. I told the jury, that if Mrs. Roberts sought her livelihood by a profit on the provisions she furnished to her guests, she must be deemed an hotel keeper within the meaning of the bankrupt law, and that the plaintiff would be entitled to their verdict. The jury, by finding for the plaintiff upon that direction, have in effect found that Mrs. Roberts sought her livelihood by a profit on the provisions furnished to her guests. It has been contended that I should have directed them to consider whether the profit to be derived from letting lodgings was the principal object of Mrs. Roberts's business, and the profit from provisions, only accessory; or whether the profit from supplying provisions was the principal object of her business: but that distinction is not quite correct, for it would exclude the keepers of many public hotels, which are frequented by persons who require only lodging of the hotel keeper, and obtain their board elsewhere. It seems to me, therefore, that the question was left to the jury in the mode most likely to fulfil the intention of the legislature, which was to extend the protection of the bankrupt laws to those persons who supply keepers of hotels and lodging-houses with furniture and provisions.

PARK, J., concurred.

**GASELEE, J.* There might have been some doubt if the party had only received lodgers occasionally, and had never supplied them with provisions: [*18 but here the house was open to any comer, and all who frequented it were supplied with provisions to some extent. In other matters it has always been held that an hotel keeper is subject to the same liabilities as an inn-keeper.

BOSANQUET, J. I am of the same opinion. It has been assumed in argument that in order to be subject to the bankrupt laws, a party must make a profit by buying and selling the principal object of his business; but many persons are specified in the statute who do not fall within that description, as bankers, wharfingers, carpenters, factors, &c. Without precisely defining the business of an hotel keeper, I think the question was properly left to the jury, and has been properly decided by them. There are many establishments of this kind in which the provisions form an inconsiderable part of the expense, a large proportion of which is occasioned by the quantity of furniture required; and the credit necessary to obtain that, was probably the reason for making the keepers of such establishments subject to the bankrupt laws. By an hotel keeper no doubt something was meant different from an inn or tavern keeper. It seems to me that the bankrupt properly came within the former description, and that this rule must be

Discharged.

*19] *PRESCOTT v. FLINN and Others. May 30.

1. From the fact that the defendants' confidential clerk had been accustomed to draw checks for them; that, in one instance at least, they had authorized him to endorse; and, in two other instances, had received money obtained by his endorsing in their name, a jury was held warranted in inferring that the clerk had a general authority to endorse.
2. Letters, forged by the clerk, purporting to contain an authority to endorse upon another occasion, held not admissible in evidence to show he had no authority to make the endorsement on which the plaintiff sued.

ASSUMPSIT on two bills of exchange endorsed to the plaintiff in the name of the defendants by Lawrence Johnson.

In order to show that Johnson had authority to endorse for the defendants, the plaintiff proved that he was the defendants' confidential clerk, and had been introduced by the defendants to their bankers, as one to whom they were to pay the same attention to as to the defendants themselves: that the defendants had, in repeated instances, recognised his authority to draw both bills and checks by procuration for them: and that on three occasions Johnson had endorsed bills by procuration for them, on one of which occasions, at least, the defendants must have known of the endorsement; and upon the other two the bills had been discounted by a bill-broker at the defendants' bankers, and the defendants had drawn out the money raised upon the bills.

The defendants offered in evidence two letters, purporting to have been written by themselves to Stevens, a bill-broker, on the 2d and 14th of July, 1830, before he had discounted the two bills on which this action was brought, for the purpose of showing that such letters had been forged by Johnson. The letters, however, related to a different transaction, and were rejected by Tindal, C. J., before whom the cause was tried; and a verdict having been found for the plaintiff.

Coleridge, Serjt., moved to set it aside as against evidence, and also on the ground that the letters to Stevens ought not to have been excluded.

*20] *Wilde* and *Bompas*, Serjts., showed cause. The circumstances of the defendants having sanctioned at least one endorsement by Johnson, coupled with the general confidence they were proved to have reposed in him, is sufficient to support the finding of the jury; and the letters were properly excluded, for they had no reference to this transaction, and if admitted, would only have shown that Johnson had committed a forgery, not that he had forged the endorsements in question.

Coleridge. The confidence reposed in Johnson, by allowing him to draw bills and checks, does not assist the plaintiff; for an authority to draw does not confer an authority to endorse; *Robinson v. Yarrow*, 7 Taunt. 455; *Murray v. The*

East India Company, 5 B. & Ald. 204; and it is too much to presume a general authority from a single instance. The letters ought to have been admitted for the purpose of showing that in some instances at least Johnson had endorsed without authority.

The Court took time to look at the bills, and judgment was now delivered by TINDAL, C. J. Two objections have been urged in this case against the plaintiff's right to recover: one, that the verdict was against evidence; the other that evidence tendered by the defendants at the trial was improperly rejected.

The first objection was, in effect, this, that the jury was not warranted in finding upon the evidence before them, that Lawrence Johnson had authority from the defendants to endorse the two bills on which the action was brought, in their names.

The evidence given to prove Johnson's authority to endorse bills for the defendants, was, first, the proof that *he was a confidential clerk of the defendants, and had been expressly introduced by them to their bankers, as [*21 one to whom they were to pay the same attention as they would to the defendants themselves. Secondly, evidence was given that they had, in repeated instances, recognised his authority to draw both bills and checks by procuration for them; bills being produced which were so drawn by him, and which afterwards bore the endorsement of the partners, and very numerous checks, about twenty in number, having been signed by him, in his own name, by procuration of the defendants; such checks being signed at the plaintiff's banking-house for sums directed to be paid under orders from country correspondents, to Messrs. Flinn and Co., but which checks, it appeared, were afterwards paid into the defendants' own bankers, so that the defendants may be presumed to have had an opportunity of seeing how their name was used. The plaintiff, lastly, proved, that on three occasions, Johnson had endorsed bills of exchange by procuration for them: on one of which occasions, at least, the defendants must have known of such endorsement, inasmuch as after the special endorsement by him as agent of the firm, to one of the partners, the bill bore the subsequent endorsement of that partner; in the other two instances, there was certainly no such knowledge brought home to the defendants; but the bills had been discounted by a bill-broker at the defendants' bankers, and the defendants had drawn out the money raised upon the bills. Now, it is contended, that the two first heads of evidence proved no authority to *endorse*, but that, at the utmost, according to the distinction laid down in *Robinson v. Yarrow*, they proved an authority to *draw*; and, again, it was contended, that from the particular circumstances under which the checks were drawn, they were, in reality, receipts for money paid by the plaintiffs, rather *than checks, and entitled to little weight upon the ques- [*22 tion.

And, further, as to the instances of endorsement by Johnson, it is argued that the single instance of the special endorsement of the bill to the order of one of the partners, by no means imported a general authority to endorse bills, as the power over the proceeds of the bill was never parted with by the owners; and that, in the other two cases, the defendants at this very time dispute their liability to pay their bankers, on the ground of the want of authority in Johnson to endorse by procuration for them. But it has not been contended, as indeed it could not, that any part of the evidence was improper to be laid before the jury, in determining whether the clerk had authority to endorse or not.

It may be admitted, that an authority to draw, does not import in itself an authority to endorse bills; but still, the evidence of such authority to draw, is not to be withheld from the jury, who are to determine on the whole of the evidence, whether such authority to endorse exists or not. The jury, although they may require some direct testimony upon the authority of the clerk to endorse, may justly be satisfied with less evidence, where it is proved that the clerk is a confidential clerk, and that he has an undisputed authority to *draw*

in the name of the principals. And as well this part of the evidence, as also the direct evidence of authority to endorse, was left to the jury, with those remarks in favour of the defendants which are now urged, and almost in the precise terms now used by the defendants' counsel.

When, therefore, the evidence on the subject was left to a special jury of merchants, who have the right to bring their own knowledge of the general course of business in aid of their judgment on the particular occasion, and they *23] have declared themselves satisfied *that the defendants have, by their conduct, shown that this clerk had authority to endorse, with what object could we send this cause to a second trial before a jury of a similar description, where the very same question must again be left to the new jury upon the same evidence?

The second objection was, that evidence had been improperly rejected. The evidence offered by the defendants was that of two letters purporting to be written by the defendants to Stevens, the bill-broker, one dated the 2d, the other the 14th of July, 1830, and purporting to state that Johnson had authority to endorse bills for the defendants. These letters the defendants offered in evidence, for the purpose of showing that they were forgeries. The evidence, when offered, was rejected, on the ground that it related to a different transaction with Stevens, prior in point of time to the discounting of the two bills on which the action is brought. And we are of opinion the evidence was properly rejected on that ground. The plaintiffs are to stand or fall as to their right to recover, upon the proof they are able to produce of the conduct of the defendants, amounting in other instances to an authority to their clerk to endorse bills in their names. If the case prove to the satisfaction of the jury, that the defendants authorized the clerk to endorse, how is that authority diminished or contradicted by proof, that in two instances in the preceding month, of which they had no notice, Johnson, the clerk, forged an authority to endorse? Such evidence appears to us to be wholly irrelevant to the point in dispute, whether the clerk had or had not authority to endorse *these bills* in the following month of August. Upon the whole, therefore, we think the verdict, which has been given for the plaintiff, should stand; and, that the present rule for setting it aside, should be Discharged.

*24] *MARTYR v. BRADLEY. May 31.

Covenant to leave, at the end of a term, a water-mill, with all fixtures, fastenings, and improvements, during the demise, fixed, fastened, or set up in or upon the premises, in good plight and condition, reasonable use and wear only excepted:

Held, to include a pair of new mill-stones set up by the lessee during the term, although the custom of the country authorized him to remove them.

COVENANT.—The plaintiff had by indenture demised a mill to the defendant in the following terms:—"All that newly-erected water corn-mill, with the appurtenances thereunto belonging, situate, lying, and being at Orford, in the county of Kent, then lately erected by the plaintiff; together with the two pair of mill-stones, and the several batting-mills, machines, gear-works, running-tackle, corn, and other bins; and all other machines that were in, or affixed to and about the said water corn-mill, or any part thereof; together also with a certain bran and counting-house in the said indenture particularly mentioned and described, and also a certain stable and wagon-lodge therein also particularly mentioned and described; together with the banks, barks, ponds, streams, watercourses, ways, easements, profits, commodities, emoluments, advantages, and appurtenances whatsoever to the said mill, stable, wagon-lodge, hereditaments, and premises belonging, or in any wise appertaining, or usually used or occupied therewith: to hold for fourteen years." The defendant covenanted

that he would keep the premises in repair; "and the said water corn-mill, stable, wagon-lodge, and other the premises thereby demised, being so well and substantially repaired, paved, scoured, glazed, cleansed, amended, and kept as aforesaid, should and would, at the expiration or other sooner determination of that demise, peaceably and quietly leave, surrender, and yield up unto the plaintiff, his heirs or assigns, together with all locks, bolts, bars, and other fixtures, fastenings, and improvements which then were, or which should or might at any time or times during the *continuance of that demise, be [*25 fixed, fastened, or set up in, upon, or about the premises, or any part thereof, in good plight and condition, reasonable use and wear only excepted."

The plaintiff, in his declaration, averred, that after the making of the said indenture, and during the term thereby granted, and whilst the defendant held, occupied, and enjoyed the said demised water corn-mill, and premises, with the appurtenances, as tenant thereof to the plaintiff, under and by virtue of the said indenture, to wit, on the 1st day of January, 1831, in the county aforesaid, the defendant removed one pair of the said stones, with the gear and machinery belonging thereto, which were in and upon the said mill at the time of making the said indenture, and during the said term placed and set up in and upon the said mill one pair of new mill-stones, with gear and machinery belonging thereto, in the place and stead of the said pair of old mill-stones, with gear and machinery; and the said one pair of new mill-stones, with the gear and machinery belonging thereto, remained so placed and set up in and upon the said mill, in the place and stead of the one pair of old mill-stones, with gear and machinery, at the end and expiration of the said term, to the great improvement of the said demised mill, with the appurtenances; and, by reason of the premises, the said one pair of new mill-stones, with the gear and machinery belonging thereto, became and were the property of the plaintiff as the landlord of the said demised mill and premises, and the person to whom the reversion of and in the said demised premises, with the appurtenances, expectant on the determination of the said term by the said indenture so granted, belonged, and so remained and continued until and at the time of the removal, carrying away, and conversion thereof thereafter mentioned: that the defendant, by the license and permission of the plaintiff, remained in *possession of the said demised mill and premises, with the appurtenances, for a [*26 short time after the expiration of the said term, to wit, until and upon the 13th of October, 1831, when he quitted the same; that during all that time, the plaintiff was, and still is, the owner of the said demised mill and premises, with the appurtenances; that the said one pair of new mill-stones, with the gear and machinery belonging thereto, remained placed and set up in and upon the said demised mill in the place and stead of the said one pair of old mill-stones, with gear and machinery, at the time of the expiration of the said term, and after the expiration thereof, until and at the time of committing the grievance thereafter next mentioned; yet the defendant, well knowing all and singular the premises, but contriving and wrongfully intending to injure and aggrieve the plaintiff, and to lessen and injure his estate and interest in the said premises, with the appurtenances, and to diminish the value of the said water corn-mill, and to deprive him of the benefit and advantage of the said one pair of new mill-stones, with the gear and machinery belonging thereto, after the expiration of the said term, and whilst he the defendant was in possession of the said demised water corn-mill and premises, with the appurtenances, by the license and permission of the plaintiff as aforesaid, to wit, on the 10th of October in the year last aforesaid, in the county aforesaid, wrongfully and injuriously, and without the license or consent, and against the will of the plaintiff, removed the said one pair of new mill-stones, with the gear and machinery belonging thereto, and restored and put back the said one pair of old mill-stones, with the gear and machinery thereof, and carried away the said one pair of new mill-stones, with the gear and machinery belonging

thereto, being of great value, to wit, the value of 60*l.*, from, out, and off the said water corn-mill, and converted and disposed thereof to his own use, where-
 *27] by *the said estate and interest of the plaintiff in the said mill and pre-
 mises was greatly injured, lessened, and reduced in value, to wit, at, &c.,
 and he the plaintiff wholly lost and was deprived of the said one pair of new
 mill-stones, and the gear and machinery belonging thereto.

At the trial before Tindal, C. J., it appeared that during his term the de-
 fendant had substituted two new French mill-stones, for two old ones, which
 he had found on the premises. The lower stone was rammed in and fixed with
 mortar; the upper revolved on its axis. When the defendant quitted the pre-
 mises at the end of about ten years, he took away these new stones, and left in
 their place those which he had found on entering. A witness stated that it
 was the general custom for the tenant to remove such stones.

The Chief Justice, however, being of opinion that the language of the cove-
 nant included the stones in question, a verdict was taken for the plaintiff, with
 leave for the defendant to move to set it aside.

Wilde, Serjt., obtained a rule nisi accordingly, citing *Naylor v. Colling*, 1
 Taunt. 19, where it was held, that a covenant by a tenant to yield up in repair,
 at the expiration of his lease, all buildings which should be erected during the
 term upon the demised premises, includes buildings erected and used by the
 tenant for the purpose of trade and manufacture, only when such buildings are
 let into the soil, or otherwise fixed to the freehold. In the present case the
 upper mill-stone, at least, was movable, and neither of them could be deemed
 a portion of the building demised.

Andrews, Serjt., showed cause. He contended that the stones being an es-
 *28] sential part of the mill, an *improvement of the stones was an improve-
 ment of the mill within the meaning of the covenant, and the rather, as
 the lessor would naturally desire to guard himself by contract against the
 custom of which evidence had been given at the trial.

Wilde. Looking at the demise, and the words which accompany the term
improvements in the covenant, it is to be inferred that by *improvements* in the
 mill, the parties meant improvements of the principal and solid structure, not
 improvements in utensils or machinery merely accessory to the principal struc-
 ture. If it applies to the stones, it must be held to apply to the strape, ropes,
 corn-bin, and all the other chattel gear, which are uniformly deemed the pro-
 perty of the tenant. Renovations of detached portions of the machinery are
 not improvements of the mill, which, after the renovations, remains as it was
 before.

TINDAL, C. J. The question is, what it was the intention of the parties to
 comprehend in the word *improvements*, and in particular whether they intended
 to include stones, such as those which have been put up and removed by the
 defendant. The words of the covenant are, "and the said water corn-mill,
 stable, wagon-lodge, and other the premises thereby demised, being so well
 and substantially repaired, paved, scoured, glazed, cleansed, amended, and kept
 as aforesaid, shall and will, at the expiration, or other sooner determination of
 this demise, peaceably and quietly leave, surrender, and yield up unto the
 plaintiff, his heirs or assigns, together with all locks, bolts, bars, and other fix-
 tures, fastenings, and *improvements* which now are, or which shall or may at
 any time during the continuance of this demise, be fixed, fastened, or set up,
 in, upon, or about the premises, or any part thereof, in good plight and condi-
 *29] tion, reasonable use and wear only excepted." *That *improvements* is a
 word large enough to cover alterations in the working part of the mill,
 appears from the words "fixed, fastened, or set up in or upon the demised pre-
 mises, or any part thereof." For, in looking to see what the premises are, we
 find them described as "*all that newly-erected water corn-mill, with the appur-
 tenances thereunto belonging, situate, lying and being at Orford, in the county
 of Kent, then lately erected by the plaintiff, together with the two pair of mill-*

stones, and the several bolting-mills, machines, gear-works, running-tackle, corn and other bins, and all other machines that were in or affixed to and about the said water corn-mill, or any part thereof; together, also, with a certain bran and counting-house." The word must mean, therefore, whatever was fixed to the premises. These stones had been fixed for ten years; the lower one rammed in, the upper, supported on its axis. And there are other words in the covenant which show that it is not confined to the structure or building alone: "In good plight and condition, reasonable use and wear only excepted." Now, "reasonable wear" is more likely to apply to machinery, which is the subject of wear, than to the more permanent parts of the premises. The evidence of the custom for tenants to remove stones of this kind, may account for the parties having resorted to such a covenant, to exclude any doubt on the question. It is to be observed, too, that this is the covenant of the defendant; and it is a universal rule, that a covenant must be taken most strongly against the party making it. When we see that in *Naylor v. Colling* a covenant to leave all buildings in repair was held to extend to buildings which by law the defendant was allowed to remove, why are we precluded from saying that this covenant also includes improvements which, but for the covenant, the tenant might have considered his own?

*PARK, J. This is purely a question as to the construction of the covenant; but *Naylor v. Colling* is a decision in favour of the plaintiff; [30 for the Court held there, that erections and buildings were within the covenant, although structures not let into the soil might be removed. But these stones were clearly a part, and an essential part of the mill, and if not an improvement, why were they put there? The exception of wear and tear seems particularly applicable to mill-stones, and makes it more clear that they were in the contemplation of the parties to the covenant.

GASELEE, J. I am of the same opinion. If the construction for which the defendant contends were to prevail, the lessee, after wearing out the lessor's mill-stones, might replace them with new ones, and after they had formed part of the mill for some years, remove them on quitting, leaving the landlord those which had been worn out in the tenant's service.

BORANQUET, J. I am of opinion that the plaintiff is entitled to retain the verdict, and that these stones constituted an improvement of the premises within the meaning of the covenant. That covenant contains an engagement, that the defendant shall repair the mill and other the premises thereby demised, and leave all fixtures and improvements fixed, fastened, and set up in and about the same. These mill-stones were improvements fixed and set up in the premises.

The tenant, perhaps, was not bound to substitute other stones for the landlord, but having substituted new ones for those which were unserviceable from wear and tear, he was bound under this covenant to leave them as improvements.

Rule discharged.

*SMITH v. SAINSBURY. May 31.

[31]

The Court refused to set aside an award, on the ground that the parties had been examined by consent, and that subsequently to the award the plaintiff had discovered that the defendant was a felon convict. It appeared, however, that the judgment of the arbitrator was formed independently of the defendant's testimony.

Jones, Serjt., had obtained a rule nisi to set aside the award of a barrister in this cause, on the ground that subsequently to the award, which was in favour of the defendant, it was discovered that the defendant had been sentenced to transportation for a felony, and had returned before his time was expired.

Both parties had, by consent, been examined before the arbitrator, and Jones averred that the plaintiff's counsel would not have consented to a reference on such terms if he had known of the defendant's conviction.

Wilde, Serjt., showed cause on affidavits, by which it appeared that the defendant had returned after a free pardon from the Governor of New South Wales; and that the arbitrator had formed his judgment altogether independently of the defendant's testimony. *Wilde* contended, that the defendant's competency was restored by the operation of 30 G. 3, c. 47, and 8 & 9 G. 4, c. 83. That after decision, objections to testimony were too late; and that, at all events, the objection here was immaterial, the arbitrator having formed his conclusion independently of the testimony of the defendant.

Jones. The objection is, that the plaintiff would never have consented to a reference had he been aware of the defendant's conviction.

TINDAL, C. J. If the testimony of the defendant had been the evidence on which the arbitrator proceeded, it might have been,—I do not say it would have been,—a ground for entertaining this motion; but, upon the *affidavits it appears explicitly, that the judgment of the arbitrator was wholly independent of the defendant's testimony. Before a jury it is very important to exclude all testimony which is not properly admissible; because a jury is not conversant with the details of evidence, or capable of discriminating very accurately between that which ought, and that which ought not to prevail on their judgment: but, an arbitrator practised in the law, has no difficulty in excluding from his judgment, statements which ought to be without effect; and as the affidavits leave no doubt that, in this case, the arbitrator abstained from giving any effect to the defendant's testimony, the rule must be discharged.

The rest of the Court concurred, and the rule was therefore Discharged.

STEPHENS v. LOWE.

Same v. STRICK. May 31.

A bond conditioned for the assessment of and arbitration on the damages occasioned by the obligor's working a mine, every two months:
Held to be imperative, and not merely directory, as to the periods of arbitration.

DEBT on an arbitration bond, dated the 30th of November, 1830, the condition of which was, that the defendants should "perform, fulfil, and keep the award, order, arbitrament, final end and determination of Joseph Malachy therein described, named, selected, and chosen, as well by and on the part and behalf of the defendant and the said Joseph Strick, as of the plaintiff, to arbitrate, award, judge, and determine, as well the amount of damages already or hereafter to be sustained by the plaintiff, her heirs, executors, administrators, *33] or *assigns, for or by reason of certain adits, levels, water-courses, engines, and other erections, then already or to be thereafter cut, made, and raised in, through, upon, and within the limits of a certain set or license for mining in and through a certain tenement of her, the plaintiff, situate and being in the parish of Calstock therein mentioned; so that the said J. Malachy did make his award in writing as to all such damages therein mentioned, and compensation to be afterwards made, on or before the 20th day of December then next: and as to all damages to be thereafter sustained and compensation to be thenceforth made, at the expiration of every two months from the said 20th day of December."

Averment, that Malachy, at the end of the second two months, from the 20th of December, 1830, to wit, on the 13th of July, 1830, made an award touching the premises, and ordered the defendant to pay the plaintiff 24*l.* for

damage occasioned by working the mine. Breach, non-payment. There was also a count for money due on an award, and on an account stated. Pleas, *non est factum*; *nil debet*; that Malachy did not make his award at the expiration of the second two months from the 20th of December, 1830; that he did not make any award; or not till after an unreasonable time.

At the trial before Tindal, C. J., Middlesex sittings after Hilary term, it appeared that the defendants, in this and the other action, were, some time previous and up to the entering into the submission for the award in question, jointly interested in a mine, in the working of which they had committed, and would continue to commit damages to the plaintiff's property. In order to ascertain the damages resulting therefrom, the defendants, by their joint and several bond to the plaintiff of the 30th of November, 1830, submitted those damages to arbitration, with the condition that the arbitrator should make successive awards at the expiration of every two months from the 20th of December, 1830. The arbitrator made his first award within the time; ^[34] but the second award, upon which the plaintiff sought to recover, was not made until the 13th of July, 1831, instead of the 20th of April in that year, and, consequently, not within the time limited by the bond. It also included damages incurred subsequently to the 20th of April. The delay was occasioned by the request of the defendants, who objected to the expenses attending such frequent awards as would take place, if the bond were strictly complied with by making them at the end of every two months.

Both the plaintiff's attorney, the defendant Strick, and Mrs. Lowe's agent, attended the arbitrator during the making of the award, survey, and assessment in question. On the arbitration bond they signed a document, which was as follows:

"*Wheal Williams Mine*, April 26th, 1830. The parties within named, by themselves or their agents, have met this day by consent, on the second assessment or award.

"J. MALACHY, Arbitrator.

JAS. HUSBAND, for Mrs. Stephens.

J. VIVIAN, }

JOS. STRICK, } for Mrs. Lowe and Mr. Strick."

This memorandum was not stamped.

On the part of the defendant it was objected, that the award was not made within the time prescribed by the condition of the bond, and that the memorandum being unstamped, could not assist the plaintiff; whereupon she was nonsuited, with leave to move to enter a verdict for 24l.

A rule nisi having been obtained accordingly,

Wilde, Serjt., showed cause, urging the objection relied on at the trial.

**Jones*, Serjt., in support of the rule. The award pursues the submission, ^[35] which is only directory, not imperative, as to the period of two months: that period is obviously named to spare the plaintiff the inconvenience of more frequent arbitrations; and it would have been impossible to examine the evidence and make the award at the precise moment when each two months expired.

At all events, after attending the arbitrator, the parties are estopped to make the objection. *Lawrence v. Hodgson*, 1 Young & Jer. 16; *Matson v. Trower*, 1 Ry. & M. 17; *Wharton v. King*, 2 M. & M. 96; *Leggett v. Finlay*, 6 Bingh. 255.

And the memorandum does not require a stamp, for it is not an agreement constituting a new submission, but a mere attestation of the fact of attendance.

TINDAL, C. J. The first question is, whether this award can be sustained under the terms of the submission bond. The condition of the bond is, that the parties shall abide by the award of the arbitrator on the premises, so that the arbitrator make his award as to all damages to be thereafter sustained, and compensation to be thenceforth made, at the expiration of every two months from the 20th of December.

It has been urged that this condition is merely directory, and being for the benefit of the plaintiff, he is at liberty to waive it: but it is equally a condition for the benefit of the defendants, for it was important to them that the periodical assessment of damages should be made as soon as possible after the alleged injury, in order that they might be secure of evidence to show the real state of the facts: and as to the supposed difficulty of making the award at the precise *36] moment each two months should expire, in this as in other cases a *reasonable time must be allowed for the duty to be performed, and what shall be a reasonable time must depend on the facts of the case and the judgment of the court. Though it is not always easy to say what is a reasonable time, it is easy, as in the present instance, to say what is unreasonable; for where the party has allowed a third month to elapse without requiring an assessment, and has included in the award damages incurred subsequently to the second month, that is a proceeding not within the condition of the bond, and, therefore, as to the bond, entirely void. That brings us to the second question, whether the award can be supported under any parol authority. Now the endorsement on the bond is, in effect, a written agreement substituting one time for another: "The parties within named, by themselves or their agents, have met this day by consent on the second assessment or award;" that is, the parties in the bond; and the assessment, that which was to have taken place every two months. What is this but an agreement to substitute *July for April*? At all events it is evidence of an agreement to that effect, and the words of the stamp act are wide enough to comprehend such an instrument. "Agreement, or any minute of memorandum of an agreement, whether the same shall be only evidence of a contract, or obligatory on the parties from its being a written instrument." (55 G. 3, c. 184.) Then, the instrument not being stamped, the plaintiff is out of court.

PARK, GASELEE, and BOSANQUET, Js., concurred.

Rule discharged.

*37] * (IN THE EXCHEQUER CHAMBER.)

GURNEY *v.* GORDON and Another. June 2.

(In Error.)

An action for costs, incurred in opposing a petition against the return of a member of parliament, may be brought against one of several petitioners, under 9 G. 4, c. 22.

DEBT.—The plaintiffs below declared that the defendant below (Gurney) was indebted to the plaintiffs under and by virtue of a certain act of parliament made and passed in the ninth year of the reign of his late Majesty George IV., to consolidate and amend the laws relating to the trial of controverted elections or return of members to serve in parliament, in the sum of 1260*l.* 10*s.* 8*d.* for the costs and expenses incurred by the plaintiffs in opposing the petition of the said defendant and one Charles King, Esq., complaining of an undue election and return for the borough of Tregony, and to be paid by the said defendant to the plaintiffs, when he, the defendant, should be thereunto afterwards requested; whereby, and by reason of the said last-mentioned sum of money being and remaining wholly unpaid and by virtue of the said act, an action had accrued to the said plaintiffs to demand and have of and from the said defendant the sum of 1260*l.* 10*s.* 8*d.*, parcel of the sum demanded. Counts for money paid, money lent, money had and received by defendant below to the use of plaintiff below, and upon an account stated. Judgment upon *nil dicit*, with a remittitur *damna* except as to 1260*l.* 10*s.* 8*d.*

By the fifty-seventh, sixtieth, and sixty-third sections of the statute referred to in the declaration (9 G. 4, c. 22), it is enacted, "That whenever any com-

mittee *appointed to consider the merits of any petition complaining of an undue election or return, or of the omission to return any member or members to parliament, shall report to the house with respect to any such petition (except as is hereinbefore excepted), that the same appeared to them to be frivolous or vexatious, the party or parties, if any, who shall have appeared before the committee in opposition to such petition, shall be entitled to recover from the person or persons, or any of them, who shall have signed such petition, the full costs and expenses which such party or parties shall have incurred in opposing the same, which costs and expenses shall be ascertained in the manner hereinafter directed." (Section 60.) "The costs and expenses of prosecuting or opposing any petition presented under the provisions of this act, and the costs, expenses, and fees which shall be due and payable to any witness summoned to attend before such committee, or to any clerk or officer of the House of Commons, upon the trial of any such petition, shall be ascertained in manner following: that is to say, on application made to the speaker of the House of Commons within three months after the determination of the merits of such petition, by any such petitioner, party, witness, or officer, as before mentioned, for ascertaining such costs, expenses, or fees, the speaker shall direct the same to be taxed by two persons, of whom the clerk, or one of the clerks assistant of the House shall always be one, and one of the following officers, not being a member of the House, shall be the other; that is to say, Masters in the High Court of Chancery, clerks in the Court of King's Bench, prothonotaries in the Court of Common Pleas, and clerks in the Court of Exchequer; and the persons so authorized and directed to tax such costs, expenses, and fees shall and they are hereby required to examine *the same, and to report the amount thereof, together with the party liable to pay the same, to the speaker of the said house, who shall upon application made to him, deliver to the party or parties a certificate signed by himself, expressing the amount of the costs, expenses, and fees allowed in such report, together with the name of the party liable to pay the same; and such certificate, so signed by the speaker, shall be conclusive evidence of the amount of such demands, in all cases and for all purposes whatsoever; and the witness, officer, or party claiming under the same shall, upon payment thereof, give a receipt at the foot of such certificate, which shall be a sufficient discharge for the same." (Section 63.) "It shall and may be lawful for the party or parties entitled to such costs and expenses, or for his, her, or their executors or administrators, to demand the whole amount thereof, so certified as above, from any one or more of the persons respectively who are hereinbefore made liable to the payment thereof in the several cases hereinbefore mentioned; and in case of non-payment thereof, to recover the same by action of debt in any of his majesty's courts of record at Westminster; in which action it shall be sufficient for the plaintiff or plaintiffs to declare that the defendant or defendants is or are indebted to him or them in the sum to which the costs and expenses, ascertained in manner aforesaid, shall amount by virtue of this act; and the certificate of such amount, so signed as aforesaid by the speaker, shall have the force and effect of a warrant to confess judgment; and the Court in which such action shall be commenced shall, upon motion, and on the production of such certificate, enter up judgment in favour of the plaintiff or plaintiffs named in such certificate for the sum specified therein to be due from the defendant or defendants in such action, in like manner *as if the said defendant or defendants had signed a warrant to confess judgment in the said action to that amount."

Archbold, for the defendant below, contended that as it appeared on the record the petition had been instituted by Charles King as well as by the defendant below, the action should have been brought against them jointly, and not against Gurney alone: that Gurney being compelled by the statute to suffer judgment by default, had no opportunity of taking this objection except on error.

Sed per Curiam. By the fifty-seventh section the party who shall have appeared before the committee in opposition to the petition is entitled to recover from the person or persons, or any of them, who shall have signed the petition, the full costs and expenses incurred in opposing the same; and by the sixty-third, to demand the whole amount thereof from any one or more of the persons liable. It is impossible to doubt that the plaintiff may, if he chooses, confine his suit to one.

Judgment affirmed.

*41] *DOE dem. JOSEPH MANTON v. AUSTIN and PLOMER. June 5.

The acts of occupiers during their occupation are, even after their occupation has ceased, evidence against the parties under whom such occupiers came into possession.

THE lessor of the plaintiff sued as the administrator of David Betson, surviving trustee under the will of John Aitkens.

Aitkens, who died in 1794, bequeathed to Betson and another, as trustees for his daughters, certain leasehold premises which he held by indenture from Mark Bell for a term of sixty-six years, commencing in November, 1773.

By a codicil to his will, Aitkens, after reciting the above bequest, and that he had in March, 1793, mortgaged the premises to John Veysey for 500*l.*, directed that in case the 500*l.* should remain charged upon the premises at the time of his death, the trustees under his will, who were also his executors, should immediately pay off the mortgage out of any other property that should come to their hands, it being his intention that the premises should continue vested in the trustees in trust for his daughters.

In 1807 the trustees underlet the premises to Catharine Fairfield for a term which expired at Christmas, 1826. Mrs. Fairfield, some time before the expiration of her underlease, assigned it to Thrupp; and Thrupp, at the expiration of the underlease, 25th of December, 1826, delivered the possession of the premises to the defendant Plomer, who put in an occupier, and with Austin, now defended as landlord.

At the trial before Park, J., the lessor of the plaintiff produced the probate of Aitkens's will, stamped with a heavy probate duty; proved Aitkens's possession of the property in question; his death; the death of the trustees *42] *named in his will; and the administration to the effects of the survivor: next, he put in the counterpart of the lease from Bell to Aitkens, the defendants, after notice, having failed to produce the original lease, which was in their possession. Then Thrupp, who appeared to be in the interest of the defendants, and failed upon a *subpoena duces tecum* to produce the under-lease assigned to him by Mrs. Fairfield, after prevaricating as to the existence or destruction of that instrument, was allowed to state that he had paid rent for the premises to the lessor of the plaintiff upon an under-lease assigned to him by Mrs. Fairfield, which expired at Christmas, 1826, till within about six months before its expiration; and that on the 9th of December, 1826, he refused to pay the lessor of the plaintiff the rent due at the preceding Michaelmas, referring him to the defendant Plomer for the reason. Mrs. Fairfield proved her own occupation under the demise from Betson and his cotrustee; payment of rent to Betson, and after his death to the lessor of the plaintiff; and the sale of the underlease to Thrupp. Betson had received the rent from 1794.

On the part of the defendant it was objected,

First, that the original lease from Bell to Aitkens ought to have been produced, or that the lessor of the plaintiff should have shown what had become of it before he produced the counterpart;

Secondly, that the lessor of the plaintiff should have shown that the mortgage mentioned in the codicil to Aitkens's will was paid off;

Thirdly, that the under-lease from Betson and his cotrustee to Mrs. Fairfield ought to have been produced; and,

Fourthly, that Mrs. Fairfield and Thrupp being no longer in possession under the demise from Betson and his cotrustee when Plomer entered the premises, their *acts and declarations ought not to be taken as evidence against the [43 defendants.

A verdict, however, was given for the plaintiff, which *Taddy*, Serjt., obtained a rule nisi to set aside on the above objections.

Wilde and *Bompas*, Serjts., showed cause. From the language of the codicil to Aitkens's will, and the length of time which has elapsed, coupled with the fact that Aitkens's devisees have been in the receipt of rent from 1794 to 1826, it may be presumed that the mortgage has been paid off. And if the defendants take under Thrupp, they, as well as Thrupp, are estopped to say that the lessor of the plaintiff, whom Thrupp by payment of rent has acknowledged to be his landlord, has not a good title, either in respect of the mortgage or the non-production of the original lease from Bell. But the defendants take under Thrupp or nobody; and Thrupp having disclaimed the lessor of the plaintiff as his landlord on the 9th of December, 1826, before the expiration of the lease under which he had paid rent to the lessor of the plaintiff, the case cannot be distinguished from *Doe d. Knight v. Lady Smythe*, 4 M. & S. 347, where it was held that a third person could not defend as landlord upon the trial of an ejectment if it appeared that the tenant in possession came in as tenant to the lessor of the plaintiff, paid rent to him, and then disclaimed, although the term for which he came in had expired before the ejectment. The lease under which Thrupp occupied having expired, it may be presumed to have been destroyed, and secondary evidence of its contents was admissible after Thrupp's testimony on his *subpoena duces tecum*.

**Taddy*, and *Andrews*, Serjt., with him, endeavoured to distinguish the [44 present case from *Doe d. Knight v. Smythe*, and contended that, at all events, the principle of that case ought not to extend to the acts of tenants who had been so long out of possession as Thrupp and Fairfield; otherwise there was no limit to the effect of such acts short of twenty years; a decision which would be productive of great inconvenience and confusion.

And Thrupp's testimony should not have been received without proof of further inquiry for the expired underlease. At all events, it appearing on the evidence produced by the lessor of the plaintiff himself that the legal title to the premises was in Veysey under the mortgage, it should have been shown that that mortgage had been paid off; for the objection is not here made by a tenant or one claiming under him, to the title of his landlord; but is disclosed by the landlord himself, who fails therefore to show a title on which he can recover.

TINDAL, C. J. I think this rule ought to be discharged. It is not necessary for us to decide whether the lease from Bell to Aitkens ought to have been produced, for it appears that rent has been paid by a succession of tenants, under whom the defendants claim, to the personal representative of Aitkens's devisee, who could only claim in respect of a leasehold interest; and with respect to the mortgage disclosed in the codicil to Aitkens's will, such evidence, on whichever side produced, is open to the same degree of consideration with respect to its concomitant circumstances, such as the presumptions arising from lapse of time or otherwise. Here the codicil itself contains express directions that the mortgage shall be called in; a large stamp appears on the probate; and none but the *representatives of the testator have interfered with the [45 property since 1793. I admit that these circumstances are not conclusive; but unanswered by any evidence of a mortgage now in existence, they afford a strong presumption that the money has been paid, particularly against the defendants who claim under a lease granted by the devisees of the mortgagor. Then, as to the admission of Thrupp's testimony, the lease under which he

occupied having expired may fairly be presumed to have been destroyed; at all events, upon his failing to produce it upon a *subpoena duces tecum*, and prevaricating with respect to its existence, the learned Judge was warranted in letting in the secondary evidence. That brings us to the main question, whether the defendants who come in under Thrupp can be permitted to dispute the title of his lessor. The principle is that a tenant shall not contest his landlord's title; on the contrary, it is his duty to defend it. If he objects to such title, let him go out of possession. But it is urged that Thrupp's admissions were made six years ago, and it is asked, how far back are such admissions to be evidence against a subsequent claimant? I answer, as far back as the tenant has admitted himself to be in under the landlord who comes forward to assert his title.

I think, therefore, that the defendants are bound by the acts of Thrupp, and that this rule must be discharged.

GASELEE and ALDERSON, J^s., expressed a similar opinion, and PARK, J., referred to the language of Dampier, J., in *Doe d. Knight v. Smythe*, as conclusive on the point,—“The tenant in possession paid rent to the lessor, and then disclaimed. But he ought to give back the possession to the lessor, and after that the defendant may have her ejectionment. It has been ruled after that *46] neither the tenant, nor any one claiming by him, can controvert the landlord's title. He cannot put another person in possession, but must deliver up the premises to his own landlord. This, I believe, has been the rule for the last twenty-five years, and I remember was so laid down by Buller, J., upon the Western circuit.” Rule discharged.

GARLICK, Assignee of LEE, a Bankrupt, *v.* SANGSTER and Another.
June 6.

An insolvent's petition is said to be *filed* when it reaches its place of final custody, and not when it first comes to the hands of the officer of the court.

ASSUMPSIT for money had and received by defendants to plaintiff's use. At the trial before Littledale, J., York Spring assizes, 1831, a verdict was found for the plaintiff, subject to the opinion of the Court, on the following case:—

The plaintiff was the assignee of the estate and effects of William Thompson Lee, a bankrupt: the defendants were creditors of the said bankrupt, and had received from him a warrant of attorney, dated the 7th of October, 1829. Judgment was afterwards entered up, and execution sued out on the same. The sheriff levied on the 13th of October, 1829; the sale of the property was begun on the 26th of October; and continued on the 27th, 28th, and 29th of October. The officer sold on the 26th of October to the amount of 180*l.* 1*s.* 11*d.*; on the 27th of October, to the amount of 394*l.* 7*s.* 8*d.*; and on the 28th of October, to the amount of 415*l.* 3*s.* 9*d.* He paid out of the proceeds 26*l.* for king's taxes, without authority from the defendants; and on the 26th of October gave the defendants a check, dated that day, for 180*l.*; a check on *47] and dated the 27th of October, for 300*l.*; a check on and dated the 28th of October, for 150*l.*; a check on and dated the 29th of October, for 359*l.*; and, on the same day, paid to the defendants 40*l.* in cash.

The sales began each day at eleven, and finished at half-past two. The first three days' sales amounted to 989*l.* 13*s.* 4*d.*, and on the morning of the 29th, the sheriff had only to sell 31*l.* to complete the amount of levy. By twelve or half-past twelve o'clock in the forenoon, the sheriff had sold about 35*l.*, and by one o'clock 150*l.*

The checks dated the 26th, 27th, and 28th of October, were not presented

or paid till the 31st of October, and the check dated the 29th of October was not presented or paid till the 3d of November, but all were duly honoured. The officer had not funds in the bankers' hands till the 30th of October. Goods were sold on the 26th and 27th of October to the amount of 100*l.* on credit, and were not paid for till after the sale was closed.

The trading, act of bankruptcy, and petitioning creditor's debt were proved. The commission was dated the 24th of November, 1829. The act of bankruptcy was a petition by the bankrupt to the insolvent court for his discharge; it was dated the 28th of October, 1829, but was not signed by the bankrupt till after four o'clock in the afternoon of that day. An assignment of his property to the provisional assignee of the insolvent court was executed in prison at the same time. After signing the petition, the bankrupt had nothing more to do with it, and it remained in the custody of the officer of the insolvent court. Mr. Dance, the officer, took the petition and assignment away with him, and brought it into the office the next day, the 29th, about two o'clock in the afternoon; and, in answer to the question, When was *the petition filed? said, he could not answer the question, but would state the practice^[*48] of the Court. That after it is signed, it is carried to the public office in Lincoln's Inn Fields, attested, numbered, and handed to the officer of the town department, with whom it remains. That, in this case, he did not return to the office on the 28th of October, after the petition was signed; and, in consequence of the number of petitions, and the business occasioned thereby, he did not get to the office the following day before two o'clock, and could not, in consequence of the numerous petitions, have numbered and attested it before the 30th of October, when it was handed to the officer of the town department, with whom it has remained since. The bankrupt was never discharged under the insolvent debtors' act.

The case was argued on several grounds, but the decision of the Court turns entirely upon the time of filing the petition; as to which

Spankie, Serjt., for the plaintiff, contended that the creditor having by the act of signing the petition done all that the statute requires on his part, it must be taken to be filed when he has delivered it, so signed, into the hands of the officer of the Court. In that sense, therefore, the petition was filed on the 28th, prior to the completion of the execution on which the defendant relies. Attestation is not necessary to the validity of such an instrument; Com. Dig. *Faits*; and the duty of the officer of the court to place it in a proper custody is independent of the act required by the legislature on the part of the creditor, namely, placing the petition duly signed in the hands of the officer. From the decision in *Rex v. Wade*, 1 B. & Adol. 861, it may be inferred that the rules of a friendly *society are filed within the meaning^[*49] of 33 G. 3, c. 54, when they are placed in the hands of the clerk of the peace.

Wilde, Serjt., *contrâ*. The petition is not filed till it has reached a place of legal custody where it may be accessible to public search. As far as the discharge of the creditor's duty is concerned, it may indeed be deemed to be filed when placed in the hands of the officer; but to defeat the rights of others, it is not filed till by being placed in a permanent custody it becomes a record of which the public has notice; as, of the *issuing* of a commission by its passing the great seal. *Ex parte Freeman*, 1 V. & Beames, 34, *Watkins v. Maund*, 3 Campb. 308. In *Rex v. Wade* the question as to *filing* was not decided.

TINDAL, C. J. It is unnecessary to give an opinion on much that has been urged in argument. On the construction which I put on the act of parliament, the act of bankruptcy was not complete till the 29th of October at two o'clock, when Dance took the proceedings to the office where they were to be filed; but the sale under the execution was complete by twelve o'clock on that day. The words in section 13 of the act are, "That the filing of the petition of every person in actual custody, who shall be subject to the laws concerning bankrupts,

and who shall apply by petition to the said Court for his or her discharge from custody, according to this act, shall be accounted and adjudged an act of bankruptcy from the time of filing such petition." And it is urged that the instrument was virtually filed as soon as Dance had it in his possession. But it is manifest, on this case, that Dance was not the person in whose custody it was *50] to remain, for *after such an instrument is signed Dance says, it is carried to the public office in Lincoln's Inn Fields, attested, numbered, and handed to the officer of the town department, with whom it remains. So that he does not consider it filed till it is carried to the office and delivered there. The case of *Rex v. Wade* has been referred to. All that the Court says in that case is, that in the construction of 33 G. 3, c. 54, "filing must be understood to mean depositing for the purpose of being filed, the society doing all that is incumbent on them;" but the instrument here cannot be said to be filed until it arrives at its destination.

PARK, J. *Filing* means putting in the proper place of deposit, and Dance was not the officer with whom this instrument was to have been deposited. So when affidavits are filed at a Judge's chambers, the placing them in the hands of the clerk does not complete the deposit in the place of legal custody, and till they arrive there they are not filed.

GASELEE, J. Two o'clock on the 29th is the earliest time at which this instrument can be said to have been filed, and that renders it unnecessary to give an opinion on any other point in the case.

BOSANQUET, J. I am of the same opinion. The sheriff had completed his levy by twelve o'clock on the 29th, and the question is, whether the act of bankruptcy was before or after that time, for when the amount of the debt has been levied, the debtor is discharged. The 7 G. 4, c. 57, s. 10, directs, "That it shall be lawful for any person who shall be in actual custody, to apply by petition in a summary way to the said Court, for his or her discharge from *51] such custody, according to the provisions of this act. And such *prisoner shall in such petition pray to be discharged from custody, and to have future liberty of his or her person against the demands for which such prisoner shall be then in custody, and against the demands of all other persons who shall be or claim to be creditors of such prisoner at the time of presenting such petition; which petition shall be subscribed by the said prisoner, and shall be forthwith filed in the said Court." Having, therefore, so directed that the petition shall be subscribed, it directs, in section 13, that the filing shall be an act of bankruptcy. But it cannot be considered that filing and subscribing are the same thing. The provisional assignee goes to the prison to obtain the signature of the insolvent, but he is not to have the custody of the instrument, which cannot be said to be filed till it becomes a record of the Court. As that did not take place till after the sale under the execution, our judgment must be for the defendant. Judgment for defendant.

RICHARDSON v. TOMKIES and Another. June 6.

1. To a cognizance for the arrears of an annuity, the plaintiff pleaded that a memorial of all the deeds, &c., by which the annuity was granted, the names of the witnesses, the consideration, &c., was not enrolled in the Court of Chancery: the defendants replied, that a memorial of all the deeds, &c., the names of the witnesses, the consideration, &c., was enrolled; and after setting out the memorial at length, concluded with a *prout patet per recordum*, and verification thereon: Held sufficient, on demurrer alleging that the conclusion should have been to the country.
2. A judgment on a warrant of attorney being one of the securities, and the judgment being referred to, as entered up, Held, that it need not be set forth in the memorial.

In *replevin*, the defendants, as bailiffs, made cognizance for the arrears of an annuity of 120*l.* due to the personal representative of Isaac Blackburne, under
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a deed *executed by James Akers, April 5th, 1808; by which [after reciting the contract for the annuity; that Akers had given a bond, [*52 bearing date January 5th, 1808, in the penal sum of 2000*l.*, conditioned for the payment of the annuity; and had executed a warrant of attorney, of even date with the bond, to confess judgment for 2000*l.*, under which warrant judgment had been entered up of record against Akers, of Hilary term, 1808; that Blackburne had sold and transferred 1900*l.* 19*s.* 9*d.*; 3 per cent. reduced annuities at the Bank of England; that such sale had produced the clear sum of 1200*l.*; and that it had been agreed, the annuity should be secured not only by the bond, warrant of attorney, and judgment, but also by an assignment of the premises, in which, &c., and issuing and payable thereout, and of the rents and profits thereof], it was witnessed, that in consideration of 1200*l.* then paid, and in performance of the above contract, Akers had granted, bargained, and sold to Blackburne, his executors and assigns, an annuity of 120*l.* charged upon the premises, in which, &c., with power of distress.

The plaintiff pleaded, 1st, *non est factum*; 2dly, that no memorial of the said supposed indenture in the said cognizance lastly mentioned, containing the names of all the witnesses, and the names of the persons for whose lives the said supposed annuity was granted, and the consideration of granting the same, was enrolled in the High Court of Chancery within twenty days of the execution of the said last-mentioned indenture. 3dly, that a memorial of every deed, bond, instrument and assurance, whereby the said supposed annuity or rent-charge was granted, within twenty days after the execution thereof, was not enrolled in the High Court of Chancery, according to the provisions of the act of parliament made and passed in the seventeenth year of George III.

*The defendants joined issue as to the first plea; and to the second replied, [*53 that a memorial of the said indenture was within twenty days of the execution thereof, to wit, on the 18th of April, 1808, duly enrolled in the High Court of Chancery, in pursuance of the statute in that case made and provided: and which said memorial was as follows,—(Setting out the deed at length, with its recitals of the bond, warrant of attorney, and judgment, and the names and address of the witnesses,)—as by the said memorial remaining duly enrolled in the said High Court of Chancery at Westminster, more fully appeared. And the defendants further said, that the said memorial did duly contain the names of all the persons for whose lives the said annuity was granted, and the considerations of granting the same, in manner and form as in and by the statute in that case made and provided, was required, as by the said enrolment of the said memorial, remaining of record in the said High Court of Chancery at Westminster aforesaid, more fully appeared: and this they, the said defendants, were ready to verify by the said record.

To the third plea they replied, that a memorial of every deed, bond, instrument, and assurance, whereby the said annuity or rent-charge, mentioned in the indenture in the said cognizance lastly mentioned, was granted, within twenty days of the execution thereof, to wit, a memorial of the said writing obligatory and warrant of attorney in the said last-mentioned indenture mentioned, was, to wit, on the 13th of April, 1808, duly enrolled in the High Court of Chancery, in pursuance of the statute in that case made and provided; which said enrolment was as follows,—(Setting out the bond and warrant of attorney at length,)—as by the said memorial remaining duly enrolled in the said High *Court of Chancery at Westminster aforesaid, more fully appeared. And [*54 the defendants further said, that the said memorial did duly contain the month and year when the said writing obligatory and warrant of attorney in the said cognizance mentioned bore date, and the names of all the parties, and for whom any of them were trustees, and of all the witnesses; and did truly set forth the annual sum or sums to be paid, and the name of the person and persons for whose life or lives the said annuity was granted, and the consideration and considerations of granting the same, in manner and form as in and by

the statutes in that case made and provided is required; as by the said enrolment of the said last-mentioned memorial remaining of record in the said Court of Chancery at Westminster more fully appeared: That a memorial of the indenture last-mentioned in the cognizance was, within twenty days of the execution thereof, to wit, on the 13th of April, 1808, duly enrolled in the High Court of Chancery, in pursuance of the statute in that case made and provided; and which said memorial was as follows—(Setting out the indenture of the 5th of April, with the names and address of the witnesses, as before,)—as by the said last-mentioned memorial, which was enrolled in the High Court of Chancery, would, when produced, appear: And that the said last-mentioned memorial did duly contain the day of the month and year when the said last-mentioned indenture in the said cognizance mentioned, was executed, and the names of all the parties, and for whom any of them were trustees, and of all the witnesses; and did duly set forth the annual sum to be paid, and the name of the person and persons for whose life or lives the said annuity was granted, and the consideration and considerations of granting the same, in manner and form as in and by the statute in that case made and provided is required: as by the said *55] enrolment remaining of record in said Court of Chancery at Westminster more fully appeared; and this, &c.

The plaintiff demurred to the replications to the second and third pleas assigning for cause, that the said replications concluded with a verification by the statute to be tried in such manner as the Court should direct, whereas divers matters of the said replications were properly matter of fact triable by a jury, and not matter of record; that is to say, whether or not the names of all the parties, and for whom any of them were trustees, and of all the witnesses, were truly stated in the supposed memorials mentioned in those replications; and whether the said supposed memorials did truly set forth the annual sum to be paid, and the name of the person or persons for whose life or lives the said annuity was granted, and the considerations for granting the same; and, therefore, the plaintiff could not take an issue on any of those facts to be tried by the country, &c. Joinder.

Wilde, Serjt., in support of the demurrer. The pleas ought to have concluded to the country; for the object of the legislature was, that all the deeds relating to an annuity should be enrolled; *Crowther v. Wentworth*, 6 B. & C. 366; *Cummins v. Isaac*, 8 T. R. 183; *Steadman v. Purchase*, 6 T. R. 737; *Harris v. Stapleton*, 7 T. R. 205; *Ex parte Ansell*, 1 B. & P. 62: and whether *all* have been enrolled, is a matter of fact to be tried by the country. But the memorial, as set out, is ill; for it discloses that one of the securities, the judgment, was not enrolled; and it appears that, in January, 1808, the consideration for the annuity was not the same as in April, 1808; for, in January, it was a bond and warrant of attorney; in April, a judgment instead of the *56] warrant: so that the second consideration set forth is inconsistent with the first, and the first was not enrolled within the twenty days required by the statute.

Merewether, Serjt., *contra*, was stopped by the Court.

TINDAL, C. J. The first question arises on a point of form. The plaintiff, by one of his pleas in bar, alleges, "that no memorial of the indenture in the cognizance mentioned, containing the names of witnesses, the consideration, &c., was, within twenty days, enrolled in the Court of Chancery." In answer, the defendants set out the memorial, and begin their replication by saying "that a memorial of the indenture was, within twenty days, enrolled in the Court of Chancery in pursuance of the statute in that case made and provided; and which said memorial is as follows:"—If they had relied on a mere denial of the allegation in the plea, it would not have been sufficient: they were bound to set out the memorial: and at the end they add,—“As by the said enrolment of the said memorial remaining of record in the said High Court of Chancery more fully appears; and this they are ready to verify by the said record.” It

has been objected that they ought not to have concluded to the record; but we think there is no valid objection to the form they have pursued. Suppose in an action of *assumpsit* a plea of judgment recovered for the same cause action, with the usual conclusion,—“as by the record and proceedings thereof, still remaining in the said court, more fully and at large appears;” the plaintiff may waive the issue on the record, and reply, that the judgment was not recovered for the identical cause of action; or, if that appears, demur. In *Hitchin v. Campbell*, 2 W. Bl. 779; 3 Wils. 240, it was held, on demurrer, that a judgment *for the defendant in trover was not pleadable in bar to an action^[*57] for the value of the same goods, it not appearing that the question was the same.

The second objection is, that the statute of 17 G. 3, c. 26, has not been complied with; and that the memorial does not state the real nature of the transaction, inasmuch as there is a difference between the consideration and security disclosed by the deed of January, 1808, and that disclosed by the deed of April. Now, the statute enacts, that “every such memorial shall contain the day of the month and the year when the deed, bond, instrument, or other assurance bears date, and the names of all the parties, and for whom any of them are trustees, and of all the witnesses:” so that a party is not called on to show the whole of the transaction, but to enrol every instrument regarding it: and the objection is answered by the case of *Buckeridge v. Flight*, 6 B. & C. 49, where it was held, that if the names of all the witnesses to a deed be inserted in a memorial, that is sufficient, without specifying the parties by whom the deed was executed in their presence: and *Abbott, C. J.*, said, “It is not required that there should be a memorial of the transaction, but of the instrument whereby the annuity is granted and secured.”

That brings us to the third objection, that there is no memorial of the judgment. Does the act require that? “A memorial of every deed, bond, instrument, or other assurance, whereby any annuity or rent charge shall, from and after the passing this act, be granted for one or more life or lives, or for any term of years, or greater estate, determinable on one or more life or lives, shall, within twenty days of the execution of such deed, bond, instrument, or other assurance, be enrolled in the High Court of Chancery; and every such *memorial shall contain the day of the month and the year when the^[*58] deed, bond, instrument, or other assurance bears date, and the name of the parties, and for whom any of them are trustees, and of all the witnesses:” words which evidently point to securities *inter partes*. A judgment, too, being matter of record, does not require those precautions against secrecy which the legislature has provided for transactions attended with less notoriety: and, in the form of memorial given by the statute, the word judgment does not appear. The memorial, however, in the present case recites, that judgment has been entered up; and if it be necessary to include the judgment in the memorial, it may be a question, whether it is not sufficiently done by such a reference. In *Ranger v. Earl of Chesterfield*, 5 M. & S. 2, it was held, that if a bond and warrant of attorney and indenture be made to secure an annuity, the memorial of the bond and warrant of attorney need not express for whose life the annuity was granted, if it be expressed in the memorial of the indenture which recites the bond and warrant of attorney, for whose life the annuity was granted. Therefore, upon the third objection, our judgment must also be for the defendants.

PARK, J. The statute of 17 G. 3, c. 26, which, in this respect, coincides with the 53 G. 3, c. 141, requires that every deed, bond, or other instrument shall be enrolled: and it may fairly be presumed that if the legislature had intended to include judgments, they would have been specified first, as the higher security. The memorial, too, is to be enrolled within twenty days; and it may often happen that the parties may not be able to enter up judgment within that time. Added to this, no mention is made of judgments in the form

*59] of *memorial given by the statute; and the provision as to the names of witnesses seems to point the enactment to instruments *inter partes*. The case, therefore, is not to be distinguished from *Sherson v. Oxlade*, 4 T. R. 824, where it was held that if a bond and warrant of attorney to confess a judgment be given to secure an annuity, and the judgment be entered up before the memorial is registered, the judgment need not be inserted in the memorial, under the 17 G. 3, c. 26. And Lord Kenyon said, "This is not one of the assurances which the legislature intended should be enrolled. The contract for the annuity was made by giving the bond and warrant of attorney to enter up judgment. Those were the securities on which the party relied; and the act is complied with by registering all the securities given by the parties. This will sufficiently answer the purpose of notoriety; and every person may see, by referring to the memorial, that the plaintiff was at liberty to enter up judgment whenever he pleased. If the memorial had been made immediately after the execution of the bond and warrant of attorney, the judgment could not have been inserted in it. Then, whether a matter shall or shall not be registered, cannot depend on an act which is to be done afterwards."

GASKLEE, J. I am of the same opinion. The plaintiff, if the fact were so, might have rejoined that there were other deeds besides those mentioned in the memorial set out upon the replication.

BOSANQUET, J. This is like a plea of judgment recovered, in which the plaintiff may, if his case requires it, waive the issue on the record, and dispute *60] the fact that the cause of action was the same. The question *here is, whether the annuity granted by the deed of April 5, 1808, appears to have been duly enrolled; and it seems to me that the memorial, as set out, is sufficient. The bond and warrant of attorney have been enrolled, as well as the deed of grant, and I think it was not necessary to enrol the judgment; for the deed recites that it had been entered up; it was therefore accessible to inquiry; and it was not the intention of the legislature to compel a memorial of that which had already the sanction of publicity.

Judgment for the defendants.

STEWART v. WOLVERIDGE. June 7.

An assignee who takes from a lessee leasehold premises by indenture endorsed on the lease, "subject to the rent reserved in the lease;" is liable in covenant to the lessee for rent which the lessee has been called on by the lessor to pay after the assignee has assigned over.

THE plaintiff declared that in 1819, one John Easthope, by indenture demised certain premises to the plaintiff for twenty-one years from March 25, 1820, yielding and paying certain rent which the plaintiff covenanted to pay; that the plaintiff entered; and by an indenture of the 22d of May, 1821, sealed with the seals of the plaintiff and defendant, and endorsed on the indenture of lease from Easthope to the plaintiff, the plaintiff for and in consideration of a certain sum of money, to wit, the sum of 65*l.* to him paid by the defendant, bargained, sold, assigned, transferred, and set over to the defendant, his executors, administrators, and assigns, as well the said indenture of lease as also all and singular the premises, with the appurtenances demised by the said indenture of lease, or expressed or intended so to be, and all the estate, right, title, interest, term of years then to come and unexpired, property, possession, claim, *61] and demand whatsoever, either at law *or in equity, of him, the plaintiff, of and unto the said premises, by virtue of the said indenture of lease or otherwise howsoever; to have and to hold the said lease, together with the said premises by the same demised, or intended so to be, and by the said assignment assigned unto the defendant, his executors, administrators, or assigns, from the

28th of May then instant, for and during all the rest, residue, and remainder of the said term of twenty-one years granted by the said indenture of lease, then to come and unexpired, subject nevertheless to the payment of the yearly rent, and to the performance of the covenants and agreements reserved and continued in the said indenture of lease; and he, the said defendant, then and there accepted the said assignment, and by virtue thereof he, the said defendant, afterwards and during the said term granted by the said indenture of lease, to wit, on, &c., entered into and upon all and singular the said demised and assigned premises, with the appurtenances, and became and was possessed thereof for the rest, residue, and remainder then to come and unexpired of the said term of twenty-one years granted by the said indenture of lease, subject to the payment of the rent, and performance of the covenants reserved and contained in the said indenture of lease: and although the plaintiff had always observed, performed, and fulfilled all things in the said indenture of lease and in the said indenture of assignment contained, on his part and behalf to be observed and fulfilled, he, the plaintiff, in fact said that the defendant did not nor would after the said assignment, and during so much of the said residue and remainder of the said term of twenty-one years granted by the said indenture of lease, as had elapsed since the said assignment, and since he, the defendant, became possessed of the said demised premises, with the appurtenances, by virtue thereof, well *and truly or in any manner pay, or cause [†]to be paid, the said rent reserved and made payable by the said indenture [†]of lease, and according to the true intent and meaning of the said indenture of assignment, and which he thereby covenanted to pay, and ought to have paid as aforesaid, but, on the contrary, wholly neglected, omitted, and refused to pay divers large sums of the rent aforesaid, to wit, the sum of 5*l.* 5*s.* of the rent aforesaid, which became due and payable under and by virtue of the said indenture of lease, and the said covenant of the plaintiff in that behalf therein contained, for one-quarter of a year of the said term ending on the 25th day of March, 1831, &c. By reason and in consequence whereof the Plaintiff, as the original lessee of the said premises with the appurtenances so demised and assigned as aforesaid, was called upon and required to pay, and was forced and obliged to pay, and had paid the said several sums to the said John Easthope, who was then lawfully entitled to, and had good, legal, and sufficient right, title, power, and authority to demand, recover, have, and receive the same, to wit, at, &c.

The defendant pleaded that before the said several sums for the rent aforesaid in the declaration mentioned, or either of them, became due and payable as in the said declaration above alleged, to wit, on the 4th day of November, 1822, by a certain indenture then and there made between the said defendant, of the one part, and one George Caesar Foley, of the other part, the said defendant duly assigned the said demised premises, and all his estate and interest therein, to the said J. C. Foley, his executors, and administrators, and assigns, to have and to hold the same, to wit, from the day and year last aforesaid, for the remainder of the said term; by virtue of which assignment J. C. Foley afterwards, and before the said several sums, or either of them, became due and payable, to wit, on, &c., entered and became *possessed of the said de- [†]mised premises, and of all his, the said defendant's, estate and interest [†]therein; and that, the defendant was ready to verify, &c.

Demurrer and joinder.

Wilde, Serjt., in support of the demurrer. The defendant having taken the premises by assignment for the residue of a term of twenty-one years, "subject to the rent reserved in the lease," has by express contract subjected himself to the payment of that rent during that term: for no precise form of words is essential to an express contract: it is sufficient if the intention of the parties plainly appears. In cases where an assignee has been discharged from payment of rent after assignment over, there has been no express contract between

him and the lessor, or assignor, and the only connexion between them, privity of estate, has been determined by the assignment. *Chancellor v. Poole*, Dougl. 764.

Burnett v. Lynch, 5 B. & C. 589, has established that where a party takes *subject to certain covenants*, he is bound to the performance of those covenants; and a contract to that effect once created, endures as long as the term. In *Jones v. Hill*, 7 Taunt. 392, where it was held that waste did not lie against the assignee for not repairing to the extent the lessee had covenanted to repair, the attention of the Court was not called to the true ground on which the plaintiff's case rested. The case was not put on the ground that a duty had arisen.

Coleridge, Serjt., contra. This was only an implied, not an express covenant; and if so, the defendant's liability is only co-extensive with his possession. That such has been the general understanding, appears from the practice *64] of requiring from assignees an express contract indemnifying the assignor during the whole term. *Staines v. Morris*, 1 Ves. & B. 8. And *Burnett v. Lynch* affords an argument in favour of the defendant. For if the liability of the defendant in that case had been the same after as during his possession, it would have been unnecessary to prove that breaches took place during his possession; and Best, C. J., said at the trial, that in order to maintain the action, it was necessary for the plaintiff to aver in the declaration, and prove at trial that the defendant was assignee during the time when some breach of duty was committed.

That upon an implied covenant, such as, "yielding and paying," and the like, a party is only liable during the continuance of his estate or interest, appears from all the authorities. because such a covenant arises on the privity of estates only. *Thursby v. Plant*, 1 Wm. Saund. 241, b, and the authorities cited in note 6: *Bachelor v. Gage*, Sir W. Jones, 223; *Swan v. Stransham*, Dy. 257, a.

Wilde. In *Burnett v. Lynch* the assignment was by deed-poll, and not by a deed *inter partes* endorsed on the original lease and referred to it, and in the present case. The words "to hold the premises *subject* to the rent reserved in the indenture of lease," amount to an express covenant. The assignee by joining in the deed, admits that such are the terms on which he consents to take the premises.

TINDAL, C. J. The question in this cause arises on the construction of a deed under the seal of the defendant, executed by the plaintiff as the assignor, and the defendant as assignee of a lease which the plaintiff held from John Easthope. If we look to the situation *of the parties, there is every reason *65] from their relation to each other, and from the plaintiff's responsibility under the lease, that he should wish for what was equivalent to an indemnity against any claim on the part of the original lessor: the question is, whether the words he has employed are sufficient to carry that intention into effect: but we must look to the intention on both sides, and, therefore, consider whether the assignees proposed to accede to such a stipulation: and there can be no doubt, that had he been called on, he would have done so by express terms. If he had continued in possession, he could not have questioned his liability to the plaintiff; and if he parted with his possession to a stranger, he might have protected himself by requiring an indemnity: there is no reason, therefore, why he should have objected to give the plaintiff an express indemnity; and that brings us to the words of this instrument, by which the plaintiff assigned the premises and his terms therein "subject to the payment of the yearly rent, and to the performance of the covenants and agreements reserved and contained in the indenture of lease."

That these words import an agreement, is clear from the case of *Burnet v. Lynch*, in which, although the question was as to the form of action, it was distinctly held that words to the same effect as those which are found in this instrument, did import an agreement. It has been answered, that in that case

the possession of the assignee continued, and an expression of Best, C. J., has been relied on, that "In order to maintain the action, it was necessary for the plaintiff to aver in the declaration, and to prove on the trial, that the defendant was assignee during the time when some breach of duty was committed." That expression, however, applied to the form of action, which was case for a breach of duty cast on the defendant by his occupation of the premises, *and not [66] covenant for the neglect of an agreement pointing out a specific period of liability.

It comes then to the single question, what was the meaning of the parties here. The plaintiff begins by assigning the premises to the defendant, to have and to hold them, "subject to the payment of the yearly rent, and to the performance of the covenants and agreements reserved and contained in the indenture of lease." I am unable to put any other construction on these words than that they import an assent on the part of the defendant that he will perform all the covenants in the original indenture of lease. Upon referring to that lease, to see what the covenants are, we find them to be covenants to pay rent, repair, &c., during the whole term. *Verba relata inesse videntur*. The words, therefore, "during the continuance of the term," must be considered as inserted in the assignment by reference to the original lease; and the defendant is liable, not upon an implied, but an express covenant, to perform the covenants in the original lease during the continuance of the term.

PARK, J. It is impossible to doubt the intention of the parties to create a covenant; the words are clear, and stipulations like this have often been construed as express covenants, when such appears to have been the intention of the parties.

GASELEE, J. *Burnett v. Lynch* is a decisive authority in favour of this action. If it rested on *Chancellor v. Poole* alone, I should have had some doubt, because there the assignee of a term declared against as such, upon a deed-poll, was holden not liable to the lessor for rent accruing after he had assigned over, though it had been stated that the lessor was a party who executed the assignment, and agreed thereby that the term, which was determinable at his option, should be absolute.

*BOSANQUET, J. I am of opinion that the plaintiff is entitled to maintain this action, and that this is an express covenant. It is true, the obligation is to pay rent to a third person; but though rent cannot be reserved to a stranger, a party may covenant to pay it to a stranger. In *Deering v. Farington*, 1 Mod. 113, Hales, C. J., said: "If I will make a lease for years, reserving rent to a stranger, an action of covenant will lie by the party for to pay the rent to the stranger." This is a deed *inter partes*, and in *Chancellor v. Poole*, where the assignment was by deed-poll, Lord Mansfield said, "The question is, whether the plaintiff is a contracting, or merely an assenting party, in the deed-poll;" however, if our decision were to depend on that case, there might be some doubt, because the deed there, in addition to the word *paying*, which the plaintiff treated as a covenant, contained the word *indemnifying*, to which it may be thought the judgment of the Court also applies.

Upon the question whether the expression *paying rent* constitutes an express or an implied covenant, there is abundant authority to show that the words "*yielding and paying*," constitute an express covenant. *Helier v. Casbard*, 1 Sid. 266. *Staines v. Morris* shows the opinion of Lord Eldon, that the situation of parties connected as those in this suit, is one which calls for a covenant rendering the assignee liable during the term; but it is not to be inferred that he thought the assignee discharged, unless he were bound by an express covenant to indemnify. It is difficult to draw a distinction between *yielding and paying* and *holding, subject to a rent* to be paid. Judgment for the plaintiff.

*68]

**M'NEILL v. REID. June 8.*

1. Damages may be recovered upon an agreement by one of several partners to introduce a stranger into the firm, although the agreement be entered into without the knowledge of the firm.
2. It is a sufficient consideration for such an agreement, that the stranger will become a partner.

THE first two counts of the declaration stated, that the plaintiff was in the naval service of the East India Company; that certain persons had promised him the command of a ship to be chartered by the company, an appointment of great value, from which the plaintiff would have derived considerable profit; that, in consideration he would relinquish this appointment, the defendant, who carried on business as a rope-maker in partnership with S. Galilee and J. Louch, promised and undertook that the plaintiff should be received as a partner into the said trade with the defendants, Galilee and Louch, the Christmas following, and should have a certain share, to wit, one-fourth of the profits, the defendant being then entitled to one-half, and, in the mean time, should have a commission of 2l. a ton upon all orders he should procure for rope and cordage. Averment that the plaintiff relinquished the command of the ship that had been promised to him; but that the defendant would not procure him to be taken as a partner in the said business.

The third, fourth, fifth, and sixth counts stated, in substance, that in consideration, the plaintiff, at the request of the defendant, would enter into partnership with the defendant, Galilee, and Louch, at the end of the then current year, and in the mean time would exert himself to procure orders for rope, the defendant undertook, at the end of the year, to take him as a partner with the defendant, Galilee, and Louch, and to give him a certain share of the profits, to wit, &c. Averment, that the plaintiff exerted himself to procure orders for *69] rope, &c., and was ready and willing, and offered to *become partner. Breach, that the defendant would not procure him to be taken as a partner, pursuant to his engagement.

The seventh and subsequent counts stated in substance that, in consideration, the plaintiff, at the request of the defendant, would enter into partnership with the defendant in his share and proportion of the said business at the end of the year, and in the mean time would exert himself to procure orders, &c., the defendant promised to take the plaintiff as a partner in the said business, and to give him a certain share, to wit, half of the defendant's share in the said business. Averment of the plaintiff's exertions as before, and of his willingness and offer to become such partner. Breach, refusal of the defendant to take him as such partner.

At the trial before Tindal, C. J., it appeared that the plaintiff had been offered the command of an East India ship for a double voyage, if he would take, at the owner's price, from one to four shares in the ship; that the value of such a voyage to the captain was not less than 1000*l.*, and that the defendant, a friend and kinsman of the plaintiff, was well acquainted with this fact; that the defendant, who carried on the rope business in partnership with Galilee and Louch, as the plaintiff knew, and whose interest was one half of the whole concern, had induced the plaintiff to relinquish his prospect of the command offered to him as above, by promising to admit him at the ensuing Christmas, in the room of Muspratt, who had retired, to a partnership in the rope business, of which the plaintiff was to have one-fourth, undertaking in the mean time to procure as many orders as he could; that the defendant afterwards refused to fulfil his promise, alleging that the plaintiff had disappointed him as to the extent of orders he had engaged to procure.

*70] *The jury having found a verdict for the plaintiff, with 500*l.* damages, Coleridge, Serjt., moved for a nonsuit, or a new trial on several points reserved at Nisi Prius.

First, as to the first and second set of counts, that an action could not lie on the contract to take the plaintiff into partnership; it being a contract the defendant had no right to enter into without the consent of his partners; a contract too indefinite to be carried into effect; the amount of interest to be transferred, and the duration of the proposed partnership ought at least to have been specified. In *Figes v. Cutler*, 3 Stark. N. P. C. 139, it was holden that an action could not be supported for breach of an agreement to become a partner generally, without proof of the specific terms of the intended partnership.

Secondly, the plaintiff could not recover on the last set of counts, because the evidence showed the intention of the parties to be, that the plaintiff should be a member of the general firm in the room of Muspratt, who had retired; and not a sub-partner with the defendant.

Thirdly, that the damages were excessive, and that the jury had not been correctly instructed how to estimate them. A rule nisi having been granted,

Wilde, Serjt., showed cause. If the defendant had not the consent of his partners to introduce a new member into the firm, he ought not to have entered into such an engagement; but having entered into it, he must take the consequences of not carrying it into effect. It is usual and lawful to convenant for the acts of others; and if the party covenanting cannot secure the performance of those acts, he must make a recompense in damages. *As to the alleged uncertainty of the contract, the defendant being actually engaged in a partnership business, and having himself a certain share of it, there was nothing indefinite in his engaging to admit the plaintiff to a fourth. In *Figes v. Cutler* the partnership did not exist to which the defendant pretended to introduce the plaintiff; and though a contract may be of a nature which a court of equity will not enforce by a decree for specific performance, it does not follow that a party may not have incurred and be entitled to recover damages in a court of law for breach of the contract. In *Peacock v. Peacock*, 2 Campb. 45, a father established in business, on his son's coming of age, told him he should have a share in it, and held him out to the world as his copartner. The son acted as such for several years; but there was never anything settled as to the particular share which he should have. Under these circumstances it was held, the law would consider that there was a partnership between the parties, as well as with respect to strangers; and that it should be referred to a jury to say to what share he was reasonably entitled.

With regard to the damages, they are low, considering the plaintiff's abandonment of an appointment which was proved to be worth more than 1000*l*.

Coleridge. The present case cannot be distinguished in principle from *Figes v. Cutler*. The defendant might have rendered the contract nugatory, by taking the plaintiff into partnership and dissolving the partnership the next day; for which reason it could not be enforced in equity; *Hersey v. Birch*, 9 Ves. 857, *Vansandau v. Moore*, Gow on Partn. 94, 96, 110, *Kinder v. Taylor*, Id., *Crawshay v. Mawe*, 1 Swanst. 495, and upon *a contract so nugatory, damages cannot be recovered. There is no criterion by which the jury could estimate the damage sustained by refusal to admit the plaintiff to a partnership from which he might have been dismissed by dissolution the next day.

TINDAL, C. J. Three objections have been made to the plaintiff's right to retain his verdict:—First, that no action lies on the contract disclosed by the evidence in this cause: and that objection divides itself into two considerations,—one, that the plaintiff was aware of the fact that other persons were already in partnership with the defendant, consequently that the defendant could not, without the consent of such persons, force a stranger into the firm; and that the plaintiff cannot seek to enforce a contract which at the time he knew to be impossible. But this is no answer in the mouth of the defendant; for he should have secured the consent of his partners before he ventured to enter into such a contract; or is bound, at all events, to obtain it afterwards. And actions are not infrequent where a party has engaged for the performance of an

act which depends on the will of others. In *Lloyd v. Crispe*, 5 Taunt. 249, it was held that if the vendor of a lease, in which was a covenant not to assign, contract to assign his interest, it is incumbent on him, and not on the purchaser, to procure the lessor's license for the assignment. It is not clear, indeed, that the plaintiff was aware of the existence of the difficulty. He was a stranger, and without the means of knowing facts with which the defendant was fully acquainted; and his suspicions, if he entertained any, were lulled by the language of the defendant's agent. In the cases referred to, the contract was illegal within the knowledge of both parties.

*73] The other point for our consideration under this head of objection is, that the contract is too vague, too uncertain as to the term of partnership, amount of capital to be contributed, and the like, to be the subject of estimate by a jury. But is that a correct statement of the evidence? It is plain that the plaintiff considered, and that the defendant led him to consider, that he was contracting for a fourth part of the defendant's business, in the room of Muspratt, who had quitted it; and that both the defendant and his agent, Carstairs, knew the precise extent and value of such an interest. That being so, the case is clear of the difficulty which arose in *Figes v. Cutler*, where the evidence was too indistinct to enable the jury to come to any conclusion. It is unnecessary to advert to the cases in equity, because this is not a proceeding to enforce performance of a contract, but to obtain damages for the breach of it.

The second objection is, that the consideration for the contract has been incorrectly stated in the declaration. I should have had some difficulty on the first and second counts, where the promise as to the command of the ship is stated to have been absolute, when, in fact, it was conditional, on the plaintiff's taking a share in her. But it is not necessary to confine the plaintiff to those counts, since it was a sufficient consideration for the contract that the plaintiff would, as stated in other counts, become a partner.

With respect to the third objection, as to the manner in which the question of damages was left to the jury, I told them that there was some difficulty as to the amount of damages, but they might see that the plaintiff considered the engagement as equivalent to an East Indian voyage, because he would not otherwise have relinquished that voyage; and the defendant could not have estimated it at less, because he made his offer as a friend *of the plaintiff. If, *74] under such circumstances, the plaintiff gave up, what, at a very low estimate, the jury found to be worth 500*l.*, there is no ground for our being dissatisfied at the amount of the verdict.

PARK, J., said, that for private reasons he abstained from delivering any opinion.

GASELEE, J. There is nothing unusual in parties covenanting for the acts of others; as when a lease is assigned, with a covenant that the lessor shall join in or confirm the conveyance. The defendant, therefore, having undertaken that the plaintiff should be admitted a partner, was bound to take such steps as should induce the firm to acquiesce, and if he failed, was answerable for their refusal; at all events, there could be no objection to his taking the plaintiff as a sub-partner in the defendant's share. *Figes v. Cutler* is distinguishable from the present case, for there no partnership subsisted at the time of the contract, to which the plaintiff could be admitted. The interposition of courts of equity is regulated by their discretion under the circumstances of the particular case, and the party is not precluded from seeking to recover damages for the breach of a covenant, although it may be such as a court of equity might not deem it expedient to enforce. As to the damages in this case, although there was difficulty in determining the amount, I think the jury had sufficient materials for the verdict they have found.

BOSANQUET, J. I think this verdict ought not to be disturbed. It is objected, that the contract is of such a nature that the defendant could not perform it without the consent of his partners; but that does not discharge the de-

fendant from his contract, for he ought not to have engaged in it unless he had secured that consent, *or was willing to incur the consequences; as where a party undertakes to sell a lease which he cannot assign without the consent of the lessor, it is his business to procure such consent: at all events, with respect to his own share the defendant was independent of his partners; and though it may be true that equity would not interfere to enforce a partnership which the partners might dissolve the next day, that does not authorize the defendant to break the contract. In *Hersey v. Birch*, Lord Eldon says, "It is extremely difficult specifically to perform such a covenant as this, even admitting that damages could be recovered at law." In *Figes v. Cutler* it did not appear what the nature of the interest was in respect of which the plaintiff sought to recover damages, and the contract itself was too indefinite for the jury to decide on. But here the plaintiff was to have one-half of the interest vested in the defendant, at the ensuing Christmas, and that is an interest sufficiently certain to sustain an action. It is by no means an uncommon arrangement, that in certain events one of several partners shall be at liberty to introduce a new member to the firm.

As to the damages, the direction to the jury was proper, and they were estimated according to what the jury thought was the value of the contract. The value of the East India voyage has not been recovered as special damage, but has been taken as an ingredient for estimating the value which each of the parties set on the contract in dispute.

Rule discharged.

*KERRISON and Another v. DORRIEN and Others. June 8. [*76]

B. after marriage having made a settlement on his wife, obtained from the trustees the title deeds of the property settled, and deposited them with a banker as a security for money advanced:

Held, that the banker was not a purchaser within the 27 Eliz. c. 4, s. 2, and that the trustees were entitled to recover the deeds.

By a postnuptial settlement, Bainbridge conveyed to the plaintiffs, as trustees for his wife, certain property, the title-deeds of which he afterwards obtained from the trustees, and deposited with the defendants as a security for money advanced.

In trover for these deeds, the plaintiffs having obtained a verdict,

Spankie, Serjt., moved for a new trial, on the ground that this conveyance was void as against a purchaser, and that the defendants must be deemed purchasers within the 27 Eliz., c. 4, s. 2, which enacts, that "every conveyance of any lands made for the intent and of purpose to defraud and deceive such person or persons as have purchased in fee simple, fee tail, for life, lives, or years, the same lands so formerly conveyed shall be deemed to be utterly void."

Sed per Curiam. The plaintiffs have a right to this verdict in a court of law. Upon the deposit of the deeds the defendants acquired no more than a right to go into a court of equity to compel a legal conveyance. The language of the statute clearly specifies a purchaser; and how can we say that upon a mere deposit of deeds, entitling the party, perhaps, to apply to a court of equity, he becomes, in the language of the act, a purchaser either in fee simple, fee tail, for life, lives, or years?

Rule refused.

*BAGSTER v. ROBINSON. June 14.

[*77]

A person who lets out types and men to print a newspaper is not the printer within the meaning of 88 G. 3, c. 78; the party who hires the types and superintends the printing, is the person responsible to the Stamp Office.

THE plaintiff declared for goods sold ; work, labour, and materials ; and for money paid by him to the use of the defendant.

His particulars of demand were a charge of 366*l.* 5*s.* for "composing and printing" certain numbers of a weekly newspaper called *The Christian Advocate*, and 7*l.* 10*s.* for composing, printing, and distributing certain cards.

The defendant paid 8*l.* into court for printing the cards, and as to the residue, pleaded the general issue.

At the trial before Tindal, C. J., it appeared that the plaintiff had a printing office at No. 14 Bartholomew Close ; that the defendants were proprietors of *The Christian Advocate*, and that one Stevens, on their behalf, made arrangements with the plaintiff for printing the paper. Stevens was to use the plaintiff's types and men at a certain price for every thousand papers. Upon these terms the work was printed in plaintiff's office, Stevens superintending, and, as he said, doing the part which belonged to a printer to do, in which no other person interfered. Stevens, who lived in Red Lion Court, was named as the printer at the end of the newspaper, and had filed an affidavit at the stamp office that he was the printer, publisher, and proprietor of the newspaper called *The Christian Advocate*, which was intended to be printed at the printing office belonging to him at No. 14 Bartholomew Close.

The 38 G. 3, c. 78, s. 1 and 2 enacts, that no person shall print or publish a newspaper without delivering to the commissioners of stamps an affidavit, *78] specifying "the real and true names, additions, descriptions, and *places of abode of all and every person and persons who is and are the printer and printers, publisher and publishers of the newspaper or other paper mentioned in such affidavit or affidavits ; and of all the proprietors of the same, if the number of such proprietors, exclusive of the printer and publisher, does not exceed two ; and, in case the same shall exceed that number, then of two of such proprietors, exclusive of the printer and publisher."

It was objected on the part of the defendant, that if Bagster were the printer, he had been guilty of an illegal act in printing a newspaper without delivering to the commissioners of stamps the affidavit required by the statute ; and, consequently, was precluded from suing ; and it was left to the jury to find for the defendant, if they thought Stevens was not the printer. A verdict, however, was found for the plaintiff, which

Jones, Serjt., obtained a rule *nisi* to set aside on the above objection.

Wilde, Serjt., who showed cause, contended that the plaintiff, by furnishing types and men, was the printer to whom the defendants were responsible for the work done, though Stevens, who superintended and directed the work, was properly the person responsible to the stamp office. The object of the 38 G. 3 was not to render liable every person concerned in the printing of a newspaper, but to be secure of the principal editor or proprietor.

Jones. According to that construction, the real printer may always elude responsibility, and the intention of the legislature be defeated. The plaintiff was either printer or not printer : if he was printer, the illegality of his conduct was a bar to his recovery ; if he was not printer, but only let out his types and *79] men to *Stevens, the evidence does not support the particular of demand, which is for composing and printing, and not for the hire of types.

TINDAL, C. J. The only question for the Court is, whether, upon the evidence given at the trial of this cause, it appears so clearly that Stevens was not and that Bagster was the printer of the work in question, that we are bound to give validity to the objection which has no reference to the merits of the case. The evidence was that Bagster had a printing office in Bartholomew Close, and that, for the purpose of this work, Stevens hired a portion of his presses and men ; and if upon this evidence an objection had been taken at the trial that the declaration contained no count for the hire of types and men, I should probably have directed a nonsuit. However, the objection taken was, that Bagster being the printer, he could not recover, because he had not complied with the direc-

tions of the 38 G. 3, c. 78. Now, according to the evidence, Stevens was clearly the printer responsible under the act of parliament; he alone directed and superintended the work, and hired men, who were set apart for the purpose. How could the Court or jury say upon that, that Bagster was the ostensible printer? The conductor of a periodical work may, and frequently does, hire the whole of a printing office for a day, in case of accident, or extraordinary pressure of matter; and if he may hire the whole, why not a part? I give no opinion upon the question as to what shall be deemed a sufficient compliance with the requisition of the statute, because Bagster has not so clearly been proved to have been the responsible printer as to render it necessary for us to defeat his claim by yielding to this objection on a collateral point; and as to the objection on a bill of particulars, the object of such particulars is, by disclosing the subject-matter of the suit, to prevent a *surprise on the [80] defendant, and not to enable the defendant to entrap the plaintiff and defeat his claim, by objecting to a slight variance which could have occasioned no mistake. No doubt the particular here designates as "work and labour," that which would have been more properly described as "hire;" but the objection was not presented at the trial, and the Court ought not to yield to it now.

PARK, J. Upon this evidence Bagster could not be deemed the printer responsible to the stamp office within the meaning of the act of parliament. In every view of the case, Stevens was the printer called upon to conform with the provisions of the act. No doubt the declaration and particular would have been more correct, if they had contained a demand for the use and hire of types and men; but that objection was not taken at the trial. It is impossible to say that the defendant has been misled; and the plaintiff, therefore, is entitled to retain his verdict.

GASELEE, J. It is impossible to say, on this evidence, that Bagster would have been liable to the penalties imposed by the 38 G. 3, c. 78; and the other objection comes too late, not having been presented at the trial.

BOSANQUET, J. The objection being *strictissimi juris*, and altogether beside the merits, the defendant must be confined to the points taken at the trial; and the only question is, whether we can see that the jury was clearly wrong in finding that Stevens was the printer.

It is not denied that Stevens conducted the work and superintended the printing; and if the names of all who have a hand in such a concern are to be entered at the stamp office, it would follow that the tradesmen who supply materials must also be included. The legislature *could not have pro- [81] posed to go to that extent, and therefore I am not prepared to say that the verdict of this jury is wrong. The objection to the form of the declaration and the bill of particulars was not taken at the trial; besides, the object of the particular is, by disclosing the general nature of the plaintiff's demand to prevent a surprise on the defendant; and it is not necessary that it should be drawn up with all the strictness and precision of a declaration. Rule discharged.

ADAMS v. BROWN. June 15.

Before applying to the Court to compel a party to give security for costs, application should be made to the party.

Coleridge, Serjt., had obtained a rule *nisi* for the plaintiff to give security for costs, on the ground that he had assigned all his effects for the benefit of his creditors, and that he had no beneficial interest in the result of this action.

Adams, Serjt., who showed cause, objected, that no application had been made to the plaintiff for security; upon which

Coleridge said, that *Bass v. Olive*, 3 M. & S. 283, which decided that such

an application was necessary, had been overruled by subsequent decisions (see *Baillie v. De Bernales*, 1 B. & Ald. 331); but

The Court said, that as this rule was, in effect, for a staying of proceedings, the better practice was, that it should be preceded by an application to the party; and the decisions being conflicting, the rule was Discharged.

*82] *BELCHER and Others, Assignees of MABERLY, a Bankrupt, v. JOHN SMITH. June 15.

A party who, by his own act, is placed in a situation to be sued, cannot call on the Court to substitute another defendant under the interpleader act, 1 & 2 W. 4, c. 58.

UPON Mr. Maberly's marriage, 15,000*l.* had been invested in consols by his wife's father, in the name of the defendant and other trustees, in trust to pay Maberly the dividends during his life; remainder over to the wife and issue of the marriage.

From the time of the marriage till 1829, these dividends had been received and regularly paid over to Maberly by a banking firm, in which the defendant was a partner.

In 1829, Maberly assigned his interest in the dividends to his son-in-law, George Robert Smith, the nephew of the defendant.

In January, 1832, Maberly became bankrupt, and the defendant at the request of his nephew, went to the bank of England, himself received the half-yearly dividend on the 15,000*l.*, for the first time, and, instead of placing it in the firm of which he was a member, to the account of Maberly or George Robert Smith, entered it in a book where the firm kept an account of sums for which they had no specific appropriation. Maberly's assignees, impeaching the validity of the assignment to George Robert Smith, had sued the defendant for the amount of this dividend, when

Taddy, Serjt., obtained a rule *nisi* under the interpleader act, 1 & 2 W. 4, c. 58, calling on the plaintiffs to exonerate the defendant, who had no interest in the affair, and to try the question with George Robert Smith.

*83] **Wilde* and *Spankie*, Serjts., who now showed cause, contended that the defendant had unnecessarily interposed by receiving the dividends at the request of his nephew, and to serve his nephew's interests; that, therefore, he was not entitled to a relief which it was in the discretion of the Court to concede or withhold.

Taddy (*Jones* and *Coleridge*, Serjts., were with him), urged that the defendant, as a trustee of Maberly, was responsible for the dividend, and therefore justified in receiving it. He had acted for his own protection, and being a trustee, could not be deemed a volunteer.

TINDAL, C. J. The act of parliament is not compulsory, but authorizes the interposition of the Court at its discretion upon proper occasions; and our duty is, to see that the party applying for the exercise of our discretion, has not voluntarily put himself into the situation from which he calls on the Court to extricate him. The words of the statute are, "That upon application made by or on the behalf of any defendant sued in any of his Majesty's courts of law, in any action of *assumpsit*, debt, detinue, or trover, such application being made after declaration and before plea, by affidavit or otherwise, showing that such defendant does not claim any interest in the subject-matter of the suit, but that the right thereto is claimed or supposed to belong to some third party, who has sued or is expected to sue for the same, and that such defendant does not in any manner collude with such third party, but is ready to bring into Court, or to pay or dispose of, the subject-matter of the action in such manner as the Court (or any Judge thereof) may order or direct, it shall be lawful for the

Court, or any Judge thereof, to make rules and orders calling upon such *third party to appear, and to state the nature and particulars of his claim, [*84 and maintain or relinquish his claim; and upon such rule or order to hear the allegations, as well of such third party as of the plaintiff; and in the mean time to stay the proceedings in such action; and, finally, to order such third party to make himself defendant in the same or some other action, or to proceed to trial on one or more feigned issue or issues; and also to direct which of the parties shall be plaintiff or defendant on such trial, or with the consent of the plaintiff and such third party, their counsel or attorneys, to dispose of the merits of their claims and determine the same in a summary manner; and to make such other rules and orders therein as to costs, and all other matters, as may appear to be just and reasonable." Without applying the word *collude* in an offensive sense, we cannot avoid seeing that the defendant has placed himself in the situation in which he now stands, at the request, and with a view to the interest, of his nephew. The rule, therefore, must be Discharged.

BRADDICK v. SMITH. June 6.

The interpleader act does not apply to a case where the defendant has a legal claim.

THIS was an action of trover against a wharfinger, who detained, for his lien, goods, the property in which was disputed between the plaintiff and J. S. Coleridge, Serjt., moved, on the part of Smith, that the plaintiff should pay Smith's lien, and substitute J. S. as defendant.

*But the Court thought the interpleader act did not extend to the case [*85 where the actual defendant had a legal claim; and Coleridge

Took nothing.

CARLISLE v. GARLAND. June 15.

The rules of Hil. 2 W. 4, are not retrospective; and a party who before those rules succeeded on two trials, is still entitled to the costs of both, and to the costs of entering up judgment *nunc pro tunc*, if the delay has not been occasioned by himself.

UPON two rules for a review of the prothonotary's taxation of costs, the one obtained on the part of the defendant, the other on the part of the plaintiff, the question was, whether the plaintiff, who had succeeded upon two trials, was entitled to the costs of both, and also to the costs of a rule for entering judgment *nunc pro tunc*.

The cause was first tried in 1825, when a verdict was found for the plaintiff, with leave for the defendant to move to set it aside, and enter a nonsuit instead, upon a point reserved at the trial.

A rule nisi was accordingly obtained on this point; but the court was obliged to send the cause down to a new trial, a fact material to their decision being wanting upon the judge's notes of the first trial.

At the second trial a special verdict was found, upon which judgment was given for the plaintiff.

After the second verdict the defendant died, and judgment was delayed by various obstacles, till at length the parties who had acted for the defendant consented that the cause should go on as if the defendant were still alive; and in the last term a rule for entering judgment *nunc pro tunc* was made absolute.

The prothonotary had allowed the plaintiff the costs of both trials, but not the costs of the rule for entering judgment *nunc pro tunc*.

*86] *Peake*, Serjt., for the defendant. According to rule 64 Hil. 2 W. 4, the plaintiff is not entitled to the costs of the first trial. Neither is he, according to the old practice, if his case is to be decided by that. It is true, that, according to that practice, a party in this court who succeeded in two trials was, generally speaking, entitled to the costs of both: but not where upon the first trial the jury found an insufficient verdict upon which no judgment could be given, and neither party was in fault. *Worcestershire and Staffordshire Canal Company v. Trent and Mersey Navigation Company*, 2 Marsh. 475. And such in effect was the case here. As to the costs of the rule for judgment *nunc pro tunc*, they accrue after the date of the judgment, and therefore cannot be costs in this cause.

Wilde, Serjt., for the plaintiff. The new rule does not apply retrospectively to a trial in 1825. In the *Worcestershire and Staffordshire Canal Company v. The Trent and Mersey Navigation Company*, the rule for a new trial expressly reserved the consideration of the costs of the former trial till another trial should have taken place; and in *Bird v. Appleton*, 1 East, 111, Lord Kenyon says, "In the Common Pleas, if a new trial be granted, and the rule say nothing about costs, if the second verdict go the same way, the party succeeding has the costs of both trials." *Payne v. Bailey*, 3 B. & B. 304, is in point for the plaintiff. There the plaintiff obtained a verdict subject to the award of an arbitrator. The arbitrator having made a material mistake in his award, and the defendant having refused to refer matters back, the court set aside the verdict, and discharged the rule for a reference. The plaintiff took the cause *87] down to trial a second time, and a second time obtained a verdict: it was held that he was entitled to the costs of both trials.

Then, the rule for judgment *nunc pro tunc* was necessary to obtain for the plaintiff the benefit of his verdict; and as the delay which has occurred is not imputed to him, he is entitled to those as well as all other costs, without incurring which he could not obtain the fruit of his action.

TINDAL, C. J. It would be a great hardship on persons who have taken steps in a cause, with reference to the old practice, to find themselves by the new rules in a situation which they never contemplated: this case, therefore, must be governed by the practice which prevailed at the time. According to that practice, as is well known, the party who, after a verdict in his favour, succeeded upon a second trial, was entitled to the costs of both, unless some special reason appeared for refusing him the costs of the first. Such a reason, it is contended, exists in this case; namely, that the second trial was occasioned by a defect in the finding of the first jury, for which neither of them was to blame; and the case of the *Worcestershire Canal Company v. The Trent and Mersey Navigation Company* has been referred to. But, in that case, the verdict was found subject to a special case, and the question of the costs for the first trial was expressly reserved for future consideration by the rule granting the new trial: here there was a general verdict for the plaintiff; he had a right to say he was satisfied; and it was in ease of the defendant that the cause went down to trial a second time.

With respect to the costs of the rule for judgment *nunc pro tunc*, it was necessary that the plaintiff should incur those costs in order to reap the fruit of his verdict: except in point of date I cannot distinguish them from interlocutory costs: they fall within the same rule, and *88] must be considered costs in the cause. The rule, therefore, for the prothonotary to allow those costs must be made absolute, and the rule for disallowing the costs of the first trial be discharged.

The rest of the court concurred in pronouncing the

Rules absolute and discharged accordingly.

GODDARD v. JARVIS. June 15.

Defendant put in bail by affidavit, but omitted to give four days' notice of justification: plaintiff having proceeded on the bail-bond, the court refused to stay proceedings upon an application made within twenty days after justification.

ON the 1st of June the defendant put in special bail, who made affidavit of justification in the form prescribed by Reg. Gen. Trin. 1831, rule 3. But he omitted to give four days' notice of justification as required by rule 1. Whereupon the plaintiff proceeded on the bail-bond; when

Wilde, Serjt., obtained a rule nisi to stay his proceedings, on the ground that the bail had justified.

Jones, Serjt., who showed cause, contended that as the defendant had not given the four days' notice of justification required by rule 1, the plaintiff was not concluded by the affidavit of justification; but had, as under the old practice, twenty days to except to the bail, and the applicant, therefore, had as yet no *locus standi*.

Wilde relied on the affidavit of justification, as superseding the necessity of notice; but

The Court thought the defendant was in default as to the notice required by rule 1, Trin., 1831; that the *plaintiff, therefore, had, as formerly, twenty [89] days to except to the bail, and, consequently, that the applicant was not in court to make this motion. Rule discharged.

HALL v. PHILLIPS. June 18.

When a verdict is taken, with damages subject to the award of an arbitrator, if the arbitrator omit to make his award within the specified time, the Court will send the cause down to a new trial.

A VERDICT had been taken for the plaintiff, with damages, subject to the award of a barrister within a certain time.

The award was not made within the time specified, which the arbitrator had omitted to enlarge. The defendant refused to proceed with the arbitration, or to name another arbitrator; whereupon

Wilde, Serjt., obtained a rule nisi to enter up judgment for the plaintiff, relying on *Woolley v. Kelly*, 1 B. & C. 68, where, in an action against several defendants, a verdict was taken for the plaintiff for 400*l.* damages, subject to a point of law, reserved for the opinion of the Court; and in case that point should be determined in favour of the plaintiff, then subject to the award of a barrister as to the damages. The point of law having been decided in favour of the plaintiff, the arbitrator, who had been consulted by one of the parties in the cause, declined proceeding in the reference. One of the defendants refused to name any other arbitrator. Under these circumstances, the Court ordered judgment and execution to issue against that defendant for the damages found by the jury, unless he would consent to refer the damages to some other arbitrator.

**Taddy*, Serjt., who showed cause, contended that the case must be re-tried, just as if the arbitrator had died before making his award. Thus, [90] in *Harper v. Abrahams*, 4 B. M. 3, where a plaintiff having obtained a verdict subject to a reference, the arbitrator died before making his award, and the parties agreed that another should be substituted in his stead, but one of them afterwards objected to such substitution; the Court of Common Pleas refused to interfere, as the death of the arbitrator had the effect of opening the cause.

Wilde observed, that *Woolley v. Kelly* was decided after *Harper v. Abrahams*.

TINDAL, C. J. The ground of my opinion is, that here the time for the

award has expired without any default on the part of the defendant. In *Woolley v. Kelly* the time had not expired, and the question of law had been decided by the Court. In *Harper v. Abrahams* the Court refused to enter up judgment, because, on the death of the arbitrator, they considered the question still open. That is the case here, and the cause must go down to trial again.

Rule discharged.

*91]

*AMOR v. BLOFIELD. June 15.

Where, upon a bailable writ, the defendant is not actually arrested, but files common bail in consequence of a defect in the affidavit to hold to bail, he is not entitled to costs under 43 G. 3, c. 46, upon the plaintiff's recovering less than would have entitled him to proceed by bailable writ.

THE plaintiff issued a bailable writ for 28*l*. The sheriff accepted, instead of a bail bond, an undertaking of the defendant's attorney to put in special bail. The defendant was never actually arrested; and was ultimately allowed to file common bail, instead of putting in and perfecting special bail, the affidavit, on which the plaintiff's writ issued, proving to be defective.

The plaintiff having recovered only 14*l*.

Wilde, Serjt., obtained a rule to tax the defendant his costs under 43 G. 3, c. 46, s. 3.

Andrews, Serjt., showed cause. That statute only gives the defendant his costs where he has been arrested and held to special bail. Here he was neither arrested, nor did he put in special bail.

Wilde contended, that issuing a bailable writ, and obtaining an undertaking to put in special bail was constructively an arrest and holding to bail within the intent of the act, which being remedial, must receive a liberal construction. The defendant had incurred the inconvenience of coming to the Court to set aside the plaintiff's process.

TINDAL, C. J. The defendant does not fall within the description of persons entitled to costs under the 43 G. 3, c. 46. The words of the statute are, "in all actions wherein the defendant shall be arrested and held to special bail, and the plaintiff shall not recover the amount of the sum for which the defendant *92] shall have *been so arrested, such defendant shall be entitled to costs of suit, provided it shall be made to appear to the satisfaction of the Court that the plaintiff had not any reasonable or probable cause for causing the defendant to be arrested and held to special bail in such amount as aforesaid." Here there was neither arrest nor holding to bail; for, instead of a bail-bond, the defendant's attorney gave an undertaking to appear, and afterwards, upon a defect being pointed out in the plaintiff's affidavit to hold to bail, the defendant was allowed to enter a common appearance. He, therefore, has not been subjected to the inconvenience of an unjust arrest. In *Berry v. Adamson*, 6 B. & C. 528, where a sheriff's officer, to whom a warrant upon a writ against Adamson was delivered, sent a message to Adamson, and asked him to fix a time to call and give bail, and Adamson accordingly fixed a time, attended, and gave bail; it was held that that was not an arrest, and that an action for a malicious arrest would not lie against the party suing out the writ, although he had no cause of action.

PARK, J. I am of the same opinion. It is impossible to distinguish this case in principle from *Berry v. Adamson*.

GASELKE, J. In *Berry v. Adamson*, Lord Tenterden decides that circumstances like the present do not constitute even a constructive arrest.

BOSANQUET, J. This application being founded on a statute, the party ought to bring himself within the terms of that statute. But he has neither been arrested nor held to special bail.

Rule discharged.

*PORTER, Assignee of HURLAND, a Bankrupt, v. VORLEY. [*93
June 15.

H., before his bankruptcy, hired a carriage of M., and let it to defendant; defendant sent it back to H. damaged; M. repaired it with the assent of H., and H. having become bankrupt, proved the amount due for repairs under H.'s commission: Held, that H.'s assignees had a right of action against the defendant, although H.'s estate paid no dividend.

THIS was an action of *assumpsit* in which the plaintiff declared, that in consideration that the bankrupt Hurland had, before his bankruptcy, let to the defendant a phaeton on hire, the defendant undertook to use it in a moderate and proper manner; and the declaration then alleged, as a breach, that he did not so use it, but that in consequence of the improper use of it, it was broken and damaged. The defendant pleaded the general issue.

At the trial it appeared on the evidence, that such contract had been entered into between the defendant and Hurland; that the phaeton had been overturned and broken by the defendant's negligence, whilst in his employment; and that the expense of repairing the damage amounted to 9l. 15s. It appeared further, however, that the phaeton was not the property of the bankrupt, but was one which he had hired from a coachmaker of the name of Mills; and that after the phaeton came back, in its damaged state, it was sent home by Hurland to Mills, who repaired it, with the assent of the bankrupt, and had since proved the amount, as work and labour, under the commission; but that Hurland's estate had not, at the time of the trial, paid, nor was likely to pay, any dividend. A verdict was directed to be entered for the plaintiff for nominal damages, on the ground that the contract entered into was broken, but that no actual damage was proved to have been sustained, or was necessarily to be sustained by the breach of the contract, either by the bankrupt, or by the plaintiffs as assignees of his estate;

*But Tindal, C. J., before whom the cause was tried, reserved leave for the plaintiff to move to increase the verdict to 9l. 17s. 6d., the amount of the damage found by the jury to have been done to the phaeton. A rule nisi having been granted accordingly,

Jones, Serjt., who showed cause, contended that the bankrupt act, 6 G. 4. c. 16, does not transfer to the assignees of a bankrupt a right to sue for damages in respect of a contingent liability cast on the bankrupt's estate. The only interest in this matter which the assignees took under the commission was a right to sue the defendant in respect of the hire of the phaeton. That was a debt which passed by the assignment; but a claim in respect of possible loss to the bankrupt's estate is not pointed out by the statute as a subject of assignment. Properly speaking, if the defendant were to pay to the assignees the expense of repairing the phaeton, they would hold the money as trustees for Mills. If they were merely trustees to hand over the whole amount, they could not claim it by virtue of the commission, under which they would only be authorized to pay him a dividend.

Wilde, Serjt., *contra*. As against the defendant, the bankrupt must be considered owner of the phaeton; and he or his assignees are the only persons to whom the defendant is liable on his contract in respect of the phaeton, or for any consequences arising out of that contract. The assignees stand in the place of the bankrupt as to that contract and all its consequences. Now, if the bankrupt, before bankruptcy, had sued the defendant for the damage done to the vehicle, the defendant could not have set up the title of Mills, nor can he against the assignees: for the assignment does not alter the consequences of the contract. The assignees have as much *right to recover damages in respect of the defendant's implied contract to keep the phaeton whole, as in respect of his actual contract to pay for the hire of it. *Cur. adv. vult.* [*95]

TINDAL, C. J. (after stating the facts as *ante*, p. 93). It is unnecessary to discuss one of the questions raised before us, namely, whether a right to sue for uncertain damages passes to the assignees; the case of *Wright v. Fairfield*, very lately decided in the Court of King's Bench, 2 B. & Adol. 727, being an express authority that such right of action passes under the assignment. Nor does it appear to us, that any distinction can be taken on the ground that the subject-matter to which this contract related, the phaeton, was not the property of the bankrupt, and did not come to the assignees; because it was perfectly immaterial as between Hurland and Vorley, whether the absolute property vested in the former or not, as long as he had sufficient possession of it to enable Vorley to enjoy it under the contract of hire, of which there was no doubt. And as to the question of damages, if Hurland, before his bankruptcy, had done the necessary repairs himself, or had paid for them when done, he would undoubtedly have been entitled to the whole sum which was laid out; or if his estate had actually paid, or had been proved ever likely to pay, any part of the amount proved against it, such proportion would have been the measure of the damages sustained by the bankrupt's estate. But as there is no proof to this effect, the consequence appears to us to be, that the plaintiffs are entitled to nominal damages for the breach of a contract on which they had the right to sue, and where no actual damage is proved.

Rule discharged.(a)

(a) See *Marzetti v. Williams*, 1 B. & Adol. 415.

*96] *RAW and Others, Assignees of LEIGH, a Bankrupt, v. CUTTEN.
June 15.

The provisional assignee of a bankrupt is not responsible for the fraud of an agent appointed with due care.

THIS was an action for money had and received to the use of the plaintiffs.

The defendant, a messenger under the great seal, attached to the list of commissioners in London, to whom the commission against Leigh the bankrupt was directed, had been appointed by them provisional assignee under that commission, and had employed one Williams as his servant or agent to manage the business of the bankrupt in Northamptonshire, and receive money due. Williams received money due to the bankrupt, but never paid it over to the defendant; whereupon the plaintiffs, assignees chosen by the creditors, sued the defendant in this action for the money so received by Williams. There being no proof nor even suggestion that the defendant had been guilty of negligence in appointing Williams his agent, the plaintiffs were nonsuited, with leave to move to enter up a verdict for the amount sought to be recovered.

Spankie, Serjt., having accordingly obtained a rule *nisi* on the ground that the defendant was responsible for the acts of his agent,

Wilde, Serjt., showed cause. The defendant is no more than a trustee, and, as such, is not liable in this action for money which never came to his hands. A trustee is liable only for what he actually receives, and not for losses incurred in the fair discharge of his trust. **Adams v. Claxton*, 6 Ves. 226;

*97] *Bacon v. Bacon*, 5 Ves. 331; *Knight v. Lord Plymouth*, 3 Atk. 480; *Ex parte Litchfield*, 1 Atk. 87; *Ex parte Belchier*, *Ex parte Parsons*, Amb. 218.

In *Ex parte Turner*, 1 Mont. & M'A. 52, it was held, that assignees chosen by the creditors are not liable under circumstances like the present, and a provisional assignee stands in the same situation. At all events, the remedy is by application to the Court of Chancery, and not by an action at law.

Spankie. The courts at law have on these matters a concurrent jurisdiction. *Hartop v. Jukes*, 2 M. & S. 438, *Ex parte Hartop*, 9 Ves. 109, 12 Ves. 349, *Hart v. Biggs*, Holt, 245, *Ex parte Johnson*, 1 Glyn & J. 23.

An action lies against the provisional assignee of a bankrupt for money had and received. *Edmeads v. Newman*, 1 B. & C. 418. And the permanent assignee may sue the provisional assignee for the balance remaining in his hands. *De Cossion v. Vaughan*, 10 East, 61, *Wray v. Barwis*, Peake N. P. C. 69, *Smith v. Jameson*, Id. 215. Then upon the principle of *respondet superior*, receipt of money by the agent of the provisional assignee must be considered as receipt by the provisional assignee himself, otherwise, by shifting his responsibility, he might waste the bankrupt's estate. And this is no hardship, for he may take security from the agent he employs. His situation resembles that of a sheriff; and in *Ex parte Litchfield*, Lord Hardwicke held an assignee liable for the default of a clerk whom he had trusted. In *Ex parte Belchier*, *Ex parte Parsons*, and *Ex parte Turner*, the parties who occasioned the deficiency were not agents of the assignee. *Bacon v. Bacon*, *Claxton v. Adams*, and *Knight v. Lord Plymouth* may be considered as overruled [*98 by *Wren v. Kirton*, 11 Ves. 377; while in *Booth v. Ingledew*, 1 Mont. 248, and *Ex parte Griffin*, 2 Glyn & J. 114, assignees were held responsible for the default of a clerk. *Cur. adv. vult.*

TINDAL, C. J. In this case the defendant, Cutten, was the provisional assignee appointed by the commissioners under the commission issued against Leigh the bankrupt, and the money for which the plaintiffs, the assignees chosen by the creditors, bring their action, is money received by one Williams, who was employed by the defendant as his servant or agent to go down to Northamptonshire for the purpose of managing the business of the bankrupt, and receiving moneys due to him, but which money so received by Williams he never paid over to the defendant. There was no proof, nor indeed any suggestion, that the defendant had been guilty of negligence in selecting Williams as his agent for that purpose. On this state of facts the question is, whether an action for money had and received is maintainable against the defendant, and we are of opinion that under the circumstances of this case such action is not maintainable.

On the part of the plaintiff it is contended, that the situation and character of the provisional assignee is the same as that of the sheriff under a writ of execution, who is answerable *civiliter*, as well for all moneys received as all acts done by his bailiffs or servants, upon the principle "*respondet superior*." On the part of the defendant it is argued, that he is strictly and properly a trustee; and as such trustee, if liable at all to an action at law, he is only liable where the money actually comes *to his hands, or fails in coming to his hands by his own neglect or default. [*99

The office of temporary or provisional assignee did not exist before the 5 Ann. c. 22. By that statute the creditors were, for the first time, empowered to elect the assignees, who before were appointed by the commissioners, but as such choice could not take place without some delay, and as in certain cases, the immediate appointment of an assignee was absolutely necessary for the preservation of the property, it was enacted by the fifth section in the terms which have been since nearly followed in all the subsequent acts, "that it should be lawful for the commissioners, for the better preserving or securing the bankrupt's estate, immediately to appoint or make one or more assignee or assignees of the estate, or any part thereof, which assignee might be removed or displaced at the meeting of the creditors, if the major part should so think fit." The object, therefore, of the appointment would be defeated, unless the provisional assignee takes the whole legal interest in the property assigned to him as fully and effectually to all intents and purposes as the assignees afterwards chosen by the creditors take the same, and accordingly the provisional assignment transfers such property to him in the largest and most comprehensive terms. In fact, the general assignees take by assignment from the provisional assignee the very same property which had been conveyed to him, and upon the same precise trusts as those under which he took, except, that there

is added in the assignment to the provisional assignee, that the transfer is made in trust for the immediate preservation of the bankrupt's property.

That the provisional assignee is therefore a trustee, in the same sense and to the same extent as the general assignee, appears undeniable. The question *100] therefore arises as to the extent of his liability as such trustee: *for, admitting for the purpose of argument, that the plaintiffs are not driven to their remedy in equity as against a trustee who has been guilty of a breach of trust, but that they may have recourse to the action for money had and received, still it must be conceded, that whatever would have formed an answer to a bill in equity, will also be a defence against the present action; so that the inquiry is, whether the defendant has been guilty of such negligence or default in allowing Williams to receive the money that was collected, as that he shall be subject to the same liability as if he had actually received the money himself. There seems no reasonable ground for contending, that the provisional assignee is liable to a greater degree of responsibility than the general assignee who is chosen by the creditors. The provisional assignee is appointed by the authority of the commissioners, and in the present case, according to the general course observed in practice, was one of the messengers under the great seal, attached to the list of commissioners to whom this commission was directed. He was a person known by the commissioners at the time of his appointment to be unable to attend personally the execution of the duties of his office in Northamptonshire, by reason of the conflicting duties of his office of messenger in London. He may be, and frequently is, made provisional assignee under different commissions running at the same time; in which case, it would be impossible for him to execute the duties personally under all the commissions. It must be presumed, therefore, that it was well known on the part of the commissioners, from whom his trust was derived, that he should have power to execute such part of his duties as could not be personally executed by himself, by an agent properly and discreetly chosen.

Under these circumstances the present question arises, whether the provisional assignee is to be answerable for *all sums received and all acts *101] done by such agent, as if he were a guarantee; or is he only to be answerable, where he has been guilty of a default in the appointment and choice of such agent? It has been argued, that the case resembles that of a sheriff, who undoubtedly would be liable to the plaintiff in any action, for money levied and received by his bailiff, although not paid over to himself. In the first place, the sheriff is no trustee, having no interest in the goods seized and sold. He is a public officer upon whom the law casts the ministerial duty of seizing and selling under the king's writ. There may well, therefore, be one scale of responsibility attached to the breach of trust in the trustee, and another to the breach of an express command made by the law to a ministerial officer. Again, from the necessity of the case, and for the security of the king's subjects, the rule *respondet superior* has been laid down from the earliest times in the case of sheriffs over whose appointment the public have no control; and in consequence of that known rule of law, the practice has prevailed from early times that the deputies and bailiffs of the sheriffs give security to him against their wrongful acts done in the execution of warrants granted by him. It would be unreasonable, therefore, to apply such rule to the present case, which comes under the description of the non-performance of a trust by a trustee appointed for a particular purpose, namely, the trust of paying over to the assignees all the moneys received by the defendant. The real question appears to us to be, whether, if a bill had been filed by the general assignees against the provisional assignee, he would have been held liable for the money so received and not paid over by his agent. The case in the matter of *The Earl of Lichfield*, 1 Atk. 87, *102] would seem at first to bear *against the present defendant. He had entrusted the clerk to the commission to receive and to pay some of the effects and debts of the bankrupt. No fraud appeared in the assignee, but the

clerk afterwards failing, the question was, whether the assignee should make up the deficiency. Lord Hardwicke held the assignee liable upon the general principle of any other trustee, who, if his agent deceives him, *respondet superior* to the *cestui que trusts*. But he afterwards adds as the ground of his judgment, that the assignee employed the clerk to the commission, "a person of very little credit," to pay the dividends; and, again, that "he did not consult with the body of the creditors, who are his *cestui que trusts*, in the appointment of this agent." So that it is clear that his judgment proceeds on a want of proper care in the assignee, in appointing the particular agent. On the other hand, the case of Knight v. Lord Plymouth, 3 Atk. 480, is strongly in favour of the defendant. In that case the receiver under the Court of Chancery, who thought it not safe to remit to London the specie collected by him, and therefore paid it in to a tradesman at Worcester, then in good credit, from whom he took bills of exchange payable on persons in London, was held to be not responsible for the amount, by reason of the failure of such tradesman: the Chancellor saying, it was a loss not owing to any default of his, but was a necessary precaution on his part to remit by bills rather than in specie: but at the same time saying, if the money had been lost by his wilful default, he should have been obliged to answer the loss. And, again, in *Ex parte Belchier*, Ambl. 218, Lord Hardwicke goes much more fully into the principle by which the question of the assignee's liability is to be governed. That was a case where the *assignee, after employing a broker to sell tobacco, the property of the bankrupt, allowed the money to remain in his hands ten days, [*103 when he died insolvent. Lord Hardwicke said, "If the assignee is chargeable in that case, no man in his senses would act as assignee under commissions of bankrupt. This court has laid down a rule with regard to the transactions of assignees, and more so of trustees, so as not to strike a terror into mankind acting for the benefit of others, and not for their own. Courts of law and equity too, are more strict as to executors and administrators; but where trustees act by other hands, either from necessity, or conformably to the common usage of mankind, they are not answerable for losses." In another part of the judgment he adds, "the assignee in this case acts as prudently for the trust as for himself, and according to the usage of business." This case, it is to be observed, came before Lord Hardwicke in 1754, nearly twenty years after that of The Earl of Lichfield. The same doctrine is laid down in *Adams v. Claxton*, 6 Ves. jun. 226, where the agent of a trustee, appointed under an assignment for the benefit of creditors, having paid the money which he had collected into Nightengale's bank, and the bank having failed, the trustee was held not to be liable for its failure.

Inasmuch, therefore, as the provisional assignee had the power, both from the necessity of the case, and also from the ordinary course of business observed on similar occasions, to execute this part of his duty by means of an agent, and as there is the entire absence of fraud on the part of the defendant, and no proof of negligence in choosing an insufficient or dishonest person as his agent, we hold, upon the authority of the *cases above referred to, that [*104 he is not to be charged with the money received by Williams and not paid over to the defendant, in an action for money had and received by him to the use of the plaintiff.

Rule discharged.

DOE dem. PRESCOTT v. ROE. June 15.

A judge at chambers has authority to order costs.

THE judgment and execution in this case had been set aside by a judge at chambers in vacation, and the plaintiff at the same time was ordered to pay the defendant his costs. In Easter term last,

Jones, Serjt., obtained a rule nisi to set this order aside, *quatenus* the costs, on the ground that a judge at chambers had not authority to order costs; for which position he cited *Read v. Lee*, 2 B. & Adol. 415.

Wilde, Serjt., showed cause. Although the decision in *Read v. Lee* is adverse to the authority of a judge at chambers in the matter of costs, the language of the court is in favour of such a jurisdiction. Lord Tenterden points out the benefit resulting to parties in the way of expedition and economy, from the summary tribunal of a single judge; but that tribunal will be unavailing for either purpose, if the suitor be compelled either to renounce his costs, or to apply for them to the superior court.

Jones. By a recent act of parliament, a single judge sitting apart in term
*105] time, is authorized to make rules of *the same force as the whole court in banc; but that act would have been unnecessary, if a single judge had the power before, either in term or vacation. There is, however, no trace of the origin or recognition of any such power. *Cur. adv. vult.*

TINDAL, C. J. The question raised upon this application is, whether a judge at chambers has authority to make an order for the payment of costs by the party against whom he decides on a point brought before him on summons.

The authority of a judge at chambers to make orders in the various cases which are brought before him, is, when considered upon principle, the authority of the court itself; for no order which is made can be enforced by attachment, until it has been first made a rule of the court; and the party who disputes the propriety of the order, has the opportunity, as in the present instance, to question its validity by application to the court. On any other principle it is difficult to account for the validity of many acts done by a single judge at chambers, such as setting aside irregular judgments signed in vacation, which judgments are to be considered on principle the acts of the whole court; discharging persons under writs of execution improperly taken out, and the like. And considered as resting on this principle, we see no reason why a single judge should not make the payment of costs a part of his order; because, until such order is made a rule of the court, where the party called upon has the opportunity to contest it, it is altogether inoperative. It would certainly impose a great hardship in many cases upon suitors, if no such powers existed. Costs are, in many cases, so important a consideration with the poorer suitor, that if
*106] he could *not obtain them at chambers, he would make his application to the court, and to the court alone, at a much greater expense.

If, therefore, he was improperly arrested, or his goods taken in execution at the commencement of the long vacation, the defendant would be placed in the alternative either of applying to a judge at Chambers, subject to the loss of his costs, or of remaining in prison, or being deprived of his goods until the next term, when he might apply to the full court. The want of such power in any case to award costs, would probably have the effect of driving parties to apply to that forum which had authority to grant them, and thus operate to prevent the frequency of application to chambers, where so much of the ordinary practice in a suit is conducted with equal dispatch and with much less expense. We think, therefore, the judge at chambers has the power to direct payment of costs on the same principle that he has to exercise any other authority in the progress of a cause; but at the same time, it is obviously one which ought to be exercised with care and discretion.

The present rule, therefore, must be discharged.

Rule discharged accordingly.

*107] *BEVAN and Another, Assignees of A. NUNN, a Bankrupt, v. B. NUNN and Another.

Under 6 G. 4, c. 16, a transfer of goods in satisfaction of a *bonâ fide* debt, made voluntarily, and in contemplation of bankruptcy, is an act of bankruptcy, and not protected

by the eighty-first section, though made more than two months before a commission issues.

TROVER.—The jury found that the goods had been delivered by the bankrupt to the defendant in satisfaction of a *bona fide* debt, but voluntarily, and in contemplation of bankruptcy; and that such delivery took place four months before the commission was issued against him.

A verdict was taken for the plaintiffs, with leave for the defendants to enter a nonsuit, if the Court should be of opinion that they were protected by sect. 81 of 6 G. 4, c. 16, which enacts, "that all conveyances by, and all contracts and other dealings and transactions by and with any bankrupt *bona fide* made and entered into more than two calendar months before the date and issuing of the commission against him, and all executions and attachments against the lands and tenements, or goods and chattels of such bankrupt, *bona fide* executed or levied more than two calendar months before the issuing of such commission, shall be valid, notwithstanding any prior act of bankruptcy by him committed; provided the person or persons so dealing with such bankrupt, or at whose suit, or on whose account such execution or attachment shall have issued, had not at the time of such conveyance, contract, dealing, or transaction, or at the time of executing or levying such execution or attachment, notice of any prior act of bankruptcy by him committed; provided also, that where a commission has been superseded, if any other commission shall issue against any person or persons comprised in such first commission within two calendar months next after it shall have been superseded, no such conveyance, *contract, dealing or [*108 transaction, execution or attachment shall be valid, unless made, entered into, executed, or levied more than two calendar months before the issuing of the first commission."

Spankie, Serjt., having accordingly obtained a rule *nisi* for entering a nonsuit,

Wilde, Serjt., showed cause. The eighty-first section of 6 G. 4, c. 16, was framed to protect transactions which could be avoided only by preceding acts of bankruptcy; and not an act fraudulent, or an act of bankruptcy in itself. Such acts have never been protected on the ground that they took place two months before the commission. In *Pulling v. Tucker*, 4 B. & Ald. 382, the transaction was two years before the commission. In *Poland v. Glynn*, 4 Bingh. 22, n., 2 D. & R. 310, the dates are not given, but the transaction must have been more than two months before the commission. In *Tucker v. Barrow*, 1 M. & M. 137, 3 Carr. & P. 85, where it seems Lord Tenterden thought the conveyance was protected, the question arose only incidentally at *Nisi Prius* and was never argued. If the defendants be protected by this section, fraudulent preference will be no longer a head of bankrupt law. But the eighty-first section was meant only to prevent the effect of a relation to the act of bankruptcy, where that relation is likely to work injustice; not to render nugatory the effect of section 8. The words of sect. 81, too, are, "conveyances, contracts, and dealings *bona fide* made and entered into," which cannot be applied to a transfer tending to defeat the whole operation of the bankrupt laws. And the eighty-second section expressly excepts every payment "being a fraudulent preference of a creditor."

**Spankie*. The preference does not in itself affect the *bona fides* of the [*109 transaction, and is only lawful as tending to defeat the equal distribution of property. But the legislature in this act meant to distinguish between preferences which were *mala fide*, and fraudulent at common law, and preferences honest in themselves. Sect. 2 enumerates what persons shall be deemed traders liable to become bankrupt. And the acts of bankruptcy enumerated in sect. 3 are, "That if any such a trader shall depart this realm, or being out of this realm shall remain abroad, or depart from his dwelling-house, or otherwise absent himself, or begin to keep his house or suffer himself to be arrested for any

debt not due, or yield himself to prison, or suffer himself to be outlawed, or procure himself to be arrested, or his goods, money, or chattels to be attached, sequestered, or taken in execution, or make or cause to be made, either within this realm or elsewhere, any fraudulent grant or conveyance of any of his lands, tenements, goods or chattels, or make or cause to be made any fraudulent surrender of any of his copyhold lands or tenements, or make or cause to be made any *fraudulent* gift, delivery, or transfer of any of his goods or chattels; every such trader doing, suffering, procuring, executing, permitting, making, or causing to be made any of the acts, deeds, or matters aforesaid, with intent to defeat or delay his creditors, shall be deemed to have thereby committed an act of bankruptcy." It is the necessary character of those acts that they are fraudulent and bad in themselves. The meaning of *bonâ fide* is, *on good consideration*; and that is a question for the jury. [ALDERSON, J. Would a conveyance of all the trader's property on good consideration, two months before the act of bankruptcy be valid?] That is an excepted case; for, by conveying all his property, the party *110] must cease to *be a trader. In all other cases, the parties have, under this statute, the same rights as at common law, provided the two months have elapsed. The apparent inconsistency between the eighty-first section and the eighty-second is reconciled by the observations of Lord Tenterden in *Tucker v. Barrow*. As the eighty-first section protects payments which were not protected before, and tending, like *bonâ fide* transfers, to defeat equal distribution, there is reason to infer that such transfers were considered in *pari materiâ*, and that the legislature meant to uphold them. *Cur. adv. vult.*

TINDAL, C. J. In this case it was found by the jury, that the goods were delivered by the trader to the defendants in satisfaction of a *bonâ fide* debt, voluntarily, and in contemplation of bankruptcy, and that such delivery took place four months before the commission of bankruptcy was issued; and upon this finding the question has arisen and has been argued before us, whether such delivery is protected under the eighty-first section of the late bankrupt act, as being "a transaction *bonâ fide* made and entered into more than two calendar months before the date and issuing of the commission."

In support of the affirmative of this proposition, it is urged on behalf of the defendants, that by the very words of that section, the only inquiry pointed out is, whether the transaction is *bonâ fide*, the proper meaning of which is contended to be *bonâ fide* at common law, independent of the statute of bankruptcy; that the eighty-first section is altogether silent on the subject of *fraudulent preference*, whereas in the eighty-second there is an express exception made of every payment, "being a fraudulent preference of a creditor," so that the statute itself points out the distinction by employing the term where it was intended *111] to be applied; and, lastly, that *upon the authority of a case of *Tucker and Another, Assignees, &c. v. Barrow*, 1 Moody & M. 137, before Lord Tenterden, C. J., it is stated to have been held, that the doctrine of fraudulent preference only applies to cases within two months before the commission.

We think, however, upon a more full consideration of the bankrupt statute, that the transaction in question amounts to an act of bankruptcy in itself, and that on that account, it is not protected by the eighty-first section of the statute.

By the third section, the making any fraudulent gift, delivery, or transfer of any part of a trader's goods or chattels, with intent to defeat or delay creditors, is, for the first time, declared to be an act of bankruptcy; such fraudulent transfer of a part of his goods not being attended with the consequence of bankruptcy under the former statutes, unless it was a grant or conveyance by deed. When, therefore, the present statute makes the very transaction in question a substantive act of bankruptcy, we think it cannot be a just interpretation of the eighty-first section to hold, that the effect and consequence of this very act of bankruptcy should itself be made valid, and protected by that clause.

If an interval of two months is held to be a protection of this act of bankruptcy, no reason can be assigned why the same rule of construction should not extend to a fraudulent conveyance of goods by deed, where such conveyance is

made in satisfaction of a *bond fide* debt; for such fraudulent conveyance is made an act of bankruptcy under the very same third section. The last-mentioned act of bankruptcy, however, it must be admitted, is one which has no such limitation as to time.

Again, the object of the eighty-first section is to *protect *bond fide* transactions against the effect of prior secret acts of bankruptcy by relation. The clause, therefore, does not apply to any case, unless where a former act of bankruptcy is assumed to have been committed. But the case of a fraudulent preference in contemplation of bankruptcy does, *ex vi termini*, exclude the existence of any former act of bankruptcy. It would follow, therefore, that such act of fraudulent preference was never within the contemplation or scope of the eighty-first section, inasmuch as the proviso, at the end of that section, that the party had no notice of any prior act of bankruptcy, cannot by possibility apply to it. [*112]

It is further insisted by the defendants, that in the eighty-second section, all payments made by the bankrupt to any creditors before the date and suing forth of the commission, are made valid, with the express proviso that such payment is not a *fraudulent preference* of the creditor; and that as such proviso is not to be found in the eighty-first section, it is to be inferred that the present transaction is rendered valid by that section. But the answer to such inference appears to be this, that, as the payment of a debt to a creditor by way of preference, is not made an act of bankruptcy in itself, it became necessary to insert those words in the eighty-second section, otherwise such payment would have been made good under that clause; but that, as the delivery of any goods or chattels, by way of fraudulent preference to a creditor is made an act of bankruptcy, there was no danger that such delivery should be made valid by the eighty-first section; and therefore it is that the words are omitted in that section.

Upon the whole, it appears to us, that to adopt the construction contended for by the defendants, would be to enable the trader to defeat the whole object of the bankrupt laws, by first making a secret delivery of *securities or other chattels to the largest possible amount in satisfaction of a *bond fide* debt due to a favoured creditor, and then by contriving to prevent the issuing of a commission of bankruptcy, for any period, however short, above two calendar months from such fraudulent delivery. [*113]

This, as it appears to us, would equally violate the letter and the intention of the bankrupt statute.

We therefore think the rule for entering a non-suit should be discharged.

Rule discharged.

NEWLAND v. WATKIN.

A warrant of attorney given by a clergyman, authorising his creditor to issue a sequestration, is void under 18 Eliz. c. 20.

THE defendant, a clergyman, had raised money by way of annuity of the plaintiff, and of W. Morris. To the plaintiff he gave a warrant of attorney to enter up judgment for the arrears of his annuity, and in the warrant expressly authorized him to issue a sequestration.

He also gave Morris a warrant of attorney to enter up judgment for arrears, but the warrant to Morris contained no allusion to a sequestration.

The defendant having failed to pay the annuities, the plaintiff first, and then Morris, entered up judgment and issued respectively sequestrations against the defendant's benefices: whereupon

Wilde, Serjt., on the part of Morris, obtained a rule nisi to set aside the

plaintiff's warrant of attorney, judgment, and sequestration, on the ground that his warrant of attorney contained an express authority to issue a sequestration *114] was a charge on the benefices, and *therefore void under 13 Eliz. c. 20, s. 1, which enacts, "that all chargings of such benefices with cure with any pension, or with any profit out of the same to be yielded or taken, hereafter to be made, other than rents to be reserved upon leases hereafter to be made according to the meaning of this act, shall be utterly void." And he referred to *Shaw v. Pritchard*, 10 B. & C. 241; *Flight v. Salter*, 1 B. & Adol. 673; *Gibbons v. Hooper*, 2 B. & Adol. 734, and *Doe dem. Mitchinson v. Carter*, 8 T. R. 57, 300.

Taddy, Serjt., showed cause. Both parties are in the same situation, and the court will not interpose in favour of one. The plaintiff's warrant of attorney is a mere security for a debt; a mode of shortening process of law, and not a charging of the defendant's benefice with any pension within the meaning of the statute. In *Flight v. Salter*, the warrant of attorney authorized the party to proceed immediately to sequestration before any arrears of the annuity were due, and the Court relied on *Doe dem. Mitchinson v. Carter*, where it was expressly found that the warrant of attorney was given in fraud of a covenant not to assign a lease. A debt is not a *profit* within the meaning of the statute; and, at all events, this application can only be made by the defendant, and not by a stranger to the judgment.

Wilde. Morris, although not a party, has a sufficient interest to entitle him to apply for the removal of a judgment which impedes his own execution. *Saunders v. Hardinge*, 5 T. R. 9. And the plaintiff's warrant of attorney, expressly pointing at the proceeding by sequestration, is a charge on the benefice within the meaning of the statute.

*After taking time to consider,
*115] The Court pronounced a rule, that Newland should no further enforce his writ of sequestration, but that he should not be subject to an action of trespass.
Rule absolute accordingly.

FOX v. CLIFTON and Others.

See ante, vol. vi. p. 776.

For the facts of this case see *ante*, vol. 6, p. 776. The cause having gone down to a second trial, pursuant to the decision of the Court there reported, the plaintiffs, in addition to the evidence on which they had relied at the first trial, put in certain resolutions purporting to have been come to "at a meeting of the proprietors of the Imperial Distillery Company, held at the City of London Tavern, the 18th of March, 1825, S. B. M. Barrett, Esq. M. P. in the chair." By these resolutions, after setting forth the utility of the undertaking, it was resolved that a company should then be formed under the denomination of the Imperial Distillery Company; that the capital should be 600,000*l.* in 12,000 shares of 50*l.* each, which the directors should distribute as they might think fit; that the company should be governed by twelve directors, who were therein, as well as the chairman, auditors, treasurers, engineer, counsel, solicitors, and secretary, named and appointed; that the directors should have power to take or purchase premises; and meet once a week or oftener, for the despatch of business, the first meeting to be summoned for the next day.

It did not appear that the defendants were present when these resolutions were entered into.

*116] *Lane, the secretary to the company, who upon the first trial had stated that a conversation, in which he had assured the plaintiff of the solvency of the company, took place previously to the contract which had been

entered into with the plaintiff, upon the second trial deposed that the conversation did not take place till after that contract. It was also proved that the scrip of the company was sold openly in the market by Mr. Wettenhall, a broker, and that persons producing that scrip and paying the instalments due, were, without further inquiry, permitted to sign the company's deed as partners. In other respects the evidence was in substance the same as upon the former trial, and, notwithstanding the direction of Tindal, C. J., that the facts proved did not constitute the defendants partners in the concern, the jury again found a verdict for the plaintiff; whereupon,

Taddy, Serjt., last Michaelmas term obtained a rule nisi for a new trial, on the ground, among other objections, that the verdict was against the evidence, and that the resolutions of the 18th of March, and the conversation with Lane ought not to have been presented to the jury as against these defendants.

Wilde and *Bompas*, Serjts., upon showing cause against the rule, argued to the same effect as before, and the Court, after hearing counsel in support of the rule, took time to consider till this term, when judgment was delivered as follows, by

TINDAL, C. J. This cause has come before the Court upon a second application for a new trial, and if the questions before the jury had been merely questions of fact, we should probably have hesitated much after two concurrent verdicts for the plaintiffs, before we should *have sent the cause down [*117 to a third investigation. For although no precise rule can be laid down upon this point, but each case must stand upon its own proper ground, yet it would be only under very strong and well-grounded dissatisfaction with the former verdicts, that the Court could be induced so far to interfere with the proper province of the jury on questions which the law has placed under their peculiar jurisdiction as to send a mere question of fact to trial by a third jury where two have before pronounced the same opinion upon it.

But the questions in this case submitted to the jury, were not questions of mere fact, but questions in which the law and the fact were so intimately involved and combined together, that the jury cannot be said to have come to a right conclusion upon the fact, unless they are contented to take the law upon the subject from the Judge who presides at the trial. Whether particular persons have entered into a partnership together, is, indeed, when abstractedly put, a question of mere fact: and if the affirmative of such question turns upon the execution or non-execution of a deed or agreement, or upon the balance of contradictory proof as to acts done by the parties which show them to be partners, the question remains one of mere fact throughout the whole of the investigation. But if, instead of such direct testimony upon a question, simple enough in itself, the evidence of the partnership consists of printed or written documents, such as advertisements and resolutions; of acts done, not by the parties themselves, but by others who it is contended had authority to bind them; or of deeds executed not by all, but some only of the parties, the question whether these parties did enter into a partnership or not, no longer depends upon the investigation of single facts upon which the jury can be left to their own discretion and natural good sense in order to *arrive at a just conclusion, [*118 but they must take from the Judge, the legal result of those documents and the legal consequence of those various facts, and be governed by his own opinion upon the law, where the facts in themselves are not in dispute.

Now the two first questions which arose on the former trials of this case, were precisely of this class and description. They were questions in which the whole difficulty lay in the application of the law to the facts, very little in the investigation of the facts themselves.

The facts presented to the jury upon these questions, on the last trial were substantially the same as those which were brought before them on the first, with the addition of the resolutions dated the 18th of March, which latter document appears to us to make no material alteration in the plaintiff's favour.

On this state of facts the opinion of the Court has been already declared upon the first question, that no partnership was created between the defendants; and as we see no reason to alter the opinion then deliberately formed, it is unnecessary to repeat the grounds of it upon the present occasion. A similar observation arises upon the question secondly submitted to the jury, both upon the last and the former trial. The jury were directed upon each occasion, that the acts given in evidence by which the defendants were supposed to have held themselves out to the world as ostensible partners, were not such as in point of law ought to bind the defendants, being done neither with their knowledge nor their assent. Upon this question also, we forbear on this occasion, to repeat the ground of the opinion which we still entertain.

The third question which was left to the jury on the last trial was one upon which, if the facts were proved, they were bound to take the direction of the Judge as to the law.

*119] Upon that question the jury were told, that if any of the defendants ever had a right to become a shareholder in the concern, and had parted with such right before the contracts entered into between the plaintiffs and the defendants, the verdict must pass for the defendants. And upon the evidence the jury were told that if it was believed that Levi, one of the defendants, had before the making of the contract on which the action is brought, sold and parted with the right he once possessed of becoming a shareholder in the concern, the action was at an end. We did not upon a former occasion express any opinion on this point; but it may be right to state upon the present, with a view to the course into which it may be judged expedient to put this cause either now or upon a future occasion, that such is our opinion. It seems to us that the scheme of this proposed partnership was such as to show it was not constructed upon the ordinary ground of a common partnership in trade. The persons who applied for shares never did so from motives of mutual confidence in each other's stability, skill, or integrity. They were perfect strangers to each other; proposing, without any previous communication together, for the division amongst them of shares, 12,000 in number. From the bare consideration of the number, they never could expect that the persons who ultimately signed the deed, and became thereby partners together, would be the same individual persons who sent in proposals for shares. Indeed it was proved in evidence that the scrip was generally and publicly sold to strangers. It was further shown that the shareholders acquiesced in it; for, when the deed was signed, no question was asked whether the person was an original subscriber or not; on the contrary, any person who produced the scrip receipt, and paid up the second instalment, was allowed to execute the deed. The present case, therefore, appears not to be governed by reference to the rules which restrain

*120] partners from parting with their shares in ordinary cases without each other's consent; for in this case the power of transferring the scrip to any one, cannot but have formed a part of the original design. It appears, therefore, to us that at the time the contract was entered into with the plaintiff, Levi was not, and could not be, a shareholder. He could not call upon the directors to admit him to a share, because he had parted with his scrip. On the other hand, the man who had purchased it, if he was willing to pay up the second instalment, would have been entitled and allowed to receive a certificate of his share and to execute the deed without difficulty. In addition, therefore, to the grounds of objection before adverted to, the undisputed facts before the jury on this third point, appear to us to put an end to this action, in which Levi is made a co-defendant.

It has been contended, on the part of the defendants, that evidence was improperly admitted at the trial. The first objection is, that the resolutions of the 18th of March were admitted in evidence, without proof that the defendants attended the meeting when they were passed. However that may be as to some of the defendants, the resolutions could not be excluded from the evidence as to the others, for one of them, Plummer, signed the deed.

It is then urged, that the evidence as to the holding out of the defendants as partners was not admissible, because it took place, if at all, after the contract was made; but the answer given at the bar appears to be correct that such evidence was, at all events, admissible with reference to the first question in the case.

We think the finding upon each of these questions has been a finding against the legal result of the facts proved, and, upon this ground, we think the rule for a new trial should be made absolute on the payment of costs.

Rule absolute.

*(IN THE HOUSE OF LORDS.)

[*121]

BAILIE v. GRANT.

A commission of bankrupt may be supported on a debt accruing before the bankrupt became a trader, and an act of bankruptcy committed after he has ceased to be a trader.

IN this case a question was proposed by the House, and the opinion of all the Judges delivered as follows, by

TINDAL, C. J. The question proposed by your Lordships to his Majesty's Judges, is this:—

A., not a trader, becomes indebted to B. to the amount of 100*l*. A. afterwards becomes a trader, and ceases to be a trader, never having paid his debt to B. After ceasing to be a trader, he commits an act of bankruptcy. Can B. support a commission against him, upon his debt, and that act of bankruptcy?

Upon this question the Judges, who have heard the argument at your Lordships' bar, are of opinion, that a commission may be supported against A. upon the debt and act of bankruptcy above supposed.

It has been decided, and has long been considered as law, that a debt contracted *before* a man enters into trade, but continuing unpaid at and after the time he is in trade, is a sufficient debt to support a commission taken out against him, upon an act of bankruptcy committed whilst he is a trader. See the case of *Butcher v. Easto*, Doug. 295.

It has also been established beyond dispute, that a petitioning creditor's debt contracted during the trading of the debtor, will support a commission taken out against him on an act of bankruptcy committed after the trading has ceased. This point has been settled to be *law by various decisions, commencing with that of *Heylor v. Hall*, Palmer's Rep. 325, and ending with that of *Ex parte Bamford*, 15 Ves. jun. 449. But it is contended, that although each of these propositions be true separately, yet that no inference can be drawn from them that the debt contracted *before* the trading, but subsisting during its continuance, and the act of bankruptcy committed *after* the trading, will support a commission. We think, however, that no valid or substantial distinction in this respect can be drawn between the debt contracted before, and that contracted during the trading. [*122]

The debt contracted before trade, but remaining unpaid at and after the time the debtor enters into trade, appears to us to be a subsisting debt for every purpose, and subject to every consequence, which belongs to a debt originally contracted during trade.

It is the same with respect to the trader's ability to carry on his trade. The money lent to the person, who afterwards commences trade, may be, and often is, the capital upon which the trade itself is carried on. At all events, the credit given to the trader by the forbearing to demand repayment, is one of the

sources from which such capital is derived, and is the same, in effect, as a new loan. Again, the debt is attended, in both cases, with the same consequences, as to the trader's ability to repay it; for in each the power of repayment is equally affected by the success or failure of the trader. No one would contend, that a debt contracted during the period of trading, though not a *trade debt*, but contracted for private purposes, and applied to private occasions perfectly distinct from the trade, is it to be considered as differing in any respect from a debt contracted in the course of the trade itself. It seems, therefore, rather *123] an artificial distinction, than a substantial difference, to hold *that the debt contracted after the trading has commenced, shall support the commission taken out on an act of bankruptcy committed after the trading has ceased; but that the debt contracted before the trading, but continuing afterwards, shall not be attended with the same consequence. If a commission cannot be supported under these circumstances, a trader, by giving up his trade, which is a voluntary act on his part, would have the power of depriving his former creditors of the benefit of enforcing an equal distribution of his effects amongst all his creditors, and would be enabled to pay his subsequent creditors out of the very funds furnished or increased by those who were his creditors before he began trade; and, upon referring to the bankrupt acts, there does not appear to be any distinction created between these two classes of creditors, as to the right to petition for a commission.

The first statute which mentions a commission is the 13 Eliz., c. 7, s. 2, which states in the most general terms, "that the Lord Chancellor for the time being, *upon every complaint made in writing*, against such person or persons being bankrupt, as is before defined, shall have full power by commission under the great seal, to name, assign, and appoint the persons therein described;" and all the subsequent statutes contain an enactment similar in effect to that in the 6 G. 4, the present bankrupt act, viz., that the Lord Chancellor shall have power, upon petition made to him in writing against any trader having committed an act of bankruptcy, "by *any creditor* or creditors of such trader," to issue his commission. Words which comprehend equally all creditors for debts existing during the trading, whether contracted before or after the commencement of the trading.

The principal stress of the argument at your Lordships' bar was placed, first upon the precise language used by the Judges in the cases above referred to, *124] *wherein they assign the reason for their opinion that the *debt grew during the trading*. But in those cases, the Judges speak with reference to the particular facts of the cases immediately before them; and such expressions afford no necessary inference that if the cases then under discussion had, like the present, been cases of a debt remaining and continuing during the trading, their conclusion, drawn from the other facts, would not have been precisely the same. Again, it has been argued that the statutes only authorize the suing out a commission against a person *using the trade* of merchandise by buying and selling, &c.; and that the ground upon which a commission is allowed to be sued out on an act of bankruptcy committed by the debtor after he has ceased to trade, is, that he cannot be considered as having left off trade whilst any of the debts contracted during trade are still unpaid. But if the debts contracted before, but continuing after, are virtually and substantially the debts of the trader, whilst a trader, as we think they are, the words of the statute which are allowed to extend to the one, ought in reason to be held to include the other also.

Upon the whole, we think that both upon the reasonableness of the thing, and also upon the proper construction of the bankrupt acts, a commission may be well supported under the circumstances supposed in the case submitted to us by this House.

Judgment affirmed without costs.

The plaintiff in error pleaded, that there were not any such goods and chattels; upon which issue was joined.

The cause came on for trial before the Lord Chief Baron, at the sittings in Trinity term, 1824, when a jury found a special verdict, which stated in substance as follows:—

That in pursuance of a commission, to inquire whether the said Harry Grover and James Pollard were indebted to the said late king, and an inquisition thereupon, finding them to be indebted in the sum of 1480*l.* 6*s.* 9*d.*, an extent issued on the said 21st of August, 1816, to the sheriff of Middlesex, to inquire what debts the said Harry Grover and James Pollard had in the said sheriff's bailiwick.

That by another inquisition taken on the said 21st *of August, before the said sheriff of Middlesex, it was found that the said Henry Fourdrinier and Thomas Nicholls were indebted to the said Harry Grover and James Pollard, in 1368*l.* 5*s.* 1*d.* for money lent; which last-mentioned debt the said sheriff of Middlesex had then seized into the said king's hands. [*130]

That on the said 21st of August, a writ of *non omittas capias ad satisfaciendum* and extent, tested on that same day, issued to the sheriff of Hertfordshire against the said Henry Fourdrinier and Thomas Nicholls, whereby the said sheriff was ordered to inquire what lands, and goods, and chattels the said Henry Fourdrinier and Thomas Nicholls, or either of them then had; and the said sheriff was thereby ordered to appraise and extend the same, and seize them into the said king's hands till the said debt was satisfied.

That this last-mentioned writ was duly delivered to the said sheriff of Hertfordshire, the plaintiff in error, on the said 21st of August.

That before the return of the last-mentioned writ, to wit, on the 21st of October, in the year aforesaid, by an inquisition held before the said sheriff, and taken by virtue of the said last-mentioned writ, it was found, that the said Henry Fourdrinier and Thomas Nicholls were, on the day of issuing the same writ, possessed as of their own proper goods and chattels, of divers goods and chattels within the said sheriff's bailiwick, which were in the said sheriff's custody at the time of issuing the same writ, by virtue of three writs of *feri facias*, for sums amounting together to 3727*l.*; and of an extent tested the 22d of July then last, for 3066*l.* 1*s.* 9*d.*; and of an extent in aid of one Richard Weedon, tested the 27th of the said month of July, for 650*l.*; all which said goods and chattels, subject to such prior executions and extents, as far as the same were available in law, in preference to the said extent of the date of *the said 21st of August, the said sheriff had taken and seized into his said Majesty's hands. [*131]

That the said goods and chattels were at the time of their seizure of greater value than the sums of money directed to be levied by the two extents, tested prior to the said extent of the 21st day of August.

That the said sheriff (the plaintiff in error), at the return of the extent of the 21st of August, returned accordingly to the Court of Exchequer, that he had seized the said goods and chattels, subject to such prior executions and extents, into the hands of his said late majesty, as by the said extent of the 21st of August he was commanded.

The special verdict then found, that before the issuing and *teste* of the said extent, tested the said 21st of August, a writ of *feri facias*, tested the 3d of July in the same year, had issued against the said Henry Fourdrinier, at the suit of one Robert Gatty, which writ, duly endorsed to levy 351*l.*, was, on the 8th of July, 1816, delivered to the said plaintiff in error, as sheriff of Hertfordshire, to be executed; and that he, on the same 8th of July, seized and took in execution divers goods and chattels of the said Henry Fourdrinier, being part of the goods and chattels mentioned in the inquisition taken on the extent of the 21st of August, and of sufficient value to satisfy the sum so endorsed.

That before the issuing and *teste* of the said extent of the 21st of August,

another writ of *feri facias*, tested the 7th of July, in the same year, had issued against the said Henry Fourdrinier, at the suit of Luder Hoffman; which writ, duly endorsed to levy 376*l.*, was delivered to the said plaintiff in error as sheriff aforesaid, on the 8th of the said month of July, to be executed, and that he on that same 8th of July, seized and took in execution divers goods *132] and chattels of the said Henry *Fourdrinier, being part of the goods and chattels mentioned in the inquisition taken on the said extent of the 21st of August, and of sufficient value to satisfy the sum, so as last aforesaid endorsed.

That before the issuing and *teste* of the said extent of the 21st of August, another writ of *feri facias*, tested on the 3d of the said month of July, had issued against the said Henry Fourdrinier and Thomas Nicholls, at the suit of one Frances Maria Rachel Rougemont, which writ, duly endorsed to levy 3000*l.*, was delivered to the said plaintiff in error, as sheriff as aforesaid, on the 21st of the said month of July; and that he, on the 22d of the said month of July, seized and took in execution divers goods and chattels of the said Henry Fourdrinier and Thomas Nicholls, being the same goods and chattels mentioned in the said last-mentioned inquisition, and of sufficient value to satisfy the sum so as last aforesaid endorsed.

That before the issuing of the said extent of the 21st of August, another writ of *non omittas capias ad satisfaciendum*, and extent, bearing *teste* the 22d of July, in the year aforesaid (and grounded upon a previous inquisition, holden by virtue of a commission in the usual form, by which inquisition it had been found, that the said Henry Fourdrinier and Thomas Nicholls were indebted to his said late majesty, in the sum of 3066*l.* 1*s.* 9*d.* for duties on paper), had issued, directed to the said sheriff of Hertfordshire, against the said Henry Fourdrinier and Thomas Nicholls, and was delivered to the said plaintiff in error, as such sheriff, on the 25th of the said month of July; and that, under an inquisition, held before the plaintiff in error, as such sheriff, it was found that the said Henry Fourdrinier and Thomas Nicholls were possessed of divers goods and chattels, which were seized by him into the said king's hands, under the said last-mentioned extent, subject to the said writs *133] of *feri facias*, and *were the same goods and chattels as are mentioned in the inquisition taken on the said extent, tested the 21st of August aforesaid.

That before the issuing of the said extent of the 21st of August, another writ of extent, bearing *teste* the 27th of July, in the same year (reciting, that it had been found by an inquisition, held by virtue of a commission, that Richard Weedon was indebted to his said late majesty in 650*l.*, for duties of excise, and also reciting, that by another inquisition, tested on the said 27th of July, the said Henry Fourdrinier and Thomas Nicholls were found indebted to the said Richard Weedon in 650*l.*, for work and labour, which debt had been seized into his said majesty's hands), issued to the sheriff of Hertfordshire, against the said Henry Fourdrinier and Thomas Nicholls, and was delivered to the said plaintiff in error, as such sheriff, on the 30th of the said month of July; and that under an inquisition, held by the said plaintiff in error, as such sheriff, it was found that the said Henry Fourdrinier and Thomas Nicholls were possessed of divers goods and chattels, which were seized by him into the said king's hands, under the said last-mentioned extent, subject to the said several writs of *feri facias* and the said extent, bearing *teste* the said 22d of July, and were the same goods and chattels as are mentioned in the inquisition taken on the said extent, tested the 21st of August aforesaid.

It was then found by the special verdict, that the said plaintiff in error, after making the said return to the said extent, tested on the said 21st of August in the year aforesaid, that is to say, on the 31st of March, 1817, sold all the goods and chattels specified in the inquisition taken thereon, for a sum not sufficient to satisfy the said writs of *feri facias* and the said extents, tested the 22d and

27th of July aforesaid, but *more than sufficient to satisfy the said last-mentioned writs of extent, and paid the proceeds arising from such sale [*134 in part satisfaction of the same writs of *feri facias*, and the said extent of the 22d of July aforesaid; and that he did not pay any part in satisfaction of the said writ of extent, tested the 21st of August, 1816, the whole having been paid and applied by him in part satisfaction of the moneys due on the said several writs of *feri facias*, and the said extent of the 22d of July as aforesaid.

The special verdict then stated, in the usual form, that the jury upon the whole matter were ignorant whether there were at the time of issuing the extent of the 21st of August aforesaid, any goods and chattels of the said Henry Fourdrinier and Thomas Nicholls, or either of them, liable to seizure under the same extent, and afterwards to be sold, for the purpose of satisfying the debt of the crown mentioned in the same writ of extent; and prayed the advice of the Court in the usual way upon that point. Upon this special verdict, judgment was given by the Court of Exchequer for the plaintiffs below, in Michaelmas term, 1824.

In Hilary term, 1825, the defendant below sued out a writ of error returnable in the Council Chamber, nigh the said Exchequer.

The common errors were there assigned, and the defendants in error joined in error, and in Hilary term, 1827, the judgment of the Court of Exchequer was affirmed.

The plaintiff in error afterwards brought a second writ of error, returnable in parliament, upon which the common errors were assigned, and the defendants in error joined in error.

On the 25th of May and 25th of June the opinions of eight of the Judges were delivered as follows: and Lord Tenterden's on the 11th of July.

*PATTESON, J. In this case your Lordships have propounded two [*135 questions for the opinions of the judges:—First, a common person brings his action against another, and obtains judgment; issues a writ of *feri facias* upon that judgment, and delivers the writ to the sheriff, who, in execution thereof, seizes the goods of the defendant. While the goods remain in the sheriff's hands, and before he has sold them, a writ of extent in aid is issued against the same defendant as debtor of a debtor of the crown, tested after the seizure under the *feri facias*, and is delivered to the said sheriff: shall this writ of extent be executed by the sheriff, by extending the same goods, seizing them into the king's hands, and selling them to satisfy the crown's debt, without regard to the writ of *feri facias* under which he had first seized them? Secondly, all other things remaining the same, does it make any difference whether the writ of extent was in chief or in aid? Upon the first question much difference of opinion has long existed; and there are conflicting decisions of the courts of law. Your Lordships, therefore, will not be surprised to find that the Judges have not been able to agree, and that it has become my duty to state my opinion upon it. I apprehend that the answer to this question depends upon two points: first, whether the property in the goods is so altered by the seizure of the sheriff under the *feri facias*, that the extent cannot take effect; and, secondly, whether the statute 33 H. 8, c. 39, s. 74, bars the right of the crown. As to the first point, at common law the goods of the debtor were bound from the teste of a writ of *feri facias* at the suit of a common person, as well as from the teste of the king's writ. This, as to common persons, is altered by the statute 29 Car. 2, c. 3, s. 16, since which they are bound only from the delivery of the writ of *feri facias* to the sheriff. The crown, however, not being named in that statute, *goods are still bound from [*136 the teste of the king's writ. But this binding, in the case both of the king and of a common person, relates only to the debtor himself and his acts, so as to vacate any intermediate assignment made by him otherwise than in market overt. *Phillips v. Thompson*, 3 Lev. 191. (Per Lord Hardwicke, *Lowthall v. Tonkins*, 2 Eq. Cas. Ab. 381, and per Lord Ellenborough in *Payne*

v. Drewe, 4 East, 588), and many other cases. And even when made in market overt in the case of the king, it in no way affects the priority of conflicting writs. The rule as to priority between common persons always was, that the writ which was first delivered to the sheriff should be first executed without regard to the teste; but between the king and a subject, that the king's writ, though delivered last, should be preferred on the ground expressed by Lord Coke in *Quick's case*, 9 Rep. 129, b. *Quando jus domini Regis et subditi insimul concurrunt jus Regis præferri debet*; and this also without regard to the teste. If, therefore, a writ of *fieri facias* at the suit of a common person be delivered to the sheriff, and before any seizure made by him under that writ, a writ of extent at the suit of the king, tested after the delivery of the *fieri facias*, be delivered to him, it is not doubted but that the sheriff would be bound to execute the writ of extent in preference to the *fieri facias*. In the case, indeed, stated by your Lordships, the sheriff had already seized under the writ of *fieri facias*, before the writ of extent was delivered to him. What then is the effect of that seizure? If by it the writ of *fieri facias* is executed, if the rights of the king and of the subject no longer run together, if the property of the goods be taken out of the debtor, then the writ of extent is too late, it has nothing on which to operate. But if the seizure of the goods be but an inception of the execution, if the rights of the *king and the subject are still

*137] conflicting, if the general property in the goods still remain in the debtor, then the maxim will still apply, and the king's right must be preferred.

It is not pretended in any of the authorities, except in some supposed loose dicta, that by seizure of the goods, any property therein is acquired by the creditor: so far is this from being the case, that when goods were seized by the sheriff under one writ (which had been last delivered), it was held that he might sell under the writ of another creditor which had been first delivered, but under which he had not seized: *Hutchinson v. Johnston*, 1 T. R. 729, and see *Jones v. Atherton*, 7 Taunt. 56. Now, if the seizure under a writ of *fieri facias* executed the writ, if it changed the property and vested it in the creditor, how came it that the sheriff, having seized under the second writ, was not compelled to sell under that writ? It cannot be said that the reason was, because the property was bound and altered by the delivery of the first writ, and, therefore, the goods could not be taken under the last, since it was held in *Payne v. Drewe*, that if the sheriff sell under the writ last delivered, the creditor, whose writ was first delivered, cannot follow the goods or their proceeds, though he has his remedy against the sheriff: and the same point had long before been determined in *Smallecombe v. Cross*, 1 Ld. Raym. 251; 1 Salk. 320, and other cases. It seems to me to be clear from these cases, that the seizure of goods by the sheriff will not make any difference as to the rights of creditors under conflicting writs, any more than the teste of the writ does, and will not vest any property whatever in the creditor under whose writ the seizure is made in the case of common persons; why then should it make any difference in the

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27th of July aforesaid, but *more than sufficient to satisfy the said last-mentioned writs of extent, and paid the proceeds arising from such sale [*134 in part satisfaction of the same writs of *feri facias*, and the said extent of the 22d of July aforesaid; and that he did not pay any part in satisfaction of the said writ of extent, tested the 21st of August, 1816, the whole having been paid and applied by him in part satisfaction of the moneys due on the said several writs of *feri facias*, and the said extent of the 22d of July as aforesaid.

The special verdict then stated, in the usual form, that the jury upon the whole matter were ignorant whether there were at the time of issuing the extent of the 21st of August aforesaid, any goods and chattels of the said Henry Fourdrinier and Thomas Nicholls, or either of them, liable to seizure under the same extent, and afterwards to be sold, for the purpose of satisfying the debt of the crown mentioned in the same writ of extent; and prayed the advice of the Court in the usual way upon that point. Upon this special verdict, judgment was given by the Court of Exchequer for the plaintiffs below, in Michaelmas term, 1824.

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It is not pretended in any of the authorities, except in some supposed loose dicta, that by seizure of the goods, any property therein is acquired by the creditor: so far is this from being the case, that when goods were seized by the sheriff under one writ (which had been last delivered), it was held that he might sell under the writ of another creditor which had been first delivered, but under which he had not seized: *Hutchinson v. Johnston*, 1 T. R. 729, and see *Jones v. Atherton*, 7 Taunt. 56. Now, if the seizure under a writ of *feri facias* executed the writ, if it changed the property and vested it in the creditor, how came it that the sheriff, having seized under the second writ, was not compelled to sell under that writ? It cannot be said that the reason was, because the property was bound and altered by the delivery of the first writ, and, therefore, the goods could not be taken under the last, since it was held in *Payne v. Drewe*, that if the sheriff sell under the writ last delivered, the creditor, whose writ was first delivered, cannot follow the goods or their proceeds, though he has his remedy against the sheriff: and the same point had long before been determined in *Smallcombe v. Cross*, 1 Ld. Raym. 251; 1 Salk. 320, and other cases. It seems to me to be clear from these cases, that the seizure of goods by the sheriff will not make any difference as to the rights of creditors under conflicting writs, any more than the teste of the writ does, and will not vest any property whatever in the creditor under whose writ the seizure is made in the case of common persons; why then should it make any difference in the

*138] case of the crown and a subject? *It is true, that in one report of the case of *Wilbraham v. Snow*, 1 Lev. 282, Lord C. J. Kelynge is made to say, "the property is altered from the owner and given to the party at whose suit." But the reporter adds a *quære*; and the other reports of the same case do not mention this supposed dictum. Again, in one report of *Clerk v. Withers*, 2 Ld. Raym. 1075, Gould, J., is made to refer to this supposed dictum of Lord C. J. Kelynge; but, in another report of the same case, 6 Mod. 290, Gould, J., is made to say, only that Lord C. J. Kelynge held in *Wilbraham v. Snowe*, that the sheriff gained a general property by seizure, whereas the other Judges held that he gained a special property only; and Powys, J., is made to say, that the general property remained perhaps in abeyance. All which shows only the inaccuracy of the reporters on the doubtful grounds of the decision; and, as a special property in the sheriff, is quite sufficient ground to warrant the decision, no other ground beyond that can be reasonably taken to have been

established. That the general property in goods, even after seizure, remains in the debtor, is clear from this, that the debtor may, after seizure, by payment suspend the sale and stay the execution (*The King v. Bird*, Show. 87), and have back his goods without any bill of sale, or assignment from the sheriff or creditor. And, again, that if the sheriff, after selling a sufficient quantity of the goods seized to satisfy the debt, proceed to sell more, trover will lie against him at the suit of the debtor. But if the property by seizure is taken out of the debtor, it must be so taken as to all the goods seized; and what has operated to restore it? Still it is said, that by the seizure, a special property vests in the sheriff, and that this is an alteration of property sufficient to protect the rights of the execution creditor, and to prevent the crown from taking otherwise than *subject to those rights. It is undoubtedly true, that the sheriff does, by the seizure, acquire a special property in the goods. He [*139 may maintain trespass or trover for them; *Wilbraham v. Snowe*, 3 Saund. 47, 1 Sid. 438, 1 Vent. 52, 1 Keb. 282, 1 Mod. 80, 2 Keb. 588., S. C.; *Mildmay v. Smith*, 2 Saund. 343; he is answerable to the creditor if they be rescued; and he is bound to sell them; *Clerk v. Withers*, 2 Ld. Raym. 1075, 6 Mod. 290, 11 Mod. 34, Salk. 322, Holt, 303, 646, S. C. But on full consideration, it seems to me that this property vested in the sheriff by seizure, is merely that which results from his being the appointed officer of the law, and to enable him to sell the goods and raise the money, not that thereby the property is taken out of the debtor. The goods are, in substance, in *custodia legis*, the seizure made by the officer of the law is for the benefit of those who are by law entitled, it is made against the will of the debtor, and no property is transferred by any act of his to the sheriff. In this respect it differs from all cases of special property, and of charges on goods created by the debtor while he has the absolute dominion over the goods. It is conceded, that the crown cannot avoid an equitable mortgage; *Casberd v. Attorney-General*, 6 Price, 411: or the lien of a factor; *The King v. Lee*, 6 Price, 369: or of a wharfinger; *The King v. Humphrey*, 1 M'Clelland & Younge, 173: or a *bonâ fide* assignment in trust for creditors; *The King v. Watson*, West on Extents, 115: or any other similar assignment or charge; because they are created when the debtor has legal power and authority to create them, and attach upon the goods before the process of the crown, and the crown can only take the goods subject to such liabilities as the debtor has legally created. In the case, however, of a seizure by the sheriff, the debtor has created no liability, and the crown has a right to say that the sheriff, whilst the goods *are in his hands, holds them for [*140 the benefit of any one who may have a legal charge against them as the property of the debtor. One instance, apparently showing that a *feri facias* is executed by seizure of the goods, is, that of the bankruptcy of the debtor after seizure and before sale, in which case the assignment of the commissioners does not pass the property in the goods to the assignees, although it relates back to the act of bankruptcy, and although the words of the statute 21 Jac. 1, c. 19, s. 9, respecting the distribution of bankrupts' effects, compels creditors upon judgments, whereof there is no execution or extent served and executed upon the lands or goods before the bankruptcy, to come in *pari passu* with other creditors. And even a fraction of a day is made in favour of the *feri facias*: *Thomas v. Desanges*, 2 B. & A. 586. It is argued, therefore, that the courts of law, by holding that seizure under an execution before an act of bankruptcy, prevents the execution creditor from being driven to come in with the other creditors, have, in effect, held that by such seizure the execution is served and executed. Now, it is to be observed, that at the time of the passing the 21 Jac. 1, goods were bound from the *teste* of a *feri facias* as against the debtor's own acts, and it seems not improbable that this provision of the statute might be intended to guard against creditors who might have sued out a writ, and so bound the debtor's goods, but still abstained from putting it in force till after an act of bankruptcy, which would be in conformity to the principle of the

subsequent sect. 11, as to goods in possession of the bankrupt by consent of the true owner. Besides, the goods when seized, are the goods of the debtor; and if the effect of the seizure were to be done away with by a subsequent act of bankruptcy, it would enable the debtor, by his own act, to *defeat the *141] creditor. The Courts, therefore, have construed the words in that act as applying to a seizure, and not to a sale. At all events, whether this conjecture be right or wrong, the decisions amount only to a construction of words in a particular act of parliament with reference to the scope and object of the act, and cannot affect the general law; and it is also to be remembered that the crown is not mentioned in, or bound by that act. The case of *Clerk v. Withers*, 2 *Ld. Raym.* 1072, 6 *Mod.* 290, and other places, is also pressed as establishing the doctrine that the property is taken out of the debtor by the sheriff's seizure; but no such doctrine is there laid down.

The facts of the case were shortly these: an administrator recovered a judgment by default against Clerk, he sued out a *fiery facias*, and Withers, the then sheriff, seized Clerk's goods. Before sale the administrator died, then Clerk sued Withers (who had gone out of office in the mean time) to have restitution of his goods, contending that, as the plaintiff was an administrator, his executor or administrator could not have the benefit of the judgment, and that any new administrator *de bonis non* could not, because the judgment was by default. Another point was raised, which is not material here, as to Withers having quitted office. After much argument it was held, that the action would not lie, because Clerk was discharged from the debt by the seizure of the sheriff *ad valentiam*, and that the sheriff having seized in the lifetime of the plaintiff, must account to his representative. All this is perfectly consistent with the position, that the general property in the goods, even after seizure, remained in Clerk, and establishes only that the debtor himself cannot defeat an execution once begun, nor get back his goods after a seizure under a *fiery facias*, without payment of the debt.

*It is argued, also, that when goods are once seized under a *fiery facias*, *142] the sheriff must go on to perfect the execution; and that even a writ of error will not operate as a *supersedeas*. The cases to establish this position are somewhat confused; but, admitting it to be established, the doctrine of change of property does not follow, for the bringing the writ of error is here also the act of the debtor himself. For these reasons, and on the authority of the cases I have mentioned, and some others to which I must refer hereafter, I conceive that the property in the goods is not so altered by the seizure of the sheriff under the *fiery facias* as that the extent cannot take effect.

I come now to consider what is the effect of the statute 33 Hen. 8, c. 39, s. 74. Premising that it appears to me somewhat doubtful whether that section applies to any writ of extent issued in the first instance, commonly called an immediate writ of extent, and whether it was not intended to apply only to the king's writs of execution after judgment, or award of execution obtained by him in a suit, I am of opinion that, if it does apply to such an extent as the present, it does not, under the circumstances stated, prevent its priority. That statute created certain new courts, and it must be admitted that it gave the king some new rights; for the fiftieth section gives to bonds made to the king the effect of statutes staple; and the fifty-third section gives the king the same remedy on those bonds as the subject had had on statutes staple. Then, after various other matters, comes the seventy-fourth section, at a great distance, and it is this: "That if any suit be commenced or taken, or any process be hereafter awarded for the king, for the recovery of any of the king's debts, that then the same suit or process shall be preferred before the suit of any person or persons. And that our sovereign lord the king, his heirs, and successors, shall *143] have *first execution against any defendant or defendants of and for his said debt, before any other person or persons, so always, that the king's suit be taken or commenced, or process awarded for the said debt, at the suit

of our said sovereign lord the king, his heirs, or successors, before judgment given for the said other person or persons."

Now, in order to arrive at the true meaning of this clause, I think we must look at the state of the law before and at the time of the passing of the act. At common law the king might, by his writ of protection, prevent any subject from suing his debtor at all until the king's debt was satisfied. Co. Lit. 131. By statute 25 Edw. 3, c. 19, it was provided, that notwithstanding such writs of protection, the subject creditor might sue the debtor to judgment, but not have execution till the king's debt was satisfied; and if the creditor would undertake for the king's debt, he should then have execution both for it and his own. Such writs of protection have long since ceased, and Lord Coke says, that he cannot say anything of them for his own experience, but there is no doubt that they were in use at the time of the passing 33 Hen. 8, that act having, by the fiftieth section, made bond debts to the king binding on the land of the debtor from the date of the bond, which they were not before. The seventy-fourth section seems to have been inserted for the benefit of the subject, primarily with a view to land, and so as to prevent the king's bonds from binding the land as against the judgment of a subject, which also bound the land, unless the king, by putting his bond in force before such judgment obtained, had expressed his intention so to bind the land; but the seventy-fourth section was also inserted, as it seems to me, with a reference to the very prerogative of the king, of preventing the execution of the subject; and so, having first executed himself, restricted as it was *by 25 Edw. 3, c. 19; and [*144 in this view it applies to all proceedings for recovery of the king's debts, and to executions against goods as well as lands; and it abridges the power of the crown, as it has been considered to do in *The Attorney-General v. Andrew, Hardr. 27*, and in 7 Rep. 92, Cecil's case, and other cases. For since the 33 Hen. 8, the crown cannot interpose and prevent the subject's execution, when he has obtained judgment before the crown process is awarded: but in that case the subject may sue out his execution, and reap the fruits of it, if he can sell before the king's execution comes into the sheriff's hands. By obtaining a judgment before the crown process awarded, the subject entitles himself to run a race with the crown, so to speak, which he could not do before the stat. 33 Hen. 8, nor, as I apprehend, can do even now, where he has not so obtained judgment. Although in all cases, according to *The Attorney-General v. Fort*, reported in a note to *The King v. Giles*, 8 Price, 364, if the crown suffers the goods to be sold under a *fiery facias* before it interposes, its process is too late, whether sued out before or after judgment obtained by the subject. The stat. 33 Hen. 8, only, as I humbly conceive, enables the subject to run a race with the crown in certain cases, but it leaves the issue of that race to depend on the common law maxim, which I stated long ago, "*Quando jus domini regis et subditi insimul concurrunt jus regis præferri debet*," which maxim is not denied, and is established by numerous cases. Otherwise, if the words of the seventy-fourth section are to be taken in their literal sense, this absurd consequence, among others, would follow; that if a subject obtained judgment, but did not take out execution for six months, another subject might in the interim commence a suit, proceed to judgment, take out a *fiery facias* and deliver it to the sheriff, and so obtain *priority; but that the crown could not: or, as [*145 it is well put in the argument in *Rorke v. Dayrell*, 4 T. R. 406, if A. recover judgment against the king's debtor on the 1st of January, but do not deliver his writ of execution till the 4th, and B. also recover judgment against the same person on the 3d, and deliver his writ on the same day, and on the 2d an extent issues at the suit of the crown, and is delivered to the sheriff, according to the construction contended for this absurdity would follow, that the king would not be preferred as against A., though he would as against B., and yet it must be admitted that B. is entitled to a preference against A. The literal meaning of the words of this section cannot, therefore, be adopted; nor am I able to see

any construction that can reasonably be put upon the statute other than that which I have imperfectly expressed, but will be found infinitely better stated in Mr. Baron Graham's judgment in this very case, 8 Price, 362, and in Lord Chief Baron Maconald's judgment in *The King v. Wells and Allnutt*.(a) Mr. West says, in his book on extents, p. 108, that the statute 33 H. 8, gave the crown a new kind of execution for all its debts, a species too of execution which before the statute was the subject's, and the subject's only. This he deduces from the fiftieth and fifty-third sections of that act. I think that he is wrong in that view of the statute, and that the proceeding by extent in the first instance at the suit of the crown existed long before the statute of 33 H. 8, and was only modified and restricted by that act. But whether he be right or wrong is not, in my humble opinion, material, for even if he be right, I still hold that the true construction of the statute is that which I have already expressed.

*146] I will now proceed to consider some of the cases in which the question has arisen or been discussed. And, first, the case of *Uppom v. Summer*, 2 Bl. 1251, 1294. In that case the sheriff, on the 18th of April, seized one Cann's goods under a *feri facias* at the suit of Uppom, the plaintiff, returnable on the 12th of May. On the 24th of April, before sale, an extent was sued out and delivered to the sheriff. The sheriff sold under the extent and returned *nulla bona* to the *feri facias*, upon which Uppom brought his action for a false return. A verdict was taken for the plaintiff, subject to the opinion of the Court of Common Pleas on a case. The plaintiff's counsel first admitted that they could not support their case, and the verdict was set aside; but afterwards, on their application, the court let them in to argue it. It was argued by Serjeant Walker, for the plaintiff, who put the case on the statute 33 H. 8, c. 39. The judgment was given by Gould, J., in Easter term 9 G. 3, delivering the opinion of Lord C. J. De Grey, himself, Nares, and Blackstone, Js. He grounds his judgment, first, on the statute of 33 Hen. 8, as to which I have already spoken; and, secondly, on authorities which I will proceed to examine. He first distinguishes Stringefellow's case, Dyer, 67 b, as not having arisen on a judgment, but on a statute staple, and, therefore, not being within the provisions 33 Hen. 8; and then relies on the cases of *Lechmere v. Thoroughgood*, 3 Mod. 236, and *The Attorney-General v. Andrew*, Hardr. 23, and on a passage in Lord C. J. Comyns's Digest, tit. *Debt* (G. 8), who, after reciting 33 Hen. 8, says, "Therefore, if execution be upon a judgment against the king's debtor, and before a *venditioni exponas*, an extent comes at the king's suit, those goods cannot be taken upon the extent;" and cites for this *147] position the two cases just above mentioned. And Gould, J., also mentions the case of *The King v. Dickenson, Parker*, 262. That was a question as to the administration of assets, in which the point decided was, that a judgment creditor of the deceased should be preferred to a simple contract creditor, who, being a debtor to the crown, had, after the death of the deceased, procured an extent in aid. A case wholly foreign to the question in *Uppom v. Summer*. The authorities, therefore, on which Lord C. B. Comyns and Gould, J., rely, are reduced to the two before mentioned, *Lechmere v. Thoroughgood*, and *The Attorney-General v. Andrew*. Gould, J., says, that the former of these cases is obscure, arising from its being reported piecemeal, and in different books, and recommends reading them in order of time, as they occur, viz., the pleadings 2 Jac. 2, 2 Ventr. 159; the first argument, 4 Jac. 2, 3 Mod. 236; the second argument and judgment, 1 W. & M., Comb. 123, 1 Show. 12; and a subsequent action between the same parties, in effect, in the Common Pleas in *Lechmere v. Toplady*, 2 Ventr. 169. I have read them all in that order, and although there are some loose dicta and extra-judicial matters stated, yet it is easy to find out what points were really determined; and they were simply these: first, that in an action of trespass by assignees of a

(a) Reported in a note to *Thurston v. Mills*, 16 East, 278.

bankrupt against a sheriff who had seized goods under a *feri facias* after a secret act of bankruptcy, the sheriff could not be made a trespasser by relation: this was *Lechmere v. Thoroughgood*: and, secondly, that in an action of trover for the same seizure against the execution creditor, the judgment for the sheriff in the action of trespass was a good bar by way of estoppel: that was *Lechmere v. Toplady*. I do not mean to say that I at all agree to the decision on the last point; but it was the point decided, and the only *point. With [*148 respect to *Lechmere v. Thoroughgood*, the facts were shortly these:— The sheriff seized goods of one Toplady, on the 29th of April, under a *feri facias*, after a secret act of bankruptcy, committed on the 28th of April; and, whilst the goods remained in his hands unsold, viz., on the 4th of May, an extent at the suit of the crown against Toplady was delivered to him. On the 5th of May, a commission of bankruptcy issued against Toplady, under which the plaintiffs were appointed assignees, and sued the sheriff in trespass. A special verdict was found, and it was held that the action would not lie. Some of the reports say, that it was held that the extent came too late; but this point could not have been determined; for the crown was no party to the suit, and was not heard; therefore no right of the crown could be decided in it. Again, the crown and the execution creditor were on the same side; the sheriff, the defendant, having seized for both: no point, therefore, as between them, could arise in the case, especially as the defendant succeeded, because it was held that the sheriff could not be made a trespasser by relation. All the reports agree in stating that to be the point decided: even Comberbach so states, although he makes Lord Holt, C. J., say, “The property in goods is vested by the delivery of the *feri facias*, and the extent afterwards for the king comes too late, and this by the statute of frauds and perjuries.” This must be a mistake: it is contrary to Lord Holt’s own position in *Smallcomb v. Cross*, 1 *Ld. Raym.* 251. It is wholly beside the question before him, and makes him consider the statute of frauds as binding on the king, who is not named in it. Lord Mansfield, in *Cooper v. Chitty*, 1 *Burr.* 20, says, that Lord Holt could never say that the property in the goods vested by the delivery of the *feri facias*, and that the *extent for the king afterwards came too late, [*149 and adds,—“No inception of an execution can bar the crown;” and Lord Ellenborough also points out the inaccuracy of Comberbach very forcibly in *Payne v. Drewe*, 4 *East*, 539.

With respect to the case of *The Attorney-General v. Andrew*, *Hardr.* 27, it is quite apparent, from a perusal of that case, that the execution, which was by *elegit*, was perfected and completed by delivery of the lands before the king’s writ issued; and then, as Lord C. B. Steel says, “the subject’s title is prior to the king’s, and is executed.” The same law and the same consequences have since been held to attach in *The Attorney-General v. Fort*, (a) and in *Swain v. Morland*, 1 *Bro. & Bing.* 370. These two cases cited do not, therefore, bear out the position of Lord C. B. Comyns, nor the decision in *Uppom v. Sumner*; and that decision must be supported if at all on the statute 33 *Hen. 8.* on which I have already remarked.

The next case is *Rorke v. Dayrell*, 4 *T. R.* 402: that case was decided principally on the authority of *Uppom v. Sumner*, and the authorities there cited; and if they are shown to be wrong, the decision in *Rorke v. Dayrell* is wrong also. Lord Kenyon puts the case on the ground of change of property; for, he says, “That as long as the property of the debtor remains unaltered, and an execution at the suit of a subject, and an extent at the king’s suit issue against the debtor, the title of the latter must prevail: for the point to be considered in these cases is, in whom is the property?” He adds, “I have always understood it to be clear and settled (and this question has very frequently occurred in the *Exchequer), that if an extent at the suit of the crown [*150 be tested prior to the time when the subject’s execution is delivered to the sheriff, the former shall have the preference. But as, by the common law,

abridged as it is by the statute of frauds, the property of the debtor's goods is bound by delivery of the writ to the sheriff, there then remains no property in the debtor on which the prerogative of the crown can attach." Now, with all possible respect for everything which fell from Lord Kenyon, I humbly conceive that he has here confounded the binding the property in goods, and the alteration of the property, and that he is mistaken in supposing that the property in goods is or ever was at all bound or altered, either by the *teste* or delivery of the writ, as regards conflicting writs; and that the binding is only as regards the debtor himself, as I have before shown; and if so, the very foundation of his judgment fails. The other judges put the case on the stat. 33 Hen. 8.

These are the only decisions in favour of the subject's execution: for *Thurston v. Mills*, 16 East, 254, went off on another point. Against them are the uniform decisions of the Court of Exchequer; one of which is reported at length, viz., *The King v. Wells and Allnutt*, in the note to *Thurston v. Mills*, 16 East, 278. This is subsequent to both *Uppom v. Sumner* and *Rorke v. Dayrell*, which are cited and relied on in argument. Now, without fully agreeing to every word that is said by Lord C. B. Maodonald, in giving the judgment of the Court (some of whose positions according to the letter, I confess, appear to me untenable), I, for one, am perfectly satisfied with the general reasons given in that judgment. The same point was again discussed and decided in *The King v. Sloper and Allen*, 6 Price, 114, which is still later.

*There are other prior cases to which I would briefly refer; and first, *151] *Stringefellow v. Brownesoppe*, Dyer, 67 b, which was decided in Mich. term 3 Edw. 6, seven or eight years after 33 H. 8. In that case the sheriff seized Brownesoppe's goods under an *extendi facias* upon a statute staple at the suit of Stringefellow, and before any writ of liberate, the king's writ of extent came into his hands, and the Court held that the king's writ should be preferred, because the property in the goods was not in Stringefellow before they were delivered to him by writ of liberate. It is said that this is no authority to the present point, for that the *extendi facias* is in nature of a judgment, and the liberate is the execution; therefore, as a judgment operates no change of property, so neither does seizure into the king's hands under an *extendi facias*; but that as delivery under a liberate operates a change of property, so does seizure under a *feri facias*. Now I cannot understand this reasoning at all. I can see that the award of an *extendi facias* may be and is analogous to a judgment; but how a seizure under it can be so I am at a loss to comprehend. Again, I can see how delivery under a liberate of the specific goods to the creditor, as is always done, may be and is analogous to sale under a *feri facias*, which directs the sheriff to make money of the goods; but how the mere seizure into the sheriff's hands under a *feri facias* should be analogous to delivery over to the creditor under a liberate, I am at a loss to comprehend. I apprehend that seizure under an *extendi facias* is the inception of the execution, and so is seizure under a *feri facias*; delivery under a liberate is the completion, and so is sale under a *feri facias*. The only difference is that a liberate must issue to enable the *sheriff to deliver in *152] the one case, whereas in the other he may and ought to sell without a *venditioni exponas*; but this difference cannot vary the effect of the seizure. The principle established in Stringefellow's case, is, in the words of Lord Mansfield, that no inception of an execution can bar the crown. Stringefellow's case was against the opinion of some of the profession at the time, but it has been recognised as good law many times since, and seems to me to be directly in point. Next comes Curson's case, 3 Leon, 239, 4 Leon, 10, which only shows that after delivery under a liberate the king's writ is too late. In *The King v. Peck*, Bunb. 8, it was taken for granted that if an extent comes after seizure under a *feri facias* and before sale, it shall be preferred.

In *The Attorney-General v. Capel*, 2 Show, 480, the point decided arose out of a bankruptcy, the king's writ being preferred after an act of bankruptcy,

and before assignment by the commissioners. It is not in point to the present question; but at the end of the judgment are these words:—"Extents have been held good that have been made upon goods actually levied by virtue of a fieri facias, and in the sheriff's custody; the extent coming before a bill of sale made, so as the property was not altered."

Also in *Smallcomb v. Buckingham*, 5 Mod. 376, which is the same case as is elsewhere called *Smallcomb v. Cross*, there is a dictum to the same effect; and many others in other places: all which dicta I merely notice to put them in opposition to other dicta as to the vesting and alteration of property by seizure. Lastly comes the case of *The King v. Cotton, Parker*, 112. That was the case of goods seized under a distress for rent; and it was held *that they were still liable to be taken under an extent at the suit of the king, though in custody of the law, and therefore privileged [*153 from being taken in execution by a subject. It is said that this case is not in point, because no property at all in the goods is gained by the distrainer, who can neither maintain trespass nor trover for them; and that such is the ground of the decision, inasmuch as it lay on the claimant in the Exchequer to prove property in himself against the crown. Now, on looking at the whole of the elaborate judgment of Lord C. B. Parker in that case, I do not find that he puts the case on the form of the pleading, but on the general principle that the property is not altered, and therefore the king has preference: and throughout his judgment he cites cases as to the effect of seizure under a fieri facias, proceeding upon that principle. I consider, therefore, that this case is a strong authority upon principle, unless it can be shown that seizure by the sheriff alters the property; and I submit that the contrary has been shown. It is true that neither *Stringefellow's* case nor the *King v. Cotton* are direct authorities with regard to the statute 33 Hen. 8; because in neither of them had the subject obtained judgment. Upon the whole, then, whether with reference to the statute 33 Hen. 8, or independent of it, the main points appear to me to be, was the property changed by the seizure? and were the king's writ and the subject's concurring? I say, that the property was not changed, and that the writs were concurring.

My answer, therefore, to the first of your Lordships' questions is, that, in my opinion, the writ of extent shall be executed by the sheriff, by extending the same goods, seizing them into the king's hands, and selling them to satisfy the crown debt, without regard to the *writ of *feri facias* under which he [*154 had first seized them.

With regard to the second question, I find it uniformly considered that (when once it has issued) an extent in aid has all the force and all the incidents of an extent in chief; and therefore I am of opinion that, all things remaining the same, it does not make any difference whether the writ of extent was in chief or in aid.

ALDERSON, J. This first question proposed by your Lordships for our consideration is in substance this:—Whether, when goods seized by a sheriff, under a writ of *feri facias*, remain in his hands unsold, a writ of immediate extent tested after such seizure does, upon its delivery to such sheriff, entitle the crown to a priority of execution: and after fully considering that question, I have arrived at the conclusion that it must be answered in the affirmative.

This subject has been for a long period *vexata questio* in our courts. And in order the more clearly to explain the grounds on which my opinion is founded, it will be useful to advert, in the outset, to the extent of the prerogative of the crown as to its debts, and the principles on which that prerogative depends; and then to proceed to examine the authorities, and the reasons assigned for those determinations which are to be found in our books on this point.

The prerogative of the crown as to its debts is laid down in various books, and cannot, I apprehend, be doubted. Lord Coke, in *Harbert's* case, 3 Rep. 12, states "that, at the common law, the body, land, and the goods of the ac-

*155] countant, or the king's debtor, were liable *to the king's execution :” and he adds, that there were “infinite precedents in the Exchequer” to prove this, antecedent to the 33 Hen. 8, c. 39. Lord Chief Baron Gilbert also, in his History of the Exchequer, lays it down that the second summons of the pipe is “in the nature of a *levari facias* against the body, lands, and goods of the debtor :” and in *Foster v. Jackson*, Hob. 60, the law is very clearly laid down thus :—“It is a prerogative to the king to have execution of body, lands, and goods ; not communicated to the subject but in case of statute merchant and statute staple, and recognisance of that nature ; which is by the statute of law ; and, therefore, the case put in Bloomfield’s case, that where the party was taken in execution upon a statute and died, and yet execution was had against goods and lands after, is nothing in this case, for they were all due at the first, and therefore may be taken at once or severally.” And in Madox’s History of the Exchequer, vol. 2, p. 183, and subsequent pages, a great variety of instances confirmatory of this passage of Lord Hobart in all its parts will be found.

I have cited this passage from Lord Hobart at full length, because I shall have occasion again to refer to it in considering the true construction which ought to be put on the statute 33 Hen. 8, and because I think it will be found to afford a sufficient clue to enable us to discover what was the real change in the law produced by that statute as to the prerogative of the crown.

It is unnecessary to cite other authorities on this subject. The result of them all being, as I conceive, that the king at common law, by his prerogative, could either by one writ, or by successive writs, as he might find it convenient, seize the body, lands, and goods of his debtor : and further, that this was originally a *prerogative peculiar to the crown, but afterwards extended to
*156] the subject, viz., as to the body of the debtor, by the statute of Marlebridge, c. 23, the statute Westm. 2, c. 11, and the statute 25 Edw. 3 ; and to the lands by the statute Westm. 2, c. 18 ; and in the cases of statute merchant and statute staple, and recognisance in nature of statute staple, by 13 Edw. 1, 27 Edw. 3, and 23 H. 8, c. 6, to the body, lands, and goods.

The next prerogative of the crown about which I apprehend there is no dispute is, that where the right of the crown and the subject concur, that of the crown is to be preferred, 9 Rep. 129 b ; a prerogative depending first on the principle that no laches is to be imputed to the king, who is supposed by our law to be so engrossed by public business as not to be able to take care of every private affair relating to his revenue ; Gilb. Hist. Exchequer, 110 ; and, secondly, on the ground that by the king is in reality to be understood the nation at large, to whose interest that of any private individual ought to give way. In the quaint language of Lord Coke, *Thesaurus Regis est firmamentum pacis et fundamentum belli*. And until restrained by various enactments of the statute law, this prerogative extended to prevent the other creditors of the king’s debtor from suing him, and the king’s debtor from making any will of his personal effects without special leave first obtained from the crown. But without further adverting to this ancient state of the prerogative, it is clear that at this day the rule is, that if the two rights come in conflict, that of the crown is to be preferred.

If, however, the right of the subject be complete and perfect before that of the king commences, it is manifest that the rule does not apply, for there is
*157] no point of time at which the two rights are in conflict ; nor can *there be a question which of the two ought to prevail in a case where one, that of the subject, has prevailed already. But if whilst the right of the subject is still in progress towards completion, the right of the crown arises, it seems to me that the two rights do come into conflict together at one and the same time, and that the consequence in that case is that the right of the crown ought to prevail. Lord Mansfield expresses this proposition in shorter language when he says, “No inception of an execution can bar the crown :” *Cooper v. Chitty*, 1 Burr. 386.

Now, if we proceed to apply these principles to the determination of the present case, it will appear that the material facts are these: J. S. has obtained judgment against a crown debtor, has issued a *fiery facias* upon that judgment, and has delivered the writ to the sheriff, and the sheriff, in execution thereof, has seized the goods of the crown debtor: the question then is this, Is the right of the subject perfect at the time when the goods are seized by the sheriff, or is there any further act to be done in order to make that right consummate?

The most simple criterion of this seems to be, whether, without anything further being done, the execution creditor is entitled to call upon the sheriff for the possession of the goods or to pay him the debt. Now, I do not believe that it was ever contended, that the execution creditor is entitled to the possession of the goods themselves, unless under some contract made between the sheriff and him, which would be equivalent to a sale under the writ. Nor can he call upon the sheriff, even after a return of goods seized *ad valentiam*, to pay to him the debt for which the levy is made. If he could, it would be utterly useless to empower him to require *the sheriffs afterwards to proceed to a sale [*158 by the writ of *venditioni exponas*. In fact, it is clear, that all he can do, even after such return, is to compel the sheriff to proceed to sale by ulterior process from the courts. There are many authorities founded on this principle, which show that a seizure of goods, *ad valentiam*, is only a temporary bar to the execution creditor, so long as the goods remain unsold in the sheriff's hands. Again, if the goods after seizure are destroyed by unavoidable accident, the loss falls upon the debtor. The principle is, that the sheriff is excused where the execution fails altogether without his fault. And, in that case, according to the doctrine laid down in *Foster v. Jackson*, Hob. 60, by Lord Hobart, the creditor may have a fresh writ of *fiery facias*, and the loss falls on the debtor. There is a third criterion, which is this, that the debtor, on tendering the amount for which the levy is made and the sheriff's charges thereon, is entitled to have a return of the goods seized by the sheriff.

From these premises, two propositions seem to me to follow; first, that at no period of time at all does the execution creditor obtain any property whatsoever in the goods themselves; and, secondly, that the general property in the goods seized remains, until the sale, in the debtor, and is not changed by the seizure: *Milton v. Eldrington*, Dyer. 98 b. After sale the case is very different; for, by the sale, the property is wholly changed from the debtor to the vendee of the sheriff, and the money, the produce of the goods, then becomes the property of the creditor; for which he may maintain an action for money had and received, and for which the sheriff is responsible to him, the original debtor being then wholly and finally discharged: *Perkinson v. Gilford*, Cro. Car. 539. The rule is thus expressly laid down by Mr. Baron Garrow, *in delivering the [*159 opinion of the Court, after full consideration, in the case of *Higgins v. M'Adam*, 3 Younge & J. 1. "The rule is that when execution is executed, the property is changed; and execution is said to be executed when a sale has taken place." It is not, therefore, till after the sale, that the right of the execution creditor becomes consummate. And it would follow, from thence, that it is not till after the sale that the right of the creditor ceases to concur with the right of the crown. If, therefore, the right of the crown arises at any period prior to the sale, it seems to me, that on the principles above laid down, it ought to have the preference. A preference depending on similar grounds, and terminating at the same period, seems to me to be fully recognised by the Court of King's Bench in *Hutchinson v. Johnston*, 1 T. R. 729. That was the case of two conflicting executions. The sheriff had seized under the writ last delivered to him; but, before sale, having discovered that another writ which was entitled to priority had been first delivered to him, he made sale under it, and paid the surplus only to the creditor under the second writ under which he had seized. And the Court expressly decided, that until sale, he had a right so to do: but, after sale, not; *Rybot v. Peckham*, 1 East, cited in notes, 781, being an express authority to that effect. And, it is observable, that many of the autho-

rities, which are relied on in the present case were then cited. In particular, the case of *Clerk v. Withers*, Salk. 322. And the very proposition now before your Lordships for decision, it is to be observed, was urged as clear law by the very eminent persons who argued that case, viz.: that, till sale, the extent prevails over the prior execution. And, I apprehended that, prior to the statute *160] of frauds, if a subject's writ of execution *had come to the sheriff after seizure, but before sale, under a writ of a subsequent teste, the sheriff would have been in like manner justified in executing it before the other writ under which he had seized, and would have been liable to an action on the case if he had omitted to do so. These authorities seem to me to show clearly, first, that no property passes by the seizure from the original debtor to the creditor; and, secondly, that even in the case of conflicting rights, as between subject and subject, the point of time which the courts uniformly look at, the period when the execution is consummate, is not the seizure, but the sale under the writ.

There is one case, however, which requires some observation, as it would seem to trench upon this proposition; I allude to the construction put by the courts upon the ninth section of the 21 Jac. 1, c. 19. There is no doubt that the courts have held, that the seizure under a writ of *feri facias* was sufficient to satisfy the words "execution, or extent served and executed," contained in this statute; and that, for the purpose of protecting the execution creditor from the effect of a prior act of bankruptcy. But this was a decision upon the construction of a particular statute, and must have reference, reasonably considered, to the peculiar objects of the legislature. It is to be observed, first, that it was prior to the statute of frauds. The law, therefore, then was, that writs of *fi. fa.* bound the debtor's property (as to all persons claiming under him), from the teste of the writ and not from its delivery to the sheriff; so that it was then possible for a party to sue out his writ of *fi. fa.*, and to omit to execute it, and so give to the bankrupt the same species of delusive credit as was provided against by the eleventh section in cases where the bankrupt was then reputed owner of another's *161] goods. It was probably, therefore, with that view that *this clause was introduced, providing that such writs should not bind, as against those who claimed under the bankrupt, from their teste, but only from the date of the public act done by the sheriff in seizing the goods under the writ. For this purpose, that of giving notice to the other creditors, the seizure, and not the sale, was the important period. The present case, however, depends on the question whether the property is changed, and until the sale this is not the case. The execution is not complete so as to transfer the property until that period.

But it is urged, and a great portion of the argument at the bar turned upon it, that, although it may be, that the execution creditor has no consummate right till after sale, and, although the general property in the goods remains until the sale with the debtor, yet, that the sheriff has a special property in him from the time of the seizure, and that the crown, in the event of the teste of the extent being subsequent to the seizure, must take the goods subject to that special property.

There is no doubt that a variety of authorities may be cited, establishing as clear law, that the crown must take, subject to a special property created by the act of the party. In the case of the factor, *Rex v. Lee*, 6 Price, 369, it was held, that goods in his hands, on which he had a lien for his advances made before the teste of the extent, could only be taken by the crown subject to that lien. So again, in the case of goods pawned or pledged before the teste of the extent; *Rex v. Cotton, Parker*, 112: and in the case of *Rex v. Humphrey*, 1 M'Clell. 19, the same law prevails. In *Ward v. Casberd*, 6 Price, 411, an equitable mortgage created before the party creating it became a debtor to the crown on record, was in like manner held to be valid against a subsequent *162] extent. But I can find no instance, whatever, *nor do I believe that any such exists, where a special property, not created by contract between the crown debtor and the person setting it up as between the crown debtor and some one under whom such person claims, has been ever allowed to

prevail. And I think good reasons may be assigned for the difference. In the case of land, if the subject sell it before he became a crown debtor, it is clear that the sale is good. Now, on principle, he who can make a valid sale, ought to be allowed to make any contract short of that, which shall also be valid. He may, therefore, make a valid pledge. The right of the other party is consummate by the act of pledging or of sale. But the cases of a distress for rent before sale; a seizure by the messenger under a commission of bankrupt; and the case now in judgment, are very different. There the goods are all taken by an adverse proceeding from the crown debtor, and are all under the custody of the law at the time the extent is put in. The creditor's right is but in progress; and the sheriff, the commissioners of bankrupt, and the distrainer, are all officers of the law, holding the property, and having rights given to them for the purpose of protecting them in their possession, not for their own benefit, but for the purpose of disposing of it for the benefit of those who may ultimately be entitled to the proceeds of that property. The true description of the state of such property is, that it is in the custody of the law; whereas in the case of the factor, wharfinger, pawnee, or equitable mortgagee, it is in the custody of the party himself, having a beneficial interest under a valid contract. Lord C. B. Gilbert, speaking of lands (and the principle is the same as applied to goods, although the charge takes effect at a different period), says, that nothing can hinder the king's charge but what amounts to a precedent alienation; and a *liberate* in pursuance of a previous judgment, amounts to an alienation of the *land. And yet, before the *liberate*, there is a seizure of the land by a public officer for the purpose of its being by the *liberate* alienated to the creditor. By the seizure, the land is taken into the custody of the law; by the *liberate* it is alienated to the creditor: and from the date of the latter the right of the owner is vested. [*163]

I am aware of the various cases and authorities which exist, in which it has been determined that trover will lie by a sheriff after seizure of goods under a *fi. fa.*; and I do not dispute the proposition, that this shows that a sheriff has, for some purposes, a special property in the goods so seized. But it seems to me, that this point is not really material. The special property which the sheriff or any other public officer has, is not a property beneficial to himself; it is a property conferred on him to enable him to discharge his public duty. The goods are in *custodiâ legis*, and the special property of the sheriff is given to him that this *custodiâ legis* may be rendered safe. If, then, it be true, as many cases have determined, and in particular *The King v. Cotton, Parker, 122*, that goods in *custodiâ legis* are in a situation in which the crown's right and that of the subject may come in conflict, I do not think that it really makes any difference whether the officer having the custody has greater or less powers to defend it conferred on him by the law. The real question seems to me to be, whether the property has wholly or in part gone from the debtor to some person claiming adversely to the crown; or, whether it is only a progress to that result. The sheriff or other public officer holds it with more or less of powers given for its protection, but really for the person ultimately entitled to receive the proceeds. If that person be a subject, having a prior writ delivered to the sheriff, the sheriff holds for him the proceeds of the *goods seized under a subsequent writ, as in *Hutchinson v. Johnston, 1 T. R. 729*; or if, as in the present case, the crown's extent come in before sale, he holds for the crown. [*164]

I have hitherto considered this as if it were *res integra*. But I shall now proceed to consider it upon authority merely. The leading case upon this subject is *Stringfellow's case, Dyer, 67*; and the authority of that case, though doubted for a time, cannot now, I think, be disputed. It was recognised as good law by Lord Hobart in *Sheffield v. Ratcliffe, Hob. 339*; by Lord Rolle in his *Abridgment*; by Lord Hardwicke, and the two Chief Justices, Ryder and Willes, in *Rex v. Cotton, Parker, 118*; and by the Courts of Common Pleas

and King's Bench. in *Uppom v. Summer*, 2 Blacks, 1294, and *Rorke v. Dayrell*, 4 T. R. 402. I do not think it necessary to add the various cases in the Exchequer on this point.

It is however contended, that Stringefellow's case is distinguishable, and undoubtedly it is so in its facts, from the present. The main ground of distinction is, that there remained in that case a further act to be done by the Court, viz., the award of the *liberate*. And it is said by Mr. Baron Wood, that the *liberate* and the *fieri facias* are equivalent to each other, 8 Price, 318; but I think that proceeds on a misstatement of the true point in the case. The right vested by the *liberate* in the creditor is to have the identical lands and the identical goods delivered to him. The creditor's right is, therefore, consummate by the *liberate*; but the *fieri facias* does not command the sheriff to seize and deliver the goods to the creditor (in which case the *fieri facias* and seizure would be equivalent to the *liberate* after the previous seizure), but in substance it commands him to seize and *sell, and to pay the money *165] produced by the sale to the creditor. The act of sale, therefore, and not the act of seizure, puts the sheriff in the same situation, with respect to the creditor, as the *liberate* under an extent; for by the act of the sale the creditor has vested in him a consummate right to the produce of the sale. Now, Stringefellow's case clearly decides that, until the *liberate*, the lands and goods seized, and in the hands of the sheriff, remain liable to the crown process. That case, therefore, appears to me in principle to have decided, that until the creditor obtains a consummate right, the crown's rights are not ousted; and so to govern the present case. The case of *Rex v. Cotton* is a much stronger authority; it seems to me to be decisive of this question. Its authority, looking at the persons by whom it was decided, and those by whom that decision was affirmed, must be admitted to be of great weight. It is not a little singular to find that, although the point now before your Lordships was there treated as the proposition, and that case as the corollary, it should now be contended, that although *The King v. Cotton* is good law, still the proposition from which that case was in truth only a corollary cannot be supported. The principle there laid down clearly was, that goods in *custodia legis* continued liable to an extent until the period arrived at which some person, other than the original debtor, had acquired a consummate right in them. And the Court clearly held that goods seized by a sheriff, but before sale, were so liable. The fanciful doctrine of a special property in an acknowledged public officer being at all material, seems never to have occurred to the great men who decided that case. The reason why the expressions as to special property are there introduced, are as it seems to me, obvious enough: the distress is in the custody of the creditor *166] himself, and, therefore, it might have been plausibly enough *contended that he having the possession, his special property (if he had any) was to be protected for his own benefit. But the Court, looking to the substance and not the form, decide that in seizing he acted as an officer of the law; that he held as such; and that the goods were not really in his possession, but in the custody of the law; they having come to him by an especial authority given by the law, and not by the act of the party, as in the case of a pledge or a like, and the consequence being, that no property, nor even any "possession *in jure*," passed to him. This case seems to me to be *a fortiori* to the present case.

I proceed to enumerate shortly the other cases in which the law has been laid down in the same way. In *Rex v. Peck*, Bunb. 8, the reporter says it was taken for granted that the law was so. In *The Attorney-General v. Andrew*, Hardr. 23, it is not, indeed, distinctly stated whether the party had obtained possession under the subject's prior extent before the right of the crown commenced, but I think it can hardly be doubted that he had. For there the Lord C. B. Steel observes, "that the subject's title is prior to the crown, and is executed." 9 Rep. 129. Now, it appears from *Empson v. Bathurst*, Hutton, 52, that until the *liberate*, no fee is due to the sheriff, because the execution is not

executed; and I think this explains the language of the Lord C. B. Steel, and makes it consistent with what he adds, that "Stringefellow's case is unanswerable."

In the case of the Attorney-General v. Capell, 2 Show. 482, it is stated, "that although the goods were actually in custodia legis, yet because the extent came before the property was vested by an assignment, it was held a good extent. Extents have been held good that have been made of goods actually levied by virtue of a fieri facias and in the sheriff's custody, the extent coming before a bill of sale made, so as the property was not altered." This [*167 latter passage Mr. Baron Wood (who omits the former part of the report) calls "a note of the reporter, unwarranted by the case." To me it appears as a reason assigned by the Court for their previous judgment.

The case of Lechmere v. Thoroughgood, Cmb. 123, has been much relied on by the other side. But I cannot think it to be an authority of any weight. It is observable that the decision in that case is clearly right; and it is difficult to perceive how this point could ever have arisen. There the extent at the suit of the crown was executed before any assignment under the bankruptcy had been made. So that, according to all the authorities, the plaintiffs had no ground of action; and the execution and the extent being set up by the same parties, no question of priority, inter se, could well have arisen. Again, the writ of fieri facias was issued before the sheriff had notice of the bankruptcy, and as the action was trespass, the Court on that ground might well decide in his favour. The dictum attributed to Lord Holt, that "the king's prerogative had been taken away by the statute of frauds," cannot be supposed to have really fallen from that learned Judge. And yet this case, although thus questionable in its application to the present subject, has been one of the main grounds on which the two principal authorities on the other side, Upmou v. Sumner, and Rorke v. Dayrell, have been decided.

The case of Clerk v. Withers, 2 Ld. Raym. 1075, seems also to me to be wholly inapplicable to the present question. Indeed, like Lechmere v. Thoroughgood, it is only to be cited for certain dicta of the Court as to the execution being complete by the seizure; for the decision itself is *clear enough. It was there argued that the death of the creditor, after [*168 seizure under the fi. fa., did not give to the debtor the right of recovering back his goods from the sheriff. And the Court held that it did not, for on the one hand there was no act to be done in Court necessary to give the sheriff authority to act, his authority being complete by the fi. fa., and therefore the death was immaterial to that purpose. But, secondly, the levy under the writ was pleadable in bar to another action for the same debt, so that the debtor sustained no injury by the execution proceeding. But indeed this case would prove too much; for it is also true, that after the award of the fi. fa. and before seizure, the same result would follow: Thoroughgood's case, Noy, 73; cited by Gould, J., in giving his judgment. Now, it is not pretended that an award of fi. fa. would bar the crown before seizure. The principles, therefore, of that decision are wholly inapplicable to this question. There are some dicta in that case, certainly, which may be relied on; but I think that if they are read, as all such dicta ought to be, with reference to the case then before the Court, they also will be found not applicable to the present subject. To some purposes, no doubt, the execution may be called complete by the seizure. It undoubtedly was so at that time, as regarded priority between an execution-creditor and the assignees of a bankrupt. It was not so in all cases, however, even between subject and subject, as appears from Hutchinson v. Johnstone; and I think it is not so, a multo fortiori, in a case between the subject and the crown, which has a prerogative peculiar to itself in interposing in medio.

Curson's case, 3 Leon. 289, is still less applicable. It depends on a totally different principle. There, Curson acknowledged a statute to Starkey, and afterwards another to P. S., who assigned to the crown. The liability, [*169 *therefore, on which the crown proceeded, was created subsequently to

that to Starkey. After this, Starkey obtained possession under his execution; and it was held that the debt to the crown did not bind the lands from its assignment, so as to avoid the subsequent but consummate execution. It may be observed, also, that this case is within the statute Hen. 8; for the judgment was prior to the king's debt, and the execution was consummate before the king's extent. Lord C. B. Gilbert (p. 94) gives this reason for it; for he says, "The creditor, Starkey, did not, by the liberate, take the land sub onere of the king's debt, because his lien was antecedent to it; and it were repugnant to construe him to take the land sub onere of the king's debt, when he took it in satisfaction of a debt precedent." So again, on the same principle, it has been held that if A. enfeoffs B. of his lands, after a judgment confessed by him to C., the crown, as assignee of C., cannot take more than C. could; viz., a moiety of the land: although, no doubt, if the judgment had been confessed to the crown originally, the crown could have taken the whole. In fact, it depends on the principle, that where the law allows a party to contract, it will not permit that contract, by any matter arising ex post facto, to be made of no value; a principle to which I have before referred, in distinguishing goods on which there is a lien by contract from goods in the custody of the law.

The case of *Uppom v. Sumner*, which is the leading authority on the other side, would, I think, be entitled to much greater weight, if it had not proceeded a good deal on the case of *Lechmere v. Thoroughgood*. Even taking the different reports of that case in the way suggested by Mr. J. Gould, no great advantage as to clearness can be derived; and I cannot help thinking that the better course would have been to have placed *no great reliance on a case in which a part was to be picked up from one reporter, and a part from another, in order to make something like a connected account, instead of attributing the confusion to the most obvious and natural cause, viz., the inaccuracy of the reporter.

The same observation applies to the case of *Rorke v. Dayrell*: the Court there also relied a good deal on *Lechmere v. Thoroughgood*.

I shall not at present refer to the main ground on which both these cases proceed; viz., the statute of Hen. 8, because I propose to consider that question separately. Subsequently to both these, the cases of *Rex v. Wells* and *Allnutt*, 16 East, 278, and *Rex v. Sloper and Allen*, 6 Price, 114, arose in the Court of Exchequer, in which the present question was decided, after reviewing all the authorities, in the affirmative. Upon the whole, I have arrived at the conclusion that the preponderance of authority also, as well as the principle on which such authorities ought to proceed, establishes the proposition, that where an extent of the crown comes after seizure and before sale, it ought to be preferred, unless, by the statute 33 Hen. 8, s. 74, there has been an alteration made in the ancient prerogative by which the priority has been taken away. I, therefore, come, in the last place, to the consideration of the true construction of that statute. There can be no doubt, even without authorities on this subject, that the statute must be construed as abridging the prerogative. But authorities are not wanting. In *Cecil's case*, 7 Rep. 92, the court so expressly resolve: and other passages might be easily cited, if necessary, to the same effect. The real question, however, is not, whether the prerogative is abridged, but to what extent it is abridged by the clause. If taken literally, the clause would, as has been *well observed, place the crown in a worse situation than a subject. This could hardly be the real intention of the legislature in a reign not remarkable for such concessions. And this will appear from a reference to the state of the law as it existed at the time the statute was passed. There are, however, two grounds, either of which, as it seems to me, is sufficient to show that this clause of the statute is not applicable to the present question: first, the words are confined to suits commenced or taken, or process awarded, for the recovery of the king's debts. Now, I apprehend, that an immediate extent does not fall within either of these descriptions.

They are confined to suits and process for the recovery of the king's debts, in the ordinary course, from his solvent debtor. An immediate extent is founded on an affidavit of the insolvency of the debtor, and issues, not for the purpose of seizing his property to the amount of the debt, but all his lands and goods into the hands of the crown, there to remain till the crown debt is satisfied. It is, therefore, rather like a forfeiture incurred by him in consequence of his failure, than a suit or process for the recovery of the debt. Again, it may, according to the admitted course of the Exchequer, issue in the midst of the proceedings, on an ordinary suit, and even where the debt is disputed. *Rex v. Pearson*, 3 Price, 288. In an ordinary extent, which is a prerogative execution, the debt, of course, is conclusively settled by the judgment; but in an immediate extent, the debt is not settled, but may be disputed by the debtor on the return of the writ. In fact, it is then that the suit respecting the king's debt, properly speaking, begins. These various differences seem to me to show that this proceeding could not have been contemplated by the legislature when they speak, in this *clause, of suits and process for the recovery of the king's debts. But, secondly, I think, that even if an immediate extent were a suit or process for the recovery of the king's debts, still the clause would not be applicable to this case. This is very clearly stated by Lord Coke. "As to the third protection, *cum clausula volumus*, the king, by his prerogative, regularly is to be preferred in payment of his duty or debt by his debtor before any subject, although the king's debt or duty be the later; and the reason hereof is, for that the *thesaurus regis est firmamentum belli et fundamentum pacis*; and therefore the law gave the king remedy, by writ of protection, to protect his debtor that he should not be sued or attached until he paid the king's debt. But hereof grew some inconvenience; for to delay other men of their suits, the king's debts were the more slowly paid. And for remedie thereof, it is enacted by the statute 25 Edw. 3, that the other creditors may have their actions against the king's debtor, and proceed to judgment, but not to execution, unless he will take upon him to pay the king's debt, and then he shall have execution against the king's debtor for both the two debts." 1 Inst. 131, b. [*172]

It appears, therefore, that when the statute of 33 Hen. 8 was passed, the creditors of a crown debtor could not proceed further than judgment, but were liable to be restrained altogether from taking out execution upon such judgment. By that statute new powers were given to the crown, and new restraints, on the other hand, imposed on the prerogative. Certain debts to the king, not of record, which before did not bind the subject till recorded, were placed on the footing of a statute staple, and so bound from the time of contracting them. It is so laid down by Lord C. B. Gilbert, page 88, and is in conformity with the general law which I have before stated from Lord Hobart's *reports. For, in order to make the king's debts not of record bind from the time of their contracting, a statute would clearly be required. [*173] Lord Chief Baron Gilbert in another part of his treatise says, "This branch of the statute had its origin in the practices introduced by 3 H. 7, c. 3, of taking recognisances to the king before justices of the peace, instead of the ancient mode in use, before conservators of the peace, sheriffs, and constables, the two latter of whom when they bailed took the obligation in their own names and not to the king. Now these recognisances to the king, says he, "being only personal securities, it became a doubt when they began to bind the lands of the subject, and formerly they held that such recognisances did not bind the land till they were returned of record." And the fifty-sixth section, which, if construed literally, would appear wholly useless as far as relates to the Court of Exchequer, may, I apprehend, have a sensible construction given to it by referring to the second part of the fifty-fourth section, by which the king was authorized to proceed with suits depending in the name of a common person to his grace's use, and which, therefore, required to be placed on the same footing

as to execution with suits originally brought by the crown. I think, therefore, that so far as relates to the king's debts, all that was in effect done by the various sections of the 33 H. 8, c. 39, was to give a priority to the particular debts not being of record, as if they had been contracted originally by a recognisance in the nature of a statute staple, which binds from the time of the contracting. Now, reasoning *a priori*, it would be probable that such a new power would have some counterbalance in order to place the subject as nearly as possible in the same situation as he was by the 25 Edw. 3. By that act the subject's writ of execution might be stayed from the time the king's debt *174] on record was contracted. A date easily *to be ascertained. But when the king's debt not of record was to bind by this new power from the time of its being contracted, it might become very difficult for a third person to ascertain that period. And it might well be considered unjust to super-add such a hardship in the case of a person who levied under an execution sued out indeed after the king's debt was contracted, but after a contract of which, it not being of record, he could know nothing. It would, therefore, be not unnatural to suppose that some restriction would be imposed rendering it necessary for the crown, seeking to avail itself of the new power, to take some public steps before the judgment obtained by the subject should thus lose its efficiency. Now, I apprehend that this was in fact done by the seventy-fourth section, which I construe as providing, that, if before the king's debt is put in suit the subject has obtained a judgment (on which but for the new law he might have sued out a writ of execution in due course), he shall still have the writ of execution, and proceed on it, notwithstanding the king's debt was in existence, and in defiance of any writ of protection from the crown. In this case, therefore, the crown is prevented from staying the proceedings by any writ of protection, and the creditor, if by using due diligence he can cause the sheriff to seize the goods and sell them before the extent comes on the part of the crown, shall be entitled to reap the fruits of his diligence. The words are, "The king shall have first execution," which I think means, shall first have a writ of execution from "the Court." In like manner, in the statute 25 Ed. 3, c. 19, the words are, that the creditor having settled for the king's debt, "shall have execution" against the defendant, which clearly there means "shall have a writ of execution."

Upon the words, therefore, as well as on the intention of 33 H. 8, c. 39, *175] s. 74, as collected from the act itself, *compared with the statutes which preceded it, I have come on both these grounds to the conclusion that, according to the true construction of the seventy-fourth section, it has no reference whatever to the question now before your Lordships. I am aware that this is contrary to the construction put on the statute in the cases of *Rorke v. Dayrell* and *Uppom v. Sumner*. But after fully considering those authorities, and the reasons assigned there, which do not satisfy my judgment, and finding them in opposition, as it seems to me, to the cases of *Rex v. Cotton*, *Attorney-General v. Capell*, *Rex v. Peck*, *Rex v. Wells* and *Allnutt*, *Rex v. Sloper* and *Allen*, and, I would also say, to the *Attorney-General v. Andrew*, and the uniform course of the Court of Exchequer, I think that those cases are not well decided; and that, both on the ground that they are contrary to the true construction of the act, as deduced from a proper reading of it, if the question were *res integra*; and also on the ground that they are opposed to cases of greater weight and authority, to which I have already referred.

I have to apologise to your Lordships for the length at which I have considered this question; but I trust that the importance of it, and the great weight due to the authorities on both sides, will be a sufficient reason for my having so done.

On the second question I shall not detain your Lordships, as I believe there is no difference of opinion upon it. I think that it should be answered in the negative.

TAUNTON, J. The first question propounded by your Lordships to the Judges is one of very considerable difficulty, arising, in my humble judgment, not so much from the nature of the subject when properly understood, as from the conflicting decisions of the courts in Westminster Hall. This question may be considered in two *points of view, first, whether by the seizure on the part of the sheriff, of the goods under the writ of *feri facias*, the property is so altered as to leave nothing in the debtor upon which the writ of extent can attach: and, secondly, whether the statute 33 Hen. 8, c. 39, s. 74, applies to the present case, which latter inquiry involves a consideration of the law as to the prerogative with respect to the king's debts before and at the time of passing that statute. [*176]

With respect to the first point, it is so clearly laid down in all the text books as a general proposition, that the property of goods is not altered, but continues in the defendant until execution executed, that it cannot be necessary to say much on that point. But then a question arises, when is execution executed, that is, completed? It would seem, from the language of the writ of *feri facias*, that the sheriff has not completed the whole of his duty under the writ until he has converted the goods and chattels seized into money; for the writ enjoins him, that of the goods and chattels of the defendant he cause to be made so much money; and he is further enjoined, that he have that money before the king at Westminster on the return day, to be rendered to the plaintiff; so that the selling or making of the goods into money appears to be a most essential part of the sheriff's duty.

But it has been contended in many of the cases on this subject, and more particularly by the late Mr. Baron Wood, in his elaborate judgment in the case of *The King v. Giles*, 8 Price, 314, that the execution is executed by the seizure; and, certainly, if that were the case, there would be an end of the question; because it is abundantly clear that, after execution executed, an extent from the crown comes too late: *The Attorney-General v. Fort*, 8 Price, 364, in note. In such case the property is altered, and the *crown cannot, on process against A., seize the goods of B. [*177]

Considering the authority by which this proposition of the seizure alone changing the property has been maintained, it becomes necessary to investigate the law upon the subject, and examine the grounds upon which it has been supported. If the property be altered by the bare seizure, to whom does it pass? They say to the sheriff. But this cannot be, for the goods would not be forfeited by his outlawry, or his conviction for felony, nor would they pass under a grant of "all his goods;" and if, after seizure, the defendant pays the debt to the sheriff, he is entitled to have his goods again without any grant from the sheriff, or, if a leasehold, without reassignment. So also, I apprehend, if goods in execution are burnt, or otherwise injured without default of the sheriff, it is the loss of the defendant. The sheriff under the writ has a mere power to sell, without any interest vested in him, except that which every bailee, such as a carrier, wharfinger, &c., who is answerable over, has for his own protection. This interest, if so it may be called, is called a special property, as contradistinguished from a general property; and, in respect of this, we know he may bring trover for the goods seized against a stranger. But it is not a beneficial interest. In addition to these illustrations there is the authority of Lord Hardwicke, who lays it down in 2 Eq. Ca. Abr. 381, that neither before the statute of frauds nor since is the property of the goods altered by mere seizure, but continues in the defendant until the execution executed. The cases cited by Mr. Baron Wood in support of his opinion, that the property is altered by the sheriff's seizure, and before actual sale, by no means bear him out. The first case he cites with respect to goods and chattels, is *Lechmere v. Thoroughgood*, Comberb. 123; 3 Mod. 236. That was an action of *trespass, not trover, brought against the sheriff. The extent there, was after the seizure, and before any sale or venditioni exponas, [*178]

and it appears, certainly, that a question was made, whether the extent did not come too late, and the judges are reported to have intimated an opinion that it did. But the case was not decided upon that ground. Judgment was ultimately given for the defendants (and not for the plaintiff, who impeached the validity of the extent), upon the ground that they could not be made trespassers by relation. The opinions, therefore, thrown out were mere *obiter dicta*, and the reports themselves are very loose and unsatisfactory. In one of them, Comberbach, Lord Holt is indeed reported to have said, "the property of the goods is vested by the delivery of the *feri facias*;" but this is directly contrary to the opinion of Lord Hardwicke in 2 Eq. Cas. Abr., and to the two cases of *Burdon v. Kennedy*, 3 Atk. 738, and *Phillips v. Thompson*, 3 Lev. 191, in which latter it was decided, that by the delivery of the writ, the goods were only so bound that the defendant could not dispose of them afterwards, and that the delivery of the writ to the sheriff is no execution thereof. And this dictum of Lord Holt, Lord Mansfield, in *Cooper v. Chitty*, 1 Burr. 20, suspected was a mistake of the reporter.

The next case relied on by Mr. Baron Wood is *Clerk v. Withers*, 6 Mod. 290. In that case the principal question was respecting the operation of the stat. 17 Car. 2, c. 8, upon a judgment by default obtained by an administrator; whether, as that statute applies in terms only to judgment after verdict, there could be any personal representative of the intestate who could, by process, compel the sheriff to sell. It was incidentally contended there, by counsel, that a seizure *179] by the sheriff *was a satisfaction of the debt, and, therefore, that the plaintiff, who had brought a *scire facias* to have restitution, should not have it. But the utmost length to which Lord Holt carried this was, that the seizure to the value of the debt discharges the defendant, unless the execution be afterwards avoided, and that the seizure, so long as it continues, is a sufficient bar. But the point really determined was, that an execution being an entire thing when once begun, shall, as between the parties, be proceeded with, notwithstanding a change of sheriff, or the death of the plaintiff, nothing having occurred to avoid the seizure, or to intercept the authority of the sheriff before sale, the sale, under such circumstances, being considered but a formal part of the execution. There was no decision, that, as against one having a paramount claim, the property, by the seizure, was irrevocably changed; but the whole is consistent with the hypothesis, that the goods, in such a case, are in the custody of the law.

With respect to the argument drawn from the statute 21 Jac. 1, c. 19—which provides, that where no execution or extent has been served and executed, creditors by judgment, statute, &c., or other security, shall not be relieved upon any such judgment, &c., for more than a rateable part of their just and true debt with the bankrupt's other creditors, without respect to any greater sum contained in such judgment, &c., or other security,—and upon which it has been determined that when a creditor has obtained judgment and sued out execution, and a seizure has been made under it, if before sale an act of bankruptcy intervenes, the judgment creditor shall not be obliged to come in under the commission, but the sheriff may proceed to sell the goods; from which determinations Mr. Baron Wood draws the conclusion, that they must have proceeded on the ground, that as soon as goods have been seized under a *feri facias*, that seizure *180] is considered in law as being an execution *executed; the answer is, that these determinations only prove, that as between subjects, an execution, once begun with seizure, shall proceed, notwithstanding a subsequent act of bankruptcy, and commission issued; and in the case of *Audley v. Halsey*, Cro. Car. 148, which I believe was the first decision to this effect, wherein the circumstances were precisely the same with those in *Stringefellow's case*, *Dyer*, 67 b,—the main difference being, that in the one the bankrupt commissioners claimed against the extent upon the statute staple, and in the other, the crown,—the Court expressly distinguished it from the case in *Dyer*, by saying, "for

there, although the goods were extended, yet they were not delivered to the conuzee, and the writ was not returned, and the writ of privilege was for debt due to the king, wherein the king hath his prerogative by the common law." In addition, I may observe, that the distinction taken in the recent cases of Wymer v. Kemble, 6 B. & C. 479; Notley v. Buck, 8 B. & C. 160; and Morland v. Pellatt, 8 B. & C. 722, which were in exposition of the stat. 6 G. 4, c. 16, s. 108, proceeded principally upon this very difference between a mere naked seizure before bankruptcy, and a seizure consummated by sale, or the payment of the money directed to be levied. In Wymer v. Kemble the goods of the debtor had been seized under a *feri facias*, and delivered to the creditor under a bill of sale by the sheriff; then a bankruptcy followed, and it was held that the plaintiff had ceased to be a creditor, the original debt having been extinguished by the sale. The like decision was come to in Morland v. Pellatt, where, though there had been no sale of the goods, the balance of the money directed to be levied had been paid over to the sheriff before the act of bankruptcy. But in Notley v. Buck, where the sheriff had made a seizure before the act of bankruptcy, but the goods remained in *his hands unsold at the time of it, it was held that the sheriff could not pay over to the creditor the proceeds of the execution received upon a sale *after* the bankruptcy. [*181]

But although the position that the property is not divested out of the debtor by mere seizure under a *feri facias*, was partly admitted by the counsel of the plaintiff in error in this case, yet it was most strongly pressed by him in his argument that by the seizure the judgment-creditor here had a lien on the goods or a special property therein, and that the crown under an extent can only take subject to that lien or special property. And this right of the judgment-creditor, he observed, had not been adverted to in any of the cases. With respect to the property, many other cases might be added; but enough probably has been said, and I will add only the authority of Mr. Justice Bayley. In Morland v. Pellatt the learned Judge says, "After seizure, and before sale, the sheriff has a special property in the goods; but the debtor has the general property; up to that time, therefore, the debt is not extinguished, and the judgment-creditor has a security for his debt." This special property is in the sheriff, not as trustee for the judgment-creditor, but for the purpose of his own protection. Neither had the judgment-creditor, in this instance, any lien on the goods. Let us see what a lien is. In Hammonds v. Barclay, 2 East, 227, Mr. J. Grose says, "a lien is a right in one man, to retain that which is in his possession belonging to another, till certain demands of him, the person in possession, are satisfied." The Master of the Rolls, in Gladstone v. Birley, 2 Meriv. 404, lays it down, "the question always is, whether there be a right to retain the goods till a given demand shall be satisfied." In Lickbarrow v. Mason, 6 East, 25 note, Mr. J. Buller observes, "liens at law exist only in cases where the party entitled to them has the *possession of the goods; and if he once parts with the possession after the lien attaches, the lien is gone." [*182] In Heywood v. Waring, 4 Campb. 291, Lord Ellenborough says, "without possession there can be no lien. A lien is a right to hold, and how can that be held which was never possessed." In Hallett v. Bousfield, 18 Ves. 188, Lord Eldon asks, "how can the doctrine of lien, that is, the right of a party having property in his possession, to retain it until his demand is satisfied, be applied to the interest of a freighter who has no possession, the whole being in the possession of the owner." (And many other dicta to the same effect are collected by Mr. Montagu, in his Summary of the Law of Lien, Introductory Chap. p. 1, &c.) So here, I ask, how can the doctrine of lien to retain these goods be applied to this judgment creditor who had no possession, the goods being in the possession of the sheriff? The sheriff seizes, not as the agent or servant of the party, but a minister of justice and an officer of the Court; and, therefore, his possession is not the possession of the creditor, but the custody of the law. But, if there was no lien, the cases of The King v. Humphrey,

1 M'Clell. & Y. 173; *The King v. Lee*, 6 Price, 369; and *Casberd v. The Attorney-General*, 6 Price, 411, which were cases of a wharfinger's and a factor's lien, and an equitable mortgage by deposit of the title deeds, are inapplicable, the creditor there having had actual possession of the articles in respect of which he claimed. But when goods are in what is called the custody of the law, the property is, as it were, in abeyance, and must ultimately belong to the party to whom, under all the circumstances, the law adjudges it.

But it was said that the judgment-creditor, by force of the seizure, had at least *183] a security. This has *certainly been so decided with reference to the 6 G. 4, c. 16, s. 108. But I do not see what it proves. The security may be vested and certain, or it may be contingent and defeasible. It does not necessarily import present property, nor even beneficial interest. If tenant for life without impeachment of waste, or tenant in tail, sell trees standing and growing on the land, which he may lawfully do, the vendee, in common language might be said to have a security for the money which he has advanced; but if the vendor should die before the trees are severed from the soil, the right of the remainderman or issue in tail steps in and defeats that of the vendee. So here, although the judgment creditor had a security, yet still it was a possible case, I say no more at present, that a *jus tertii* might interpose and destroy it.

This brings me to the consideration of the second branch of the question, namely, whether the extent in this case at the suit of the crown constituted such a *jus tertii*. It is perfectly clear, that at common law the king had very peculiar prerogatives, much beyond the common right of a subject for the recovery of his debts. Of these (not to mention others which are not to the present purpose), one was, that where one was indebted to the king, and likewise to other persons, the king's debt was to be preferred in payment, that is, the king was to be paid before any other creditor of the party, and, consequently, to be preferred in an execution. *Mad. Exch.* 183, c. 23, s. 7. The general rule is, and this has been acknowledged in all the cases, that when the right of the king and that of a subject concur, that of the king shall prevail. See the instances put in *The Attorney-General v. Andrew*, *Hardr.* 23; *Plowden*, 258, 259, 264. But in ancient times the law of prerogative went farther than *184] this, and provided the most effectual means of *security, that the king's title should always be the first. It prohibited the creditors of a king's debtor even from taking out execution until all the king's debts were satisfied, although the king's debts were the later in point of time; and if the king's debtor, notwithstanding, was sued or attached, the king had a remedy by writ of protection to protect his debtor: *Co. Litt.* 131, b, *Fitz. N. B.* 65, 66, tit. *Protection*. *The King v. Cotton*, *Parker*, 128. A king's debtor could not make a will to dispose of his chattels to the king's prejudice, nor could his executor have administration, without permission from the king or justices, or barons of the exchequer, upon giving security to answer the king's debts. See numerous precedents in *Maddox's Exchq.*, c. 23. These prerogatives have, at different times, been controlled and regulated by statutes; but these very statutes testify their existence. Thus, in the statutes of *Magna Charta*, 9 Hen. 3, c. 18, it is enacted, that if any holding of the king a lay fee do die, and the sheriff show the king's letters patent of his summons for debt, which the dead man did owe to the king, it should be lawful to the sheriff to attach and enrol all the goods and chattels of the deceased being found in the lay fee, to the value of the debt, so that nothing thereof should be removed until the debt be paid off, and the residue should remain to the executors to perform the testament of the deceased. Again, the stat. 25 Ed. 3, c. 19, after reciting, that forasmuch as the king had before that time made protections to divers people which were bounden to him in some manner of debt, that they should not be impleaded of the debts which they owed to others, till they had made gree to our Lord the King of that which to him was due by them by reason of his prerogative; and so, during such protections, no man hath used nor durst implead

such *debtors; enacts, that, notwithstanding such protections, the parties which have actions against their debtors shall be answered in the king's court by their debtors; and if judgment be thereupon given for the plaintiff or demandant, the execution of the same judgment shall be put in suspense till gree be made to the king of his debt: and if the creditors will undertake for the king's debt, they shall be thereunto received, and shall have execution against the debtors of the debt due and adjudged to them, and also shall recover against them as much as they shall pay to the king for them. After the passing, therefore, of this statute, which considerably abridged the ancient prerogative, although a subject might pursue his debtor to judgment, yet he could not sue out execution until the king's debts were paid or secured, the king being entitled to the first execution. This execution, it is material to recollect, at the common law, was against the body, the land, and the goods of the accountant of the king's debtor. Sir William Harbert's case, 3 Rep. 12 b. The words of Lord Coke on this point are, "It was resolved that, at the common law, the body, the land, and the goods of the accountant or the king's debtor were liable to the king's execution, for *Thesaurus Regis est pacis vinculum et bellorum nervi*, and, therefore, the law gave the king full remedy for it: and therewith agrees 5 Eliz. Dyer, 324, and Plow. Com. 321; Sir William Cavendish's case, who was treasurer of the chamber; 24 E. 3, Watten De Chirton's case; and infinite precedents in the Exchequer, to prove, that for the king's debt, the body and the land of the debtor shall be liable by the common law before the statute of 33 H. 8, c. 39." The statute did *not* give to the crown this triple remedy, and whether it could be pursued as now by one single process, or must have been separately worked out by different writs, is a matter of no moment.

*Thus stood the law until the statute 33 Hen. 8, c. 39, passed. And upon this short statement there seems to me no doubt, that if no alteration of the law in this respect was made by that statute, the king, in the present instance, is entitled to preference under the extent, although it did not reach the sheriff until the *feri facias* was partly executed by seizure; for it would be absurd to hold that when it was unlawful to issue any execution before the king's debt was paid, that the creditor, by his disobedience of the law in suing out an execution, should gain an advantage over the king. Then, has the stat. 33 Hen. 8, c. 39, altered the law in this matter? That stat., sect. 74, enacts, "that if any suit be commenced or taken, or any process be hereafter awarded for the king, for the recovery of any of the king's debts, that then the same suit and process shall be preferred before the suit of any person or persons, and that our said sovereign lord, his heirs and successors, shall have the first execution against any defendant or defendants, of and for his said debts, before any other person or persons, so always that the king's said suit be taken and commenced, or process awarded for the said debt at the suit of our said sovereign lord the king, his heirs or successors, before judgment given for the said other person or persons." It has been very properly observed by Lord Chief Baron Macdonald, in his judgment in the case of *The King v. Wells and Allnutt*, 16 East, 280, 281, n, that, according to the construction put upon this clause in the cases of *Uppom v. Summer* and *Rorke v. Dayrell*, it must have the effect of postponing the king's execution, though it should happen to be prior, both in *teste* and delivery, to the subject's execution on his prior judgment; which would be putting the crown, as to its execution, upon a worse footing than a subject, inasmuch as between subject and *subject the priority of the delivery of the writ of execution always determines the question of preference, without regard to the priority of judgment. Such a result surely could never have been intended, and this goes some way to show that the construction animadverted upon is not the right one. But I am of opinion, upon other grounds, that this section of the statute has been misunderstood. The first branch declares, generally, that the king's suit and process shall be preferred before the suit of any person or persons. This seems to be distinct from

the latter branch, which confirms the right which the king had before this statute of having the first execution ; not a preference where there are two concurring executions, one at the suit of the king ; but the first execution ; that is, the sole and exclusive execution against any defendant for his debt, before any other person. Then comes the condition or proviso, "so always that the king's said suit be taken and commenced, or process awarded before judgment given for the said other person." Now, I take this seventy-fourth section to be a supplement to the nineteenth chap. of the 25 Edw. 3, and the judgment mentioned herein to mean a judgment obtained by favour of the latter statute. Then the meaning will be this : Where the subject has obtained no judgment, the king is entitled, as of course he must be if he sues out process, to the first execution. But if the subject has obtained a judgment before any process sued out by the crown, the execution thereof shall not, by virtue of the stat. 25 Edw. 3, c. 19, be put in suspense till gree be made to the king of his debt ; but in such event he is at liberty to follow it up by execution, although the king's debt be not paid ; and if he can get his execution completely executed before the king's process be sued out, he will be safe ; for the king is only to have absolutely the first execution where the king's suit is taken and commenced, or process awarded *188] before judgment given for the other person. By this construction the greater difficulties, in my humble judgment, will be overcome, though perhaps some may remain ; and this will account for the disuse of protections afterwards, which would be unavailing when the king had no longer a right in all cases to the first execution.

So much by way of argument from the account we have in our books of our ancient prerogative, and from the statutes.

The cases that have been decided upon this question have been so often cited that it is unnecessary to go through them all ; I will only observe that the weight of authority appears to me to preponderate very considerably in favour of the right of the crown. The course of decision in the Court of Exchequer has been uniform, with the exception of the Attorney-General *v. Andrew*, Hardr. 23, and Mr. Baron Wood's opinion in *The King v. Giles*, on that side ; and considering that this is the king's great court of revenue, in which the Judges are more particularly conversant with these matters, this consistency of judgment ought to carry great weight with it. In the Attorney-General *v. Andrew* the reasons assigned by the Judges are extremely short, and in truth consist only of two ; the one that the stat. 33 Hen. 8, abridges the prerogative, and controls the common law, and that the words in the seventy-fourth section make a condition precedent, and imply a negative ; the second, that there the subject's title was prior to the king's, and was executed. I have already explained why, in my opinion, the interpretation that has been made of this statute is an erroneous one, and why this statute does not affect the present case. With respect to the holding that the subject's title was executed, if *liberates* had issued upon *189] the *elegits*, which does not *appear to have been the case, there is no doubt but that this was so ; but if nothing more had been done than extending the lands upon the *elegits*, I take the liberty of saying that the subject's title was not executed ; and for this Stringefellow's case, Dyer, 67 b, is my authority. In that case Stringefellow had sued out a writ of *extendi facias* to have execution of a statute staple. The sheriff made extent of the defendant's lands, and seized them into the king's hands, but did not make livery, and afterwards a writ of the king's prerogative issued out of the Court of Exchequer, reciting the prerogative which the king ought to have to be first served and paid by his debtors, and commanded the sheriff to levy the debt of the goods of the debtor ; and if he had not sufficient, then to extend his land. This writ was delivered to the sheriff after the day of the return of the first writ, but before the first writ was returned. On the sheriff returning to the king's writ that the debtor had no goods or lands to be extended besides the goods and chattels, lands and tenements above extended, and therefore as to the further execution of that

writ he had done nothing, it was holden in the Exchequer for law that the sheriff should be amerced if he would not amend his return, namely, return the extent into the Exchequer for the service of the king's debt; and Justices Hale and Bromley were of the same opinion, because the property of the goods and land was not in Stringefellow before they were delivered to him by the writ of liberate. This case has always been acknowledged for good law. And although a query is subjoined by the reporter because the goods on being seized into the king's hands to be delivered to the party, were in the custody and consideration of the law, and privileged from all other executions, yet this doubt proceeds from *not attending to the distinction between the king's case and that of a common person. In the case of a subject, goods dis- [*190 trained or seized in execution cannot be again taken, for that reason; but it is otherwise in the case of the king. *The Attorney-General v. Capel*, 2 Show. 481. See also the note by Manwood Chief Baron, in margin, Dy. 67, b.

The cases of *Uppom v. Sumner* and *Rorke v. Dayrell* appear to me to have been determined on wrong principles. Little research appears to have been made, in either, into the nature and extent of the royal prerogative at common law. In the first, the judgment proceeded principally on the stat. 33 H. 7, c. 8; and in the latter, on the mistaken assumption that the property was changed by the delivery of the writ to the sheriff. With all my respect for the learned Judges by whom these cases were decided, and no one can have greater, I cannot assent to them. And I do this with the more freedom, because on no less than three solemn occasions the Court of Exchequer has subsequently testified a similar dissent.

The case of *Thurston v. Mills*, 16 East, 254, is no authority either way; because although the Court intimated they had formed an opinion on the point, it was not divulged. With these exceptions, the determinations of the courts will be found, from the earliest times, to have been in favour of this prerogative. I therefore humbly give it as my opinion, that the first question propounded by your Lordships should be answered in the affirmative.

With respect to the second question submitted to the judges,—Whether it makes any difference whether the writ of extent be in chief or in aid—I am of opinion that, in this respect, there is no difference between an immediate extent and an extent in aid. It appears to have been the practice, in very ancient times, that if the *king's debtor was unable to satisfy the king's debt [*191 out of his own chattels, the king would betake himself to any third person who was indebted to the king's debtor, and would recover of such third person what he owed to the king's debtor, in order to get payment of the debt he owed to the crown. *Mad. Exch. c. 23, s. 8*. In like emergencies the king's debtors or accountants were wont to have writs of aid, whereby to recover their debts of such persons as were indebted to them, in order to enable them to answer the debts they owed to the king. Many precedents of both modes of proceeding are cited by Madox in his notes, ch. 23, s. 8, 12. One of them is in the fifth year of Richard I., in the great roll whereof it is stated that Henry de Cornhill owed the king 100*l.* for the arerage of the cambium of all England, except Winchester, and 6*l.* for the term of the land of Engelran de Mustroil; and William Earl of Albemarle acknowledged before the Barons of the Exchequer, that he owed so much to Henry de Cornhill; and thereupon William Earl of Albemarle was charged (as debtor to the king) with the said respective sums. Others are of the reign of Henry 3, and Edward 1. In some of them the mandate is to the sheriff to distrain a former sheriff, or to aid collectors and assessors in distraining persons indebted to the king for aids or the like: and therefore are not [properly extents in aid, the process being against persons originally indebted to the crown; but in some instances, as in those of the executors of Herbert de Burgh, Walter de Watford, and the executors of the late Bishop of Hereford, the mandate to the barons is, that

they distrain the debtors of those particular persons, in order that the king may be satisfied the debts which they owe to him respectively, according to the law and custom of the Exchequer. This process, though now called an extent *192] in the second degree, is in principle, *the same as that called peculiarly an extent in aid: the only difference being, that in the one case the crown is the real as well as the nominal plaintiff; in the other, the process is sued out for the recovery of the debt due to the king's debtor and for his benefit.

It is clear, therefore, from these authentic records, that the practice of charging the debtors of a person indebted to the king, for the king's debt, goes back as far as the period of legal memory; and the process has been gradually moulded into its present shape, and limited to its present extent by statutes, and by the rules and decisions of the Court of Exchequer.

I am of opinion, therefore, that it makes no difference whether the writ of extent was in chief or in aid.

VAUGHAN, B. After much consideration devoted to the question which your Lordships have been pleased to propound to the Judges, I am of opinion that the writ of extent issued by the crown under the circumstances stated, ought of right to supersede the subject's execution.

During the progress of this inquiry my mind has been agitated by doubts suggested by a review of the conflicting judgments which have been pronounced in the superior courts of Westminster Hall upon this long controverted question, involving a claim to exercise an important prerogative of the crown on the one part, and a valuable civil right of the subject on the other.

The arguments in favour of the plaintiff in error may be resolved into the following propositions:—First, That no prerogative right existed in the crown by the common law to issue an extent whereby the goods and chattels, and lands of the king's debtor might be extended, and his body seized to enforce the payment of his debt.

*193] Secondly, that admitting the existence of such *prerogative right under the common law, it was restricted and controlled by the statute 33 Hen. 8, c. 39, so as to prevent its operation in the case sub judice.

Thirdly, that, independent of all prerogative right, after an actual seizure of the sheriff under a fieri facias, at the suit of a judgment creditor, the property in the goods taken became thereby altered, no longer continuing the property of the debtor, and consequently no longer amenable to the process of the crown.

Fourthly, that the sheriff acquired, by the seizure, such a special property in the goods as to deprive the crown of any benefit to be derived from this process of extent.

The main question depends upon the true construction of the 33 Hen. 8, c. 39, s. 74: but in the interpretation of this statute, the important preliminary inquiry presents itself; viz., whether before, and independent of, any legislative enactments, the crown was not entitled, by the common law, to extend the lands, and to take the body as well as the goods and chattels of the king's debtor in satisfaction of the debt.

Sir Edward West in his Treatise upon the Law and Practice of Extents, states (but, as I conceive, erroneously), that the crown derived its power of issuing an extent from the provisions of this statute. In page 108 he observes, that "this statute gave to the crown a new kind of execution for all its debts; a species too of execution which before that statute was the subject's execution, and the subject's only;" and in page 110 he repeats, "that the subject's process by extent being imparted to the crown, the crown will of course have the same rights in the use of that process as the subject."

The author of that treatise seems to have been betrayed into this error by what I would rather call an equivocal than an inaccurate expression of Lord *194] Coke in his Comment. upon the eighth Cap. Magna Charta, *2 Inst. 19, which contains the following passage:—"After the statute 33 Hen. 8,

c. 39, was made for levying of the king's debts, the usual process to the sheriff at this day is, *Quod diligenter per sacramentum,*" &c. From the words after the statute Mr. West infers that the king was not empowered by virtue of his prerogative at the common law, to issue any writ of extent to enforce the payment of his debts before that statute, such authority being created and conferred for the first time by the provisions of that act. Lord Chief Baron Gilbert understands this expression of Sir Edward Coke's, after the statute, &c., in the same sense, although he suggests a doubt respecting its accuracy; for in page 127, of his Treatise on the Court of Exchequer, after transcribing a process known by the name of the long writ, he observes, "My Lord Coke says this writ was made since the statute, but of this I have great doubt, because it seems so contrived that an inquisition should be found whether the debtor had any goods and chattels, and if upon inquisition there were none found then to extend the lands and to take the body of the debtor. So that it seems this writ might have been used before the stat. of Hen. 8, without any violation of Magna Charta, for if it were found that the debtor had no goods, they might seize the lands and take the body: and, therefore, it seems to be a writ that was used upon motion to the Court and in cases of necessity before the stat. of Hen. 8, but since that statute they may have a *capias*, *levari*, or extent, without any such inquisition touching the goods."

The opinion of Sir Edward Coke appears to me to have been misapprehended. I do not understand him to affirm that the king had no power of issuing an extent for the levying of his debts before the statute, but that the particular writ of which he gives only a partial extract, had been the usual process to the sheriff since *that statute, and was so at that day. Indeed, the very [195] first passage in the eighth chapter of Magna Charta, upon which he is commenting, "*Nos vero vel Ballivi nostri non seiziemus terram aliquam vel redditum pro debito aliquo quamdiu catalla debitoris presentia sufficient ad debitum reddend et ipse debitor paratus sit inde satisfacere,*" was introduced in case of the subject, for the purpose of restraining the power of the crown, and correcting an abuse of the prerogative, by preventing the seizure of the lands and rents of the crown debtor, where goods and chattels could be found sufficient to satisfy the debt. Lord Coke observes upon this passage, that "by order of the common law, the king for his debt had execution of the body, lands, and goods of the debtor:" and adds, "this is an act of grace, and restraineth the power that the king had before." Both the text and the comment therefore conspire to prove that Lord Coke could never intend to ascribe the origin of the process of extent to the stat. of Hen. 8. Indeed, the reports of that eminent lawyer are replete with resolutions confirming the prerogative right of the crown to issue process of this description from the earliest times. I will cite one case only from his reports in proof of this position. Sir William Harbert's case, 3 Rep. 12, b. It was there resolved, that at the common law the body, the lands, and the goods of the king's debtor or accomptant were liable to the king's execution; for that *thesaurus regis est pacis vinculum et bellorum nervi*. And, therefore, the law gave the king the full remedy for it: and therewith agrees 5 Eliz. Dyer, 224, and Plowd. Com. 321, a; Sir William Cavendish's case, 24 Edw. 3.; Walter de Chirton's case; and infinite precedents in the Exchequer, to prove that for the king's debt the body and land of the debtor shall be liable by the common law before the stat. 33 Hen. 8, c. 39.

*I have before observed, that Lord Coke gives only a partial extract of the usual process which he states to have issued since the stat. 33 [196] Hen. 8. If the whole of it had been inserted it would have appeared from the concluding part whether it issued from the office of the king, or of the lord treasurer's remembrancer.

The long writ, introduced and commented upon by Lord Chief Baron Gilbert in the chapter in which he expresses his doubts respecting the accuracy of Lord Coke as to the period of time when that species of process was first issued for

the purpose of securing the king's debts, was undoubtedly a writ from the office of the king's remembrancer; as appears from the concluding part of it, containing an injunction not to sell until the further order of the Court; from the bonds remaining in the custody of the king's remembrancer; and from referring in distinct terms to the statute 33 Hen. 8, as the authority from which it emanated, and being also signed by Masham, who was at that time an officer, not in the lord treasurer's but in the king's remembrancer's office.

Without professing to have examined the infinity of precedents to which Sir Edward Coke alludes, the searches I have made have satisfied my mind that from that department of the revenue office in the Court of Exchequer under the control and management of the lord treasurer's remembrancer, a strong prerogative process or writ, combining in effect the *fieri facias*, the *levari facias*, and *capias corpus*, has, from the earliest time, been issued upon special application founded on the necessity of the case, without any previous summons or notice, and directed at once against the goods and chattels, lands, and tenements, and body of the crown debtor, to levy all such debts as by being charged upon the revenue rolls in that office were become in the nature of recorded debts or duties.

*197] The more ordinary and usual course of proceeding was to transmit them to the pipe office, and enter them upon the roll annexed to the summons of the pipe, to be levied by that process; and if returned nihil by the sheriff, to introduce them into a schedule as described by Lord Chief Baron Gilbert, and send them into the office of the lord treasurer's remembrancer, to be levied by the general prerogative process, or long writ, which issued periodically at two stated seasons of the year for the recovery of all such debts.

I will not abuse your Lordships' patient attention by stating the reasons which have led me to conclude the Lord Chief Baron Gilbert may have confounded the long writ issued from the office of the king's remembrancer under the authority of the statute 33 H. 8, with the long writ which it has been immemorially the course of the Court of Exchequer to issue from the office of the lord treasurer's remembrancer. It may be sufficient for the purpose of the present inquiry to take it upon the authority of so eminent a Judge, who presided at the head of the Court of Exchequer, that long anterior to the statute of H. 8, such debts of the crown as were entered on the great roll in the treasurer's remembrancer's office might be levied by a process having the force and virtue of an immediate extent.^(a) I would, therefore, conclude my observations upon this first branch of the inquiry with a passage from Lord Chief Baron Gilbert's *Treatise on the Court of Exchequer*, p. 90. "An extent of a later *teste* supersedes an execution of the goods by a former writ; because by the king's prerogative at common law if there had been an execution at the subject's suit, and afterwards an extent, *the execution was superseded un-
*198] til the extent was executed, because the public ought to be preferred to private property."

I proceed to the second branch of the inquiry, how far the statute 33 H. 8, c. 39, restricts or controls this prerogative. In considering the legal operation and effect of such of its clauses as have relation to this question, we should remember that it was passed at a period of time when that monarch was in the plenitude of his power, when the revenues of the crown had been recently greatly augmented by the surrender and dissolution of the abbeys and monasteries, and by the daily increasing commerce and prosperity of the kingdom; nor can we forget that the history of that reign records more frequent examples of sacrifices extorted from his subjects than of any voluntary surrenders of his acknowledged prerogatives to them.

Upon the first forty-nine sections of this statute relating to the erection of

(a) Much curious learning upon this subject may be found in Mr. Price's valuable and elaborate treatise upon that branch of the Court of Exchequer which relates to the office of Lord Treasurer's Remembrancer.

the court of surveyors of the king's lands, its officers, and their authority (all which have long since ceased to exist), it becomes unnecessary to make any observations.

The object of the legislature in the six consecutive enactments, from section 50 to 56 inclusive, was the more speedy recovery of debts due to the crown upon obligations and specialties which not being (before that act) enrolled of record were not amenable to the strong prerogative process of extent. The statute, therefore, gave them the force and effect of obligations acknowledged according to the statute staple at Westminster. It gave also to the king his costs as to a common person. It gave to each of the several courts, as well to those recently erected as to those already existing and mentioned in the fifty-fifth section, the same coextensive power and authority to commence and prosecute suits for debts and duties grown due to the crown in respect of obligations remaining in each of those several courts *and offices, and to hear and determine them, and to award execution upon the body, lands, and goods of the parties condemned therein. But it appears to me a fallacy to suppose that, because in directing in what offices and courts (some of those courts being then recently erected) the suits shall be commenced, and what process may in their discretion be used (mentioning, *inter alia*, the *capias*, *extendi facias*, &c.), that therefore the power of issuing such process was given for the first time to the Court of Exchequer. As applied to obligations and specialties, which before that statute were matters in *pais* not yet ripened into matters of record, I admit they were not liable to the immediate extent until rendered mature for that process by becoming enrolled of record.

The sections to which I have referred, from fifty to fifty-six, appear to me exclusively applicable to the debts and duties accruing in respect of the obligations and specialties mentioned in those sections.

Section 57 enlarges the jurisdiction of the several courts therein enumerated; extends their authority to a variety of other subjects having no relation to the present inquiry; and after introducing various regulations respecting the offices of receiver, auditor, accomptant, &c. (imposing penalties upon them for the breach of their respective duties), the statute proceeds to enact the seventy-third and seventy-fourth sections, the last of which gives occasion to the present question.

The 73d section directs, that in all actions and suits for the recovery of any debts which shall accrue to the king by reason of any attainder, outlawry, forfeiture, or gift of the party, or by any other collateral way or means, it shall be sufficient to declare generally, without showing the circumstances at large according to the due order of the common law. Then follows immediately the much controverted 74th section, in the *following words:—"If any suit be commenced or taken, or any process be hereafter awarded for the king for the recovery of any of the king's debts, then the same suit and process shall be preferred before the suit of any person or persons; and our sovereign lord, his heirs and successors, shall have first execution against any defendant or defendants of and for his said debt before any other person or persons; so always that the king's said suit be taken and commenced, or process awarded for the said debts at the suit of our said lord the king, his heirs and successors, before judgment given for the said person or persons."

The first branch of this clause, introducing this proviso, contains a plain declaration of the king's prerogative right under the common law, by which he was at all times entitled to have his suit preferred, and to have first execution.

The proviso was undoubtedly intended to engraft some qualification or restriction upon that right, or at least to confer a privilege upon the subject; and the question arises as to the extent of that restriction or privilege. By stat. 25 Edw. 3, c. 19, the subject (notwithstanding the king's ancient prerogative of granting writs of protection), was empowered to implead his debtor, and to proceed to judgment with a stay of execution until the king's debt was

satisfied; and it seems to me that this further privilege was granted by the 74th section; viz., that he should no longer be restrained from proceeding to issue an execution in those cases to which that section applied, viz., in which the crown had neither commenced any suit nor awarded any process before his judgment was obtained. The legislature did not, I conceive, intend to interfere in any cases of conflicting or concurrent executions; but simply to remove the restraint continuing upon the subject at the time of the passing of the act *201] of the 25 Edw. 3, and *to permit him to sue out execution without being guilty of any violation of the law, which, before the statute 38 Hen. 8, he could not do. The section being silent as to which execution shall be first satisfied, imports only (according to my view of it) that the subject's execution may first issue, still leaving the prerogative right of the crown to issue an extent, unimpaired.

Supposing this to be the true construction of the statute, to what suit of the crown does this seventy-fourth section extend? Does the proviso or condition control and override all the preceding clauses in the act, or is it confined and limited in its operation to the subject-matter of the seventy-third section immediately preceding? This question is involved in some obscurity. The collocation of the sections would favour the latter and more limited construction; but the words in the seventy-fourth section are sufficiently general and comprehensive to embrace other debts than those designated in the seventy-third section as accruing to the king "by attainder, outlawry, forfeiture, or gift of the party, or by any other collateral way or means." At the same time, if the restriction be construed to apply to every species of crown debt, so as to include the obligations and specialties mentioned in the fiftieth section, it would involve the difficulty, nay absurdity, of supposing that an act of parliament, passed for the professed purpose of facilitating the speedy recovery of the king's debts, by giving them the force and effect of a statute staple, would, instead of expediting their payment, place the king in a more unfavourable position than any of his subjects. In every race between the subject and subject, the point of time to determine the priority of execution is not the moment in which judgment is obtained, but that in which the execution is delivered to the sheriff; whereas the construction contended for by those who im- *202] pugn the preferable title of *the crown, would give to the subject, in possession of a judgment, the power of postponing indefinitely the king's execution, unless there had been an inception of his suit, or an award of his process before such judgment was signed.

I interpret the words "debts" in this section (taking it with reference to all the previous provisions of the statute) to mean such debts as not being enrolled of record, are in *feri only*, *unascertained*, and *remaining to be recovered* through the medium of a suit to be commenced or "process to be awarded;" inasmuch as informations for penalties always conclude with a prayer that process may be awarded. This construction would also embrace such debts as are mentioned in the immediately preceding section; and unless the crown had in all such cases actually commenced the suit or awarded its process, the subject having obtained a judgment, might proceed to issue execution, and thereby, in obedience to the language of the proviso, prevent the king from having first execution, to which before that statute he was entitled. I do not, however, read the clause as prohibiting the crown from issuing an extent under the circumstances stated in this case.

I come next to consider the question, whether, after seizure by the sheriff under a *feri facias*, at the suit of a judgment creditor, the property in the goods taken becomes thereby altered so as to be no longer liable to the extent of the crown. The crown claims to be entitled to priority in the execution of its process, by virtue of its prerogative. The subject denies the existence of any such prerogative, asserting, that after the execution has once begun by an actual seizure made, the crown has no longer any right to intervene, the subject's execution from that time being entitled to the preference.

*Upon this question the crown, as *representing the public in respect of the revenue*, and an individual creditor, in right of his private claim, [203] are at issue. For the subject, the cases of *Uppom v. Sumner* and *Rorke v. Dayrell*, and for the crown, *The King v. Wells and Allnutt*, and *The King v. Sloper and Allen*, are relied upon as conclusive; and your Lordships are constrained to elect by which of these decisions you will abide, for no sophistry of argument can reconcile them.

After the elaborate comment upon these cases, and upon all the authorities applicable to this subject, and upon the principles to be deduced from them, which your Lordships have heard from those who have preceded me, I shall state shortly the reasons which have determined me to prefer the latter judgments delivered by the Court of Exchequer, as containing the sounder exposition of the law, and as resting upon the more solid foundation. Any judgment pronounced by the Court in which Lord Chief Justice De Grey presided, assisted by that great constitutional lawyer Sir William Blackstone, Mr. Justice Gould, and Mr. Justice Nares, presents, upon the first view, the strongest claim to the concurrence of any English lawyer; but I must confess, after weighing the reasons assigned, and the authorities upon which the judgment of the Court of Common Pleas in *Uppom v. Sumner* professes to be founded, I cannot yield my judicial assent to it. The whole argument upon the stat. 33 Hen. 8, as reported in 2 Sir W. Blackstone's Reports, is comprised in this single observation, viz., that the former part of the seventy-fourth clause is declaratory of the old prerogative law, and the latter a new restriction, so that it shall not take place after judgment given for the subject. The authorities on which this judgment proceeded are still more unsatisfactory. The case of *Lechmere v. Thoroughgood*, as reported in *Comberbach*, 123, and 3 Mod. 236, is relied *on as the prominent ground of the decision; which, together [204] with *Attorney-General v. Andrew*, Hardr. 23, and the passage extracted from Lord Chief Baron Comyn's Digest, vol. ii. 238, viz., "if execution be upon a judgment against the king's debtor, and before venditioni exponas an extent comes at the king's suit, those goods cannot be taken on the extent," are referred to as comprehending the pith and marrow of the law embodied in this solemn judgment. As to the *Attorney-General v. Andrew*, Lord Chief Baron Steel's judgment appears to have proceeded on the ground that the execution, which was an *elegit*, was *perfect and consummated* before the extent issued: Hard. 27. He says, "The subject's title is prior to the king's, and is *executed*." And he adds, "*Stringefellow's case*, in *Dyer*, is unanswerable." And as to the passage in Lord Chief Baron's Comyn's Digest, vol. ii. 358, I do not understand him as throwing the preponderating weight of his own great name into the scale to guarantee the credit of any decision where he cites cases to support it.

Upon the authority, therefore, of this single case of *Lechmere v. Thoroughgood*, admitted by Mr. Justice Gould to be a little obscure, from being reported only piecemeal and in different books, is built the disputable, or, I would rather say, the *untenable* proposition, that after execution *begun*, but not completed, the king's extent comes too late.

I have examined with care the several reports of this case in *Comb.* 123, 3 *Mod.* 236, 1 *Show.* 12, and 2 *Vent.* 160, from which it will appear, that the action was trespass by the assignees of a bankrupt against the sheriffs of London and others for seizing goods under a *fieri facias* against the bankrupt after an act of bankruptcy committed by him.

*The act of bankruptcy was committed on the 18th of April; the seizure was on the 29th. After the seizure, an extent issued at the suit [205] of the crown. The case was twice before the Court—once in Trinity term, 4 Jac. 2, of which 3 Mod. gives the account; and again 1 W. & M., to which *Comberbach* and *Show* refer. "The Court were of opinion a construction should not be made to make the officer a trespasser by relation, for the taking was lawful at the time."

The question, therefore, as to the right of the crown to have the extent preferred to the execution, was not the point depending in judgment; and supposing Lord Holt to have said what Comberbach imputes to him, viz., that the extent came too late after the *feri facias* delivered to the sheriff, it could be regarded only as an obiter and extrajudicial dictum.

When the same question arose in *Rorke v. Dayrell* as in *Uppom v. Sumner*, Lord Kenyon, after expressing his perfect satisfaction with that decision, relied upon this proposition as the basis of his judgment, viz., that as long as the property of the debtor remained *unaltered*, and an execution at the suit of the subject, and an extent at the king's suit, issue against the debtor, the title of the crown must prevail; for the point to be considered is, in whom is the property? He then proceeds to state, that as the property of the debtor's goods is bound by the delivery of the writ to the sheriff, there then remains no property in the debtor on which the prerogative of the crown can attach.

With great deference to the judgment of so profound a lawyer, I venture to question the soundness of this opinion, preferring the doctrine of Lord Hardwicke in *Lowthal v. Tonkins*, 2 Eq. Cas. Abr. 381, who says, "That neither before the statute of frauds nor since, is the property in the goods *altered*, *206] *but continues in the defendant until the execution executed. The meaning of these words, the goods shall be bound by the delivery of the writ to the sheriff, is, that after the writ is so delivered, if the defendant makes an assignment of his goods, unless in market overt, the sheriff may take them in execution." The same opinion was expressed by Lord Holt in *Smallcomb v. Cross and Another*, 1 Ld. Raym. 251, who says, "If writ of execution be delivered to the sheriff against A., and A. becomes a bankrupt before it be *executed*, the execution is superseded; and, consequently, the property in the goods is not *absolutely* bound by the delivery of the writ to the sheriff. But the teste of the writ binds against all sales and acts of the party himself." The same point was decided in *Philips v. Thompson*, 3 Lev. 191. Lord Kenyon, in the judgment I am commenting upon, says, "The point to be considered is, in whom is the property?" I would try it by that test. If the property be not in the debtor after the seizure and before the sale, I would ask, in whom is it? The debtor may, at any moment before the sale, pay the debt and demand the goods, nor is any bill of sale necessary to retransfer the property in order to confirm his title. Suppose the goods, whilst remaining in the custody of the sheriff, to be consumed by lightning or destroyed by fire, or by an armed tumultuary force, would the execution be satisfied or the debt discharged? Surely not. The judgment of the Court of King's Bench, in *Thurston v. Mills*, 16 East, 254, furnishes a direct authority upon this point. Goods were taken in execution by the sheriff under a *feri facias*, and whilst remaining unsold, an extent at the suit of the crown of a subsequent teste issued, under which the sheriff took them subject to the former seizure, and afterwards sold *207] them under a venditioni exponas from the Court of Exchequer. *Money had and received was brought by the plaintiff in the original action against the sheriff for the proceeds of the sale. Lord Ellenborough, in delivering his judgment, observes, "Neither the money nor the goods were originally, or at the time of the action brought, the property of the plaintiff. The sheriff had, indeed, seized them under a *feri facias*, but the plaintiff acquired no property in them by the sheriff's seizure. If they had been burnt in the hands of the sheriff, the plaintiff would not have borne the loss."

Lord Kenyon concludes his judgment in *Rorke v. Dayrell* with these words: "With respect to what is supposed to have been said by Lord Mansfield, in *Cooper v. Chitty*, 1 Burr. 36, of Comberbach having mistaken Lord Holt's opinion in *Lechmere v. Thorougheed*, it is as probable that the report of that observation is misstated."

If Lord Kenyon, before he delivered his judgment in *Rorke v. Dayrell*, had fortunately referred to his own note of *Cooper v. Chitty*, which has since been

published by Mr. Hanmer from his Lordship's original manuscript, instead of impeaching, he must have borne testimony to the accuracy of Sir James Burrow's report of Lord Mansfield's judgment in that particular. The notes of Lord Kenyon and of Sir James Burrow on this point are in such perfect harmony, that the one may be considered a fac simile of the other, and I will transcribe them. Lord Mansfield is reported by Sir James Burrow to have said, "That Comberbach, in giving the judgment of the Court, which is the only sensible part of his whole report (for it is plain to me, that he did not understand the former argument on the former day, which is the first part of his report of the case), agrees with Shower, and says, that 'the Court were of opinion, that a construction should not be made, to make the officer a **trespasser by relation*: for the taking was lawful at the time.' But he must be mis-^[*208] taken in the first part of his report; for Lord Chief Justice Holt could never say 'that the property of the goods is vested by the delivery of the fieri facias, and the extent for the king afterwards comes too late.' No inception of an execution can bar the crown." The following passage is extracted from Lord Kenyon's report of *Cooper v. Chitty*, as published by Mr. Hanmer, page 422: "This case of *Lechmere v. Thoroughgood* is reported in two other books: in Comb. 123, the latter part of the case is agreeable to that of Shower, that a construction should not be made, to make the officer a trespasser by relation. As to the other part of the report, it is manifest to me, that he did not understand what they were arguing about; for he makes Lord Holt say, what he could never say, about barring the extent of the crown. In 3 Mod., it is as plain that the reporter misunderstood what passed; for he says the extent came too late, and that the property was bound by the fi. fa., though the contrary is very clear."

The inference I draw from all the authorities upon the subject, whether the question be considered with regard to executions on statute staple, or to executions at common law, by fieri facias or elegit, is this, viz.: That the extent of the crown must be preferred, if the execution be not perfectly executed by the delivery of the land to the creditor, or by the sale of the goods. That the inception of the execution by the bare seizure of the goods will not bar the crown. That the execution must be no longer in progress, but completed, and that, until the actual sale, the property is not altered or divested from the original owner.

Mr. Baron Wood, in the elaborate judgment delivered by him in the Court below, and reported in 8 Price, 314, seems, throughout his most able argument, to admit, that in order to exclude the process of the crown, the **execution* of the subject must be *executed*; but he insists, that the act of^[*209] seizure by the sheriff is for that purpose a full and final execution: but neither the cases he cites, nor his reasoning to illustrate that position, have succeeded in making me a convert to his opinion. Curson's case, 3 Leon. 239, 4 Ib. 10, cited by that learned Judge, to show that the prerogative of preference is determined when the subject's final execution has begun, proves on the contrary, as it appears to my mind, that it is not determined until the subject's execution was perfect and consummated by the delivery of the land to the creditor under the liberate.

The only point remaining to be considered, viz., whether the sheriff acquired by the seizure, such a special property in the goods as to defeat the process of the crown, has been so fully discussed by my learned Brothers who have preceded me, and to whose judgment I beg leave to refer (more especially to my Brother Alderson's), as illustrating my view and incorporating my opinion upon that subject, that I willingly spare your Lordships the fatigue of attending to my examination of it in detail.

That the sheriff is invested with power as the ministerial officer of the law, to protect the property, whilst remaining in his custody, for the benefit of those who may be entitled to it, cannot be disputed. Against a wrong-doer he may

maintain trover or trespass. But from thence I apprehend no inference can be drawn unfavourable to the rights of the crown. He may still be called upon to execute His Majesty's process of extent, subject to any legitimate claim of property in third persons previously existing, and capable of being established.

My brother Alderson has accurately defined the state and condition of such property as being in *custodiâ legis*. I will, therefore, dismiss this last head of inquiry *with an observation of Lord Hobart's, extracted from his *210] judgment in *Sheffield v. Radcliffe*, Hob. 389, when commenting upon Stringefellow's case, 1 Dyer, 67, so often referred to. The passage is in these words: "Stringefellow sued an extent upon statute staple against Brownesoppe. The sheriff of Bedfordshire extended the land and appraised the goods, and seized them into the king's hands; but before liberate, an Exchequer writ for a debt of 100*l.* of the king's, to be levied upon Brownesoppe, came to the sheriff, who returned on the writ this special matter into the Exchequer, and he made the same return into the Chancery upon the liberate, and that there were no other goods. *Yet he was enforced, notwithstanding the custody of the law, to serve the king.*"

For these reasons, I am of opinion that the king's extent is entitled of right to be preferred to the subject's execution, and that there is no solid distinction to be made between an extent in chief and an extent in aid.

I fear that I have rendered myself obnoxious to the imputation of trespassing too largely upon your Lordships' valuable time. My apology for doing so may be found in the importance and difficulty of the subject, which has for so many years been considered in Westminster Hall as *vexata questio*, distracting and dividing the opinions of the most enlightened Judges. If the judgment which I have humbly submitted to your Lordships be deemed erroneous, I shall at least have the consolation of reflecting that I am under the shade of great authority: "*Magno se iudice quisque tuetur.*"

GASKLEE, J. My Lords, I have the misfortune to differ in opinion with those of my brothers who have preceded me, and, I understand, from a great *211] majority of those who are to succeed me in addressing your *Lordships upon this occasion; and when I consider that the two noble and learned Chief Justices to whom this case was referred, upon a writ of error brought to review a judgment which was given in the Court of Exchequer in favour of the defendant in error, reported to the Lord Chancellor, that the question was one which has agitated the Courts of Westminster Hall for a great many years; that there had been a difference of opinion in the Courts of Westminster Hall, the Court of King's Bench in one case, and the Court of Common Pleas, having decided that the extent was not entitled to priority over the execution at the suit of the subject; that the Court of Exchequer has uniformly decided the other way, *viz.*, that the extent was entitled to priority; and that their Lordships having heard the case argued, and considered it very maturely, had not been able to come to a decision upon the subject, and to agree upon what advice they should give to the Lord Chancellor; I am a little surprised that so considerable a majority of the Judges should have formed an opinion adverse to that which is the result of the best consideration I have been able to give to the subject.

The first question propounded by your Lordships for the opinion of the Judges branches out into two: *viz.*, first, whether the property is altered by the seizure of the sheriff under the writ of *fiat facias*; and, secondly, whether the statute 33 Hen. 8, c. 89, s. 74, abridges the prerogative process of the crown, and prevents it from taking effect unless it be issued antecedently to the subject's execution, or, in the words of the statute, unless the king's suit be taken and commenced, or process awarded for the debt at the suit of the king, his heirs, or successors, before judgment given for the other person or persons. In considering the first of these questions, I would call to your Lordships' attention *212] that the question in this case is not, as in many of the *cases in which the decision has been given by the Court of Exchequer in favour of the

crown, whether the claimant has such a property in the goods as to enable him, according to the technical practice of the court, to come in and claim the property, under the usual rule, upon the return of the writ and inquisition into the court; in which case no one can be allowed to traverse the king's title without showing title in himself; but here the question is, generally, whether the writ shall be executed by the sheriff by extending the same goods into the king's hands, and selling them to satisfy the crown debt, without regard to the *fi. fa.* under which he had first seized them. It is admitted, and, indeed, after the decision in *Swain v. Morland*, 1 B. & B. 370; 3 B. Moore, 740, it is too late to deny, that after an execution is once executed at the suit of a subject, an extent comes to the sheriff on the part of the crown to be executed on the same property, comes too late. One question, therefore, on this part of the case is, at what time may an execution be said to be executed? Now, my Lords, there are many authorities which lay it down, that, by the seizure (the sale being but the formal part of the execution), the property vests in the sheriff. The first authority I shall trouble your Lordships with on this point is the opinion of Lord Holt, in the case of *Lechmere v. Thoroughgood*, reported in several books, and, amongst others, in *Comberbach* 123, in which Lord Holt is stated to have said,—“The property of the goods is vested by the delivery of the *fi. fa.*, and the extent afterwards for the king comes too late, and that, on the statute of frauds and perjuries.” It is true the case does not appear to have been decided upon that ground, but because the taking, being lawful at the time, the officer could not be made a trespasser by relation; and that Lord Mansfield, in **Cooper v. Chitty*, 1 Burr. 36, says that the reporter must be mistaken [213 in the first part of his report. In 4 T. R. 411, Lord Kenyon is stated to have said, with respect to what is supposed to have been said by Lord Mansfield, in *Cooper v. Chitty*, of *Comberbach* having mistaken Lord Holt's opinion in *Lechmere v. Thoroughgood*, it is probable that the report of that observation is misstated. But in the *Banker's case*, 11 State Trials, 28, Lord Holt says, so soon as a *fi. fa.* is delivered to the sheriff, and upon it goods are levied, the property of the goods is altered, and the sheriff becomes a debtor to the plaintiff. The case of *Clerk v. Withers*, 6 Mod. 290, is also to the same effect. That case is as follows:—F. Dives, as administrator of J. Dives, recovered 303*l.* against Clerk, upon a bond to his intestate, upon judgment by default in the Common Pleas, and sued out a *fi. fa.*, tested of Trinity term, 1st Ann., returnable in Michaelmas term, directed to the sheriffs of London, which was delivered to the sheriff on the 1st of August in the same year, who, on the same 1st of August seized goods to the value. F. Dives, the administrator, died 9th September following. The sheriff returned the seizure to the value, *sed remanent, &c., pro defectu emptorum*. On the 29th of September the sheriff was removed and another put in. Defendant Clerk now sued out a *sci. fa.* against the then sheriff for restitution of his goods; and upon demurrer, judgment was given against the plaintiff in the Court of Common Pleas, and he then brought a writ of error. And now, the case having been twice solemnly argued at the bar, the court *seriatim* affirmed the judgment. Mr. Justice Gould says,—“The execution is executed in the life of the administrator, and the sale, *viz.*, the formal part of it, may be done by the same writ. The sheriff, by the levying the goods by a *fieri facias*, *as he seizes the goods, gets a property in them against all persons, and may have trespass against the true owner [214 if he gets them; and so he may have trover, as appears in *Wilbraham v. Snow*, 2 Saund. 47, where Chief Justice Kelynge held that he gains a general property: but all the rest say that it was only a special property, so as to sell, &c. This is not like the case put before of an extent; for in that case there must be a *liberate*, which is by award of the court.” Mr. Justice Powys says,—“This execution is so far completed that it is a vesting of the property in the sheriff. The selling is but a formal part of the execution; and by the seizure and writ he has authority to sell, and the *venditioni exponas* adds not to his authority,

but is to spur him on to sell." And Mr. Justice Powell says,—“Execution is an entire thing; and, therefore, where a sheriff levies goods, and while they remain in his hands for sale a new sheriff is chosen, he who begins the execution shall go on with it, and sell the goods, and not deliver them over to the new sheriff, who is the officer of the court. The reason is, that execution is one entire thing (Year-Book, 34 H. 6, pl. 36), and, therefore, where it begun, it shall end; and that is the reason that a *supersedeas*, after execution begun, shall not supersede it upon error, because it is an execution from the first levying of the goods, and not like the case of an *extendi facias*, because the extent is only a seizure into the king's hands, and there must be another award of the Court, viz., a liberate to deliver them over to the plaintiff.” By Holt, C. J., “It is true, after he has seized goods to the value of the debt, though he be out of office, yet he is bound to make sale of the goods, and to make a return; and when he has made a return of the seizure of the goods, and that they remain in his hands *for want of buyers, that is not a discharge of the command

*215] of the writ, but only an excuse that he has not the money; and he is compellable by law to bring it in; and though a *venditioni exponas* does lie, yet a *distringas* is the proper remedy: and there are two sorts of *distringas* *super vicecomitem* before mentioned (Year-Book, 34 H. 6, pl. 36), the one a *distringas* to the new sheriff, to distrain the old one to sell the goods and bring the money into court; the other, to distrain him to sell *et denarios inde provenientes* to deliver to the new sheriff to bring into court. Now, if a *distringas* lies for the new sheriff to compel the old sheriff to sell, that shows the old sheriff has an authority to sell by virtue of the former writ, and that which commands the new sheriff to distrain the old one to sell and bring in the money, is the most usual. (Rastall's Ent. 164; Thes. Brev. 90.) Now, then, since the sheriff is compellable to sell, having seized the goods, what should hinder, in this case, that he should not sell, notwithstanding the plaintiff's death? for the writ is as forcible and compellable upon them to levy and bring in the money, as if the plaintiff had levied. When he seizes the goods by virtue of the writ, the defendant is actually discharged, though they are not sold, for the plaintiff must depend upon his execution, and rely upon that; he has no farther remedy against the defendant, but altogether against the sheriff. This came in question upon an ejectment brought by an administrator *de bonis non*, and it was held that the extent was void, for the writ was abated, and no matter whether the plaintiff died before the return of seizure or after. But, in case there be no act of the court to be done, but an *elegit* sued out which commands the sheriff to deliver the lands extended to the party, if, there, the executor or administrator die after the inquisition and before the delivery, in that case the death of the plaintiff shall not avoid the execution; and that appears by

*216] *the case of *Harrison v. Bowden*, 1 Sid. 29, though not so very plain.” If he do not sell between the teste and return of the *distringas*, he shall forfeit issues; and after goods once seized, no writ of error or *supersedeas* shall stay the sale. In *Wilbraham v. Snow*, 2 Saund. 47, the point was, that the sheriff may maintain trespass or trover against any person who takes away goods which he has seized in execution: *Mildmay v. Smith*, 2 Saund. 343. And by seizure of the goods in execution, the sheriff has property in them, so that he may re seize them, and sell when he is out of office as before. In the case of a *fi. fa.* there is no further act to be done. Although the terms of the writ direct the sheriff to bring the money into court to render to the plaintiff, it is not necessary he should do so; he not only may pay it over himself to the plaintiff, but in the case of *Perkinson v. Gilford*, Cro. Car. 539, it is said an action of debt may be maintained against him or his executors, if he does not do so after he has sold the goods.

It is true, that authorities have been cited on the other side; and, amongst others, *The King v. Peck*, Bunb. 8. In that case a *fi. fa.* issued out of the Court of Common Pleas at the suit of *Roberts* against *Peck*, which was tested

3d of April, by virtue of which the sheriff levied the goods, &c.; but before the sale thereof, or the return of the writ, an extent came to the sheriff at the suit of the crown to levy the goods, &c., of Peck, tested the 2d of May. The sheriff returned this special matter on the *fi. fa.*, and likewise upon the extent into the Court of Exchequer; on which it was said, that Peck had possession of the goods the 30th of April: upon which Mr. A. moved to quash the inquisition, and Mr. F. moved that the sheriff might amend his return. *Baron Price was for quashing the inquisition, which being found by a jury, he did not see how the sheriff could amend it. The Lord Chief Baron Bury and Baron Montague were of opinion the sheriff might amend his return, and an order was made for that purpose, which was what the sheriff wanted to indemnify him in case anything had been moved against him in the Common Pleas on the return of the *fi. fa.* There is a note to that case in these terms:—N. B. It was taken for granted, that though the goods were levied by virtue of the *fi. fa.* three days before the teste of the extent, yet that was no bar to the crown. But query, if they had been sold, for then execution had been executed. Stringefellow's case has also been very much relied upon on this part of the case, as an authority on the part of the crown. That case is thus reported in Dyer, 67 b, *Stringefellow v. Brownesoppe*. One Stringefellow sued a writ of *extendi facias* out of Chancery, to have execution of a statute staple against Brownesoppe, directed to the sheriff of Berks, who made extent of the lands of Brownesoppe, and took his goods accordingly into the hands of the king, according to the writ, but did not make livery; and afterwards a writ of the king's prerogative issued out of the Exchequer, reciting the prerogative which the king ought to have to be first served and paid by his debtors, and commanded the sheriff to levy the debt to the king which Brownesoppe owed him, 100*l.*, of the goods of the debtor, and if he had not sufficient, then to extend the land. And this writ was delivered to the sheriff after the day of the return of the first writ; but the first writ was not returned at the day: and the sheriff returned this special matter upon the writ of the Exchequer, and that he had returned the writ into chancery, served as above, and averred in his return that the debtor had no goods or lands to be extended *besides the goods, chattels, lands, and tenements above extended; and it was holden in the Exchequer for law, that the sheriff should be amerced if he would not amend his return, viz., to return the extent into the Exchequer for the service of the king's debt. And Justices Hales and Bromley were of the same opinion, because the property of the goods and land were not in Stringefellow before they were delivered to him by the writ of liberate. The distinction, however, between that case and the case of a *fi. fa.* has not only been very fully pointed out in the opinions of some of the Judges in the case of *Clerk v. Withers*, above cited, but is also very pointedly observed upon by Mr. Baron Wood, in the case now in judgment, in 8 Price, 314. It is, that the extent is not the execution, and gives no authority to the sheriff to sell or deliver over to the party: it merely authorizes the sheriff to seize the property, but not to do anything with it until the liberate issues, which is, in fact, the execution. The *fi. fa.* commands the sheriff to make the money of the goods; and no further authority is requisite to empower the sheriff to sell, and to pay the money over to the plaintiff. This distinction is also shown in *Playne's case*, in Cro. Elis. 47. A lessee for years was obliged to pay his rent. In debt upon it, he pleaded that the lessor was bound in a statute, and upon that an *extendi facias* was awarded to seize the lands and tenements of the lessor into the queen's hands, which was executed accordingly; and upon that a liberate was awarded; and in the mean time, between the *extendi facias* returned and liberate awarded, the rent was incurred for which he was chargeable to the queen, and demands judgment. The opinion of the whole court was clear to the contrary. Before the liberate awarded, *nihil operatur*, for he remains always tenant to the lessor, and chargeable to *him for the rent; and the writ before, is but of form when it speaks of the seizing into

the queen's hands; for it was never seen that lands were seized upon that writ. So that here, upon an *extendi facias*, it is clearly held that nothing was divested out of the debtor until the liberate. In *Smallcombe v. Cross*, 1 *Ld. Raym.* 251, which has been cited on the part of the crown, there is the following note:—In this case Mr. Northly said, *arguendo*, that it is the common practice at this day, that if a *fi. fa.* be delivered, and the goods appraised and sold, and the writ is not returned, and an extent for the king comes out of the Exchequer, it will overreach the former sale. But, *per Curiam*, it is a very dangerous practice. It is, however, now admitted, that the sale would bar the crown; and I only mention this note to show how far the argument has, in earlier times, been carried in support of the alleged rights of the crown. A passage at the end of the case of the Attorney-General *v. Capel*, 2 *Show.* 481, was also cited on the other side; viz., “extents have been upon goods actually levied by virtue of a *fi. fa.* and in the sheriff's custody, the extent coming before a bill of sale made, so as the property was not altered.” This passage does not appear to be part of the judgment of the Court in the Attorney-General *v. Capel*, in which the question was, whether the extent was too late, coming after the commission of bankruptcy, but before the assignment. There is nothing in the case, wanting, or in any way calling for the inference; which, as Mr. Baron Wood says in his judgment, is a mere *gratis dictum* of the reporter of that case.

The result of a due consideration of the foregoing cases seems to me to be, that the property is altered, and the crown barred by the levy under the *fi. fa.* *220] It *is not necessary to go the length of showing that the sheriff has the general property in the goods. There are several cases which show that where the general property remains in the debtor, yet if another has any special property in or lien upon the goods, the crown shall not take the goods but subject to that lien. Thus, an equitable mortgage; which binds the crown, and against which the crown is entitled only upon satisfaction of the lien of the mortgagee to its full extent; *Casberd v. The Attorney-General*, 6 *Price*, 411: or the lien of a factor, who has accepted bills to the amount of the value of the goods consigned to him; *The King v. Lee*, 6 *Price*, 369: or of a wharfinger, on the goods of his customer in his possession, for his general balance, which has been decided to be available against the crown; *The King v. Humphrey*, 1 *McClell. & Young*, 178. Mr. West's *Treatise on Extents*, p. 98. He says the plaintiff in an execution may be said to have an interest in goods which have been taken under his execution, the goods being in the custody of the law, and the sheriff having the special property in them, the general property remaining in the defendant under the execution. But it is said that that rule cannot apply to the case in question, because at any time before sale, and after the seizure, the debtor may, by payment of the debt, suspend the sale and stay execution. The same answer would apply to the case of the factor, wharfinger, and other persons above named, in all which the debtor, upon payment of the debt, regains the property.

If the decision on this part of the case is in favour of the plaintiff in error, the remaining question will not arise; but if not, I am of opinion that the statute 33 *H. 8.* c. 39, s. 74, abridges the prerogative process of the crown, and *221] prevents it from taking effect in this case, the king's suit not *having been taken or commenced, or process awarded at his suit before judgment given for the plaintiff on the *fi. fa.* The following are the words of that section:—“And be it also enacted, by the authority aforesaid, that if any suit be commenced or taken, or any process be hereafter awarded for the king for the recovery of any of the king's debts, that then the same suit and process shall be preferred before the suit of any person or persons: and that our said sovereign lord the king, his heirs and successors, shall have first execution against any defendant or defendants of and for his said debts before any other person or persons, so always, that the king's suit be taken or commenced, or process awarded

for the said debt of our sovereign lord the king, his heirs or successors, before judgment given for the said other person or persons." Before proceeding to the further consideration of this part of the case, I should call your Lordships' attention to the fact, that, in the present case, so far from the king's suit being taken or commenced, or process awarded before the judgment was given for the other person, the debt was not due to the king, but to the debtor of the king's debtor, and was not put on the record until after the giving the judgment, the issuing of the *fi. fa.*, and the actual seizure of the goods under it. In the case of *The Attorney-General v. Andrew, Hardr. 23*, in 1663, it was determined by all the Court, that the statute did abridge the prerogative. The case was, Sir William Harrison acknowledged two judgments in debt to one Andrew upon bond, and was bound to one Fielder on a bond bearing date before the judgments. Fielder assigned his debt to the king: Andrew takes out execution upon his judgments, *vis. two elegits*: by one he has the moiety, by the other, the other moiety of Sir W. Harrison's lands extended. Then process issued out of the Exchequer *for the debt assigned to the king, and the principal question was, whether or no the king should be preferred in this [222] case. After argument, the Court, in Trinity term, 1656, gave judgment for defendant. Baron Parker said, "The king has many prerogatives *pro bono publico*, but in the case in question the statute 33 Hen. 8 abridges the prerogative, and controls the common law. Affirmative statutes do not alter the common law, but negative statutes do; and here is a negative implied. See Stringefellow's case in *Dyer*, 67 b; also *Lassel's case in Dyer*, 364." Baron Nicholas: "Before the statute 33 Hen. 8, the king was not bound, but the statute has made an alteration, though it sounds in the affirmative; for it enacts a new thing, and *ita quod* makes a condition precedent, and a limitation." He then refers to certain authorities as showing how such statutes are to be expounded, and that the clause would else be idle. Chief Baron Steel: "The subject's title is prior to the king's, and is executed: the words of the statute of 33 Hen. 8 are introductive. Cecil's case, 7 Rep. 18 b, and Stringefellow's case, are unanswerable." It is observable that although so much stress is laid upon Stringefellow's case on the part of the crown on this occasion, Chief Baron Steel and Baron Parker, in the above case of *The Attorney-General v. Andrew*, cite it as being conclusive in favour of the subject. The case of *Uppom v. Sumner*, 2 Blacks. 1251, 1294, is precisely the same as the present. Uppom, the plaintiff, in Easter term, 17 G. 3, recovered a judgment against Cann in the King's Bench, in debt for 1020*l.*, and on the 16th of April, 1777, sued out a *fi. fa.*, returnable on Monday next after the morrow of the Ascension, 12th of May; a warrant on which was, on the 18th of April, delivered to the officer, who on the same day took the goods, and kept possession of the same by virtue of *the warrant. On the 24th of April, before any sale of the [223] goods, an extent was sued out and delivered to the sheriff against the goods of Cann, to levy 62*l.* 4*s.* 9*d.*, a debt to the king; and a warrant was on the Monday delivered to the same officer, who then had the goods in his possession under the former warrant, and who, two days after, had the goods appraised, and on the 30th of April took an inquisition on the extent. The plaintiff Uppom's attorney attending and putting in his claim, the goods were sold the 23d of May, and the sheriff being called upon by Uppom to return the writ, returned *nulla bona*. When the cause was first called on, the plaintiff's counsel thought they could not support their case, and accordingly judgment was given without argument. It was, however, afterwards argued, and after time to consider, Mr. Justice Gould delivered the unanimous opinion of Chief Justice De Grey, who was present at the argument, himself, and Justices Blackstone and Nares, that in this case the extent did not take place of the execution, the king's suit being commenced after the judgment. It had been contended in argument by Mr. Serjt. Grose, who afterwards was one of the Judges, and agreed with the rest of the Court in the judgment in *Rorke v. Dayrell*, that

the statute Hen. 8 only restricts the prerogative in the particular revenue courts erected by and mentioned in that act. But in giving judgment, Mr. Justice Gould, after stating the particular parts of the act, says, about seven sections only, viz. sections 50, 74, 75, 76, 77, 78, and 80, contain general provisions extending to all the king's subjects, and are applicable to all the king's courts as well as to the courts of revenue, where the subject of them falls under consideration. Indeed, he says it would have been absurd to have one law

*224] prevail in the King's Bench and Common Pleas, and another in the *Exchequer and Duchy, with regard to such questions as the present, the priority of the king's debts before those due to a subject. The learned Judge, after stating the seventy-fourth section of the act, says, "The former part of this clause is declaratory of the old prerogative law, the latter is a new restriction of it, so that it shall not take place after judgment given for the subject." With respect to the case of *Lechmere v. Thoroughgood*, upon which so much has been said, he says, "In *Lechmere v. Thoroughgood*, it appears by *Comberbach*, 123, and 3 *Modern*, 236, that first Herbert and then Holt were clearly of opinion, that after execution begun, but not completed (and of course after judgment signed), the king's extent came too late." This case is a little obscure, from its being reported only piecemeal, and in different books: but with some attention it will be found to be clear and consistent, by reading the several parts of it in order of time as they occur, viz. the pleadings, 2 *James* 2, 2 *Ventris*, 159; first argument, 4 *James* 2, 3 *Mod.* 236; second argument and judgment, 1 *William and Mary*, *Comberbach*, 123, 1 *Show*, 12: and a subsequent action, between the same parties in effect, in the Common Pleas, viz. *Lechmere v. Toplady*, 2 *Vent.* 169. In the *Attorney-General v. Andrew, Hardr.* 23, it was held by the Court of Exchequer, that when there was a judgment and an execution by *elegit*, a debt of the king prior to the judgment, but the process thereon sued out after it, should be postponed to the judgment. And from these authorities Lord Chief Baron Comyns in his *Digest* collects this doctrine, that if execution be upon a judgment against the debtor, and before *renditioni exponas*, an extent comes at the king's suit (which is the very case

*225] at bar), those goods cannot be taken on the extent. *And this opinion is also supported by *The King v. Dickinson*, 1692; *Parker*, 262. The case of *The King v. Dickinson* was this; A. was indebted by judgment to B., by bond to C. and D., and by simple contract to E., and died. E. being a debtor to the king, caused the debt due to him to be seized into the king's hands, and upon this a *scire facias* issued against Dickinson, executor of A., and before the return of it, C. and D., the bond creditors, obtained judgment, and then Dickinson pleaded to the *scire facias* the prior and the subsequent judgment. The Attorney-General demurred. The points argued in Hilary term, 1691, were, first, whether the subsequent judgment should be preferred to the king's debt; for it was admitted that the preceding judgment should be preferred. The second is unnecessary to state. This case was adjourned to this term (Easter, 4 W. & M. 1692), when it was adjudged for the king, that his debt should be preferred before the subsequent judgment, viz. before any bond: *Hardres*, 23; but a precedent judgment should be preferred before it, upon the words of the twenty-sixth section of 38 H. 8, c. 39. "So always that the king's suit be taken and commenced, or process awarded for the debt of the king before judgment given for the other persons."

In *Rorke v. Dayrell*, 4 T. R. 402, the plaintiff had obtained a judgment, in Hilary term, 1787, against Clark for 727*l.* Plaintiff sued out a *fi. fa.* tested 28th of November, 1787, returnable 12th of January, 1788. Writ delivered to the sheriff 7th of January, 1788, who, on the 8th, seized the goods. Before the sale, viz.: 11th of January, 1788, a writ of extent tested that day issued out of the Exchequer on a bond to the crown under the seal of Clark, dated 5th of April, 1782, for 800*l.* payable at a day before the issuing of the

*226] *fi. fa.*, and then unpaid. On *the 12th of January, extent delivered to the sheriff. The sheriff acted under the extent, and returned *nulla bona*

to the writ of *fi. fa.* The case was argued upon the statute of 33 H. 8, c. 39, s. 74. The Court were unanimously of opinion the extent was too late. Lord Kenyon states, "Where the king and a subject stand in equal degree, there is no doubt but that the king's prerogative must prevail; and, therefore, where the property in the goods remains in the king's debtor at the time, and an execution at the suit of the king, and another at the instance of the subject, are sued out, the former will be preferred. On this principle, the case of *The King v. Cotton, Parker*, 112, proceeded; that was not the case of an execution, but a distress; the goods taken were in *custodiâ legis* as a pledge, to answer the demand of the landlord, and the property in the goods was not divested out of the tenant. Now, in this case, the sheriff had actually seized the goods under the plaintiff's writ of execution; and an execution once begun shall proceed; it shall not stop on the issuing of a commission of bankrupt against the debtor: and in this respect I know no distinction between the case of the crown and that of a subject. As to the statute 33 H. 8, c. 39, s. 74, either it did or it did not give some new privilege to the crown. If the counsel for the crown contend that it did, they must take the word *execution* as referring to personal chattels, and then the words are against the king, because here there was a judgment by the plaintiff. If it did not introduce some new benefit, then the crown must be referred to its ancient prerogative, which only extends to the case I stated at first, namely, when the king and a subject stand in equal degree, and the property is not altered, there the former shall prevail. With respect to what is supposed to have been said by *Lord Mansfield in *Cooper v. Chitty*, [*227 of *Comberbach* having mistaken Lord Holt's opinion in *Lechmere v. Thoroughgood*, it is as probable that the report of that observation is misstated." Justice Ashhurst says, "The case of *Uppom v. Summer* certainly underwent a great deal of consideration before it was decided; all the prior authorities were thoroughly examined at that time. Unless, therefore, it could be shown that the case proceeded upon wrong principles, it ought to govern the present. The words of the statute of Henry VIII. are clear and decisive, that the king's suit shall be preferred to that of any other person, 'so always, that the king's suit be taken or commenced, or process awarded before judgment given for the said other person or persons.' Now, this act of parliament gave a new prerogative to the king, in various instances, which he had not before; by that he is enabled to issue immediate execution in cases where he could not before; for before he had only a right to such execution when the debt was upon record. And as this was a new prerogative, the legislature had a right to restrain him; and they have in express terms restrained him, where the subject's judgment is prior to the inception of the king's execution." Mr. Justice Buller says, "This case arises on the statute of 33 Hen. 8; for previous to that act the crown could not issue immediate execution on a bond debt. Though the cases that have already happened on this statute show that the act is not to be confined to bond debts only, but that it extends to all debts and executions: it is so stated in express terms by Lord Coke in *Sir T. Cecil's case*, 7 Rep. 18 b. If this act of parliament be restrictive on the crown, it goes a great way to determine this question; for if it be, it expressly requires that the king's suit shall be commenced before judgment is given for *the subject. [*228 Now, that was expressly decided in the case in *Hardres*, where the whole Court were of opinion that the statute does abridge the king's prerogative. And there Chief Baron Steel said, 'The subject's title is prior to the king's, and is executed.' On this ground I put the question to the counsel in argument, 'What effect a judgment obtained by a subject would have, where he lay by till the king's extent was executed?' I am inclined to think that in such a case the execution by the subject would be postponed; but it is not necessary to decide that point in the present case. As to the effect of the statute of 33 H. 8, c. 39, it is impossible to have a more direct authority for the restriction on the king's prerogative than that in 7 Rep. 19 b, where it is said, 'The act

hath given a benefit and advantage to the king; first, in making every bond made to the king in nature of a statute staple; secondly, in giving remedy to the king himself for obligations made to others to his use; thirdly, to recover costs and damages; fourthly, in suing of execution for all his debts; fifthly, in charging the issue in tail, and the heir, who hath the land of the gift of his ancestor: and, therefore, it was the intent of the act to gratify the subject, that where a new provision was made for the levying of the king's debt in a more speedy and beneficial manner than the king had before, the subject also should have some new benefit which he had not before.' Now, that new benefit was to give him a preference in cases where his judgment was obtained before the extent of the king issued." Mr. Justice Grose says, "The simple question is this, whether the king's right of issuing an extent upon a bond supersedes a prior judgment of a subject. If the crown have such a right, it must arise upon the statute of 33 Hen. 8, c. 39, s. 74: *Gilb. Hist. Exch.* 165. Now, the words of this clause in the act are extremely pointed to show, first, what the king's

*229] prerogative was before; secondly, how far the prerogative was intended to be assisted in these cases, and how far to be limited. But it is said that 'execution' in this act was intended only to affect lands. But there is no reason why it should be so confined: it must mean every kind of execution to which the king was entitled before the passing of this act, otherwise the king would be bound in cases where he had a prerogative before. Thus, this case stands on the words of this statute. The authorities also are decisive. First, the case in *Hardres* is very pointed: and there it was not even hinted that execution in this act ought to be confined to an execution against land. Then came the case of *The King v. Dickinson*. And Lord Chief Baron Comyns, 2 Com. Dig. 538, 648 (G. 8), drew this conclusion from the cases, that, 'if execution be upon a judgment against the king's debtor, and before a *venditioni exponas*, an extent comes at the king's suit, those goods cannot be taken upon the extent.' Therefore, as well on the decisions, as on the construction of the statute 33 H. 8, the plaintiff is entitled to recover."

After the decision of these two cases of *Uppom v. Sumner*, and *Rorke v. Dayrell*, came the case of the *King v. Wells and Allnutt* in the Court of Exchequer, which, as to the point in which the Court delivers their judgment, for there was another upon which the case might have been put, was precisely similar to the present. The Court of Exchequer gave judgment for the crown. And such has been the practice of that Court ever since. That case, however, was principally founded upon the case of *The King v. Cotton*. The principle on which that case was decided being stated in the judgment of the Lord Chief Baron in *The King v. Wells and Allnutt* to be, that if the

*230] king's execution bore teste before the property was altered, it *bound that property. The case, however, of *The King v. Cotton* arose upon a distress, and not upon an execution, which, I apprehend,—and it is so stated by Lord Kenyon in his judgment of *Rorke v. Dayrell*,—makes a material difference; the sheriff in the case of seizure under an execution having, in my judgment at least, a special property in the goods. In the case of *The King v. Wells and Allnutt*, the Lord Chief Baron relied much on *Stringefellow's* case, the difference between which and the present case I have already pointed out, viz. that in that case the liberate is the execution, and was not issued until after the issuing of the crown process. The question was afterwards brought before the Court of King's Bench in *Thurston v. Mills*, 16 East, 274, and twice argued, and the Court were prepared to give their judgment, but on the day on which it was to have been given, they suggested a doubt as to the form of the action, and directed a third argument upon that point only; upon which they gave their judgment against the plaintiff. What the judgment was which the Court was prepared to give upon the general question, it is impossible to say. It is not probable that it was in favour of the defendant, or at least, unanimously so, for if so, they would probably have put the question at rest for ever. It is not

likely the Court would have raised another question, and have given their judgment upon the question so newly raised. With respect to the observation which has been made, that if the statute were to be construed literally the crown would be in a worse situation than the subject, if the king's suit must be commenced before judgment given for the subject, for then, if the subject's judgment be first, he would have precedence though his execution were last, which is not the case even between subject *and subject; I apprehend the true answer to that observation is what was suggested by Mr. Justice Buller in [*231 his judgment on *Rorke v. Dayrell*. He thought it unnecessary to decide on that particular case, viz., that in case of a laches or delay on the part of the subject, his execution would be postponed. I believe, by looking to the writ of extent itself, it will appear, by the terms of it, that it is issued by virtue of this statute. Without trespassing farther, therefore, upon your Lordships' time, my humble answer to your Lordships' questions are, first, that this writ of extent shall not be executed by the sheriff by extending the same goods, seizing them into the king's hands, and selling them to satisfy the crown debt, without regard to the writ of fieri facias under which he had at first seized them; and, secondly, that all other things remaining the same, it makes no difference whether the extent was in chief or in aid.

LITLEDALE, J. The question is, whether, under the particular circumstances of this case, the execution of the crown or that of the subject is to prevail? Connected with these questions, the case of *Uppom v. Sumner*, 2 Black. 1251, 1294, came before the Court of Common Pleas in 1779, and was decided against the crown. *Rorke v. Dayrell*, 4 T. R. 402, afterwards came before the Court of King's Bench, and was also decided against the crown. Then *The King v. Wells and Allnutt*, 16 East, 278, came before the Court of Exchequer, and was decided in favour of the crown. After that *Thurston v. Mills*, 16 East, 254, came before the Court of King's Bench, in order to have the question settled; but after hearing the case argued twice upon the principal point, it went off on a point of form, that *an action for money had and received, would not lie, and therefore the question remained as it was. [*232 As no opinion was delivered, it is immaterial to conjecture what the opinion of the Judges was. After that *The King v. Sloper and Allen*, 6 Price, 114, came before the Court of Exchequer, and the Court there acted upon the case of *The King v. Wells and Allnutt* in favour of the crown. In this case an information in the nature of an action for a false return was filed, and after judgment for the crown in the Court of Exchequer, the court of error, after it had been twice argued, determined that an information for a false return would not lie, as the return was true in fact though false in law. In giving my opinion I shall not consider whether the Judges on these occasions were more or less competent to decide them from having filled one situation or another, or whether any of them laid too much stress, or too little stress upon former authorities; such a discussion would protract the case into a very great length without any beneficial result. The present case is brought forward to settle the law where there have been contrary decisions; and I shall consider the case as it would have stood if none of these later cases had occurred.

In ascertaining what is the king's prerogative, two questions arise: first, as to its extent independently of the statute 33 Hen. 8, c. 39; and, secondly, upon the effect of that statute. The crown by its prerogative has some privileges and advantages by the common law beyond what a subject has, and a reason for this is given in *Gilbert's History of the Exchequer*, p. 90, "because the public ought to be preferred to the private property; and the rather, because the king is supposed, by public business, not to be able to take care of every private affair relating to his revenue, and therefore no time occurs to *the king; and if he was to be prevented of his execution by another person [*233 coming in before him, laches must be imputed to him, which the law does not allow." And in *Co. Litt.* 131 b, Lord Coke gives as a reason that *thesaurus*

regis est fundamentum belli, et firmamentum pacis. And there is no doubt that where the king and subject stand in an equal degree, the king's prerogative must prevail. One of the advantages which the king had was by giving protection to his debtor that he should not be sued or attached till he paid the king's debt. But inconvenience being felt from that, it was enacted by 25 Ed. 3, c. 19, "That notwithstanding such protections, the parties which have actions against their debtors shall be answered in the king's court by their debtors; and if judgment be thereupon given for the plaintiff as demandant, the execution of the same judgment shall be put in suspense till gree be made to the king for his debt; and if the creditors will undertake for the king's debt, they shall be thereunto received, and shall have execution against the debtors of the debt due adjudged to them, and also shall recover against them as much as they shall pay to the king for them." No question can arise upon this act of parliament, because it only applies to those cases where protection had been granted to the king's debtors, which has not been done here; and indeed it appears from Co. Litt. 131 b, that these protections are now entirely fallen out of use.

On the part of the crown it is contended that the king by his prerogative has a right to be first served and paid by his debtors, provided his process issues at any time before there is a complete divesting of the property out of the debtor. And that although upon the seizure by the sheriff under an execution there is a special property vested in him, yet that the general property remains in the debtor till there is an absolute alteration, which can *only be by sale. *234] This extent of prerogative is denied by the judgment-creditor, and he says, that upon the seizure by the sheriff the property is divested out of the debtor; and whether it be so or not, yet that the execution is executed by the seizure, and that the crown process comes too late.

The first case in the order of time, relied on by the crown, is that of Stringefellow v. Brownesoppe, Dyer, 67 b, which as it has already been stated, it is not necessary for me to go through again. The same case is also to be found in Roll. Abr. 528, tit. *Prerogative le roy*. Some doubt seems to have been expressed at the time as to the propriety of the decision; but, assuming it to be right, I don't think it trenches on the grounds on which I form my opinion, because that was an *extendi facias* on a statute staple, under which the goods are by the writ directed to be seized into the hands of the crown: and after that is done, and so returned by the sheriff, another writ, called a *liberate*, issues, commanding the sheriff to deliver them to the creditor to hold until he shall be satisfied his demand. The property, therefore, does not pass out of the debtor till the *liberate*, and the execution cannot be considered as executed till the *liberate* is executed. And in *Blayne's case*, Cro. Eliz. 47, where a question arose whether a lessee was liable for rent incurred before the time of a writ of *extendi facias* and a *liberate*, it was held that before the *liberate* awarded *nihil operatur*; and the writ of *extendi facias* is but of form when it speaks of seizing into the queen's hands, for it never was seen that lands were seized upon that writ. The King v. Andrew, Hardr. 28, is relied upon on the part of the crown, for what Chief Baron Steel says as the reason of his judgment against the crown, that the title of the subject was prior to that *of the king, and was executed. *235] Whatever effect that opinion of Chief Baron Steel may have upon the statute 33 Hen. 8, it can have none to support the doctrine of prerogative contended for on the part of the crown, because, as the title of the subject was complete on the delivery of the land on the *elegit*, the question of prerogative could not arise. The case of *Smallcombe v. Cross and Buckingham* (1 Ld. Raym. 275; 1 Salk. 320; 5 Mod. 376, and in other books), has also been mentioned. That arose on two writs of *fieri facias*, at the suit of different creditors, delivered to the sheriff on the same day, and he executed the last the first, and therefore proves nothing as to the point of prerogative. And as to any question arising whether the execution was executed, it is to be observed, that there was no seizure under the first writ. In the report in 5 Mod., Shower

says, in argument as to the prerogative, "that if the king's writ of extent came out after execution, yet the execution is superseded, and the king's extent shall take up the goods; but if the sheriff had sold the goods by bill of sale, &c., the property is altered, and shall not be divested by the king's writ." This does not reach the point under consideration; for he does not state at what stage of the execution the king's extent is supposed to come in: and if it did bear upon the point, it is only the statement of counsel. In Sir Edward Cook's case, 2 Roll's Rep. 294, Mr. Justice Doddridge says, in page 296, "If a writ comes for the king before the execution is finished, the king shall be preferred, as is to be seen in the case of Brownesoppe in 4 & 5 M." But the question is, *when* the execution is in point of law finished; and as he takes his authority from Brownesoppe's case, his opinion carries it no further than that case. Chief Justice Hobart, in page 299 of the same case, says, "It is certain *that where a man is debtor to the king the king shall never lose his debt, but where there is nothing to satisfy him." This expression of [*236 Hobart does not, however, advance the point contended for by the crown, for nobody could have had any doubt about that. The Attorney-General v. Capel, 2 Show. 480, was a question between the crown and the assignees of a bankrupt; and in the conclusion of the case it is said, "Extents have been held good that have been made upon goods actually levied by virtue of a fieri facias, and in the sheriff's custody, the extent coming before bill of sale made, so as the property was not altered." As far as that statement goes, it is in point for the crown; but it does not appear how that statement came to be introduced. Sir Bartholomew Shower argued the case as counsel for the assignees, and after his argument, he says that it was answered, &c. &c., by which I understand that it was answered by the counsel for the crown. Then a case in the Exchequer is cited, and then, at the end of the case, the statement above mentioned is added, and which, therefore, I presume was added by the counsel for the crown by way of illustration; and if so, it is only the statement of counsel. The King v. Cotton, Parker, 112, is also relied upon as in favour of the crown; but that was the case of a distress for rent, which had been seized and appraised before the extent came in: but there is a great difference between a distress and an execution. Chief Baron Parker, in page 121, says, that a distrainer neither gains a general nor a special property, nor even possession in the cattle or the things distrained. He cannot maintain trover or trespass, for they are in the custody of the law by the act of the distrainer, and not by the act of the party distrained upon. In page 125, he says, "Though a sheriff may maintain trover or trespass for goods taken *in [*237 execution by him against a wrong-doer, because he is answerable over for the value, yet goods so taken in execution and remaining unsold, are liable to seizure upon an extent." This opinion of Chief Baron Parker is in point for the crown; and though it was not upon the question in the case, yet it is illustrative of it, and is certainly entitled to great attention. The King v. Peck, Bunbury, 8, is in point for the crown, if it can be relied upon. That was a question whether the sheriff should amend his return, and upon an order being made, it appears to have been what the sheriff wanted. At the end of the case there is a N. B., "It was taken for granted that though the goods were levied by virtue of the fieri facias three days before the *teste* of the writ of extent, yet that was no bar to the crown: but quære, if they had been sold, for then execution had been executed." If the last reason be the only one that can be adduced, I think it cannot be supported, as I think the execution is executed by the seizure under the fieri facias. What is said in Chief Baron Gilbert's History of the Exchequer, p. 89, may also be cited for the crown. He says, "But goods were bound at common law from the *teste* of the writ, whether it was a *levari* or a *fieri facias*, because otherwise the debtors by alienation of the chattels might disappoint the executions of their lords; who having, by their process, a right to distrain goods, there arose a lien on those goods from the time the *levari* was taken out; and the king's prerogative could not be

less than the right of the subject, and, therefore, bound the goods from the *teste* of the writ. But this was found inconvenient, and, therefore, by 29 Car. 2, c. 3, no execution shall bind the property of goods but from the time of the delivery of the writ to the sheriffs: but this act seems not to *extend *238] to the king, for an extent of a later *teste* supersedes an execution of the goods by a former writ, because by the king's prerogative at common law, if there had been an execution at the subject's suit, and afterwards an extent, the execution was superseded till the extent was executed, because the public ought to be preferred to the private property; and the rather because the king is supposed by public business not to be able to take care of every private affair relating to his revenue; and therefore no time occurs to the king; and if he was to be prevented from his execution by another person coming in before him, laches must be imputed to him, which the law does not allow; and since the king's debt is preferred in the execution, therefore an executor is obliged by the law to pay the king's debt on record before a debt on record to a subject." Where the Chief Baron is, as above, speaking of the king's prerogative as to priority of execution, it does not appear what particular circumstances of the subject's execution he alludes to. He afterwards goes on to point out instances where the king's extent shall be preferred where the subject's execution is running at the same time; but they appear to apply to cases of the subject's execution on a statute staple; as to which no doubt can be entertained but that it is not complete till the *liberate*. The expression of Lord Mansfield, that no inception of an execution shall bar the crown, is also relied upon for the crown; but the question is, what is an inception of an execution, and whether this execution has not gone beyond an inception, and whether the execution is not executed.

These appear to be the principal authorities for the crown as to the general extent of the prerogative, independent of the statute Hen. 8. There can be no doubt but the property is partially divested out of the debtor, and up to the extent of *239] enabling the sheriff to carry the *writ into effect he has a special property in the goods, and so far the property is changed; and the sheriff may maintain either trespass or trover against persons who take the goods from him without lawful excuse, as appears by the cases of *Tyrell v. Baah*, Cro. Eliz. 639, *Wilbraham v. Snow*, 2 Saund. 47, and is taken for granted in *Clerk v. Withers*, to which I shall presently refer, and in *The King v. Cotton*, already cited. The property is not vested in the creditor, though the contrary is laid down in some cases, because the sheriff is not to deliver the goods to the plaintiff; he is to make of the goods the sum recovered by the judgment, and which sum is to be paid to the plaintiff, and who by the mere seizure, has nothing to do with the goods; and, in that respect, a *fiery facias* differs from an *elegit*, where the sheriff is to deliver goods as well as lands to the plaintiff, at a reasonable price. But I think that the property is not wholly divested out of the defendant by the act of seizure, because, if a second execution come in before sale under the first, the sheriff may seize under that, which he could not do if the property was wholly out of the debtor; and so, if upon a writ of *fiery facias*, the sheriff has sold as much as will satisfy the first writ, and he continues to go on to sell other goods, the debtor may have an action of trover against the sheriff for such sale, as appears by the case of *Stead v. Gascoigne*, 8 Taunt. 527. And, so also, the debtor may, I apprehend, maintain trover against the sheriff in case of his selling after the debtor has tendered him the amount of the money to be levied under the writ; *vide The King v. Bird*, 2 Show. 87. The crown contends, that as it is only a special property which is divested out of the debtor, and the general property remains in him, the execution of the crown is to attach upon the whole property, as much as if there had been no special *240] *property divested. But I do not assent to that, and I think that the execution of the crown cannot have any greater effect upon the property which remains in the debtor, than the execution of a private individual upon it.

It will be proper to see what is the effect of the seizure, whether it constitutes a change of property or not, in case of other conflicting creditors, whether under executions or commissions of bankrupt, or otherwise; and I think that, generally speaking, as between subject and subject, the execution is executed by the mere act of seizure, and as the execution is begun, the sale cannot be stopped by any subsequent proceedings. It is so in case of a writ of error, which operates as a *supersedeas* from the time of the allowance of the writ of error. If it be allowed before the goods are seized, it operates as a *supersedeas*. This point was completely settled in the case of *Meriton v. Stevens*, Willes, 271; and Chief Justice Willes enumerated several cases on the subject, which I shall here state from his judgment. In *Cro. Eliz.* 597, the case of *Charter v. Puter*, 40 *Eliz.*, in the King's Bench, was this,—A *fi. facias* was awarded, by virtue whereof the sheriff took the defendant's goods, and before sale the record was removed into the exchequer chamber by writ of error and a *supersedeas* awarded. The sheriff returned a seizure of the goods, and that they remained in his hands *pro defectu emptorum*: a restitution was prayed, but denied; and it was holden *per totam curiam*, that as the sheriff had begun the execution regularly, he must complete it as far as he had gone, and a *venditioni exponas* was awarded to perfect it. It is there said, it was so held in the case of *Sir Miles Corbert v. Rookwood*, 39 *Eliz.*, though the record was removed by a writ of error; and in *Dyer*, 98 a, *99 b, there is a case exactly to the same purpose. In *Moore*, 542, [*241] *Hilary* 40 *Eliz.*; if the sheriff take goods in execution on a *fi. fa.* and has them in his hands not sold, and then a *supersedeas* comes to the sheriff, yet he shall not deliver the goods, but shall proceed to the sale of them, because the beginning of the execution was before the *supersedeas* delivered, and the execution being entire, shall not be divided. In *Tocock v. Honyman*, *Yelv.* 6, a writ of error, and *supersedeas* to the sheriff after a *fi. fa.*; he shall proceed to the sale of the goods which he has levied before the *supersedeas*, but shall levy no more: *per totam curiam*. In the case of *Baker v. Bulstrode*, 1 *Vent.* 255, it was held, that if, before the writ of error, the sheriff returns *fieri feci et non inveni emptores*, the execution is not to be undone. And in the case of *Clerk v. Withers*, 1 *Salk.* 322, 323, it is said that the execution is one entire thing, and is not to be superseded after it is begun. The only case to the contrary is in 2 *Roll. Abr.* 491, where it was said, that if the *supersedeas* comes before the sale, the goods shall not be sold; because (as it is said there), the property is not altered by the seizure, which reason not being a true one, Chief Justice Willes says, I give no credit to this case. Now, from the determination above cited, it appears that the execution is considered as executed by the seizure under the *fi. facias*; and though the writ of *supersedeas* forbids the sheriffs from executing any process of execution, he may, nevertheless, proceed to sell goods already seized.

I shall now state other cases, in which it appears to be considered, that the execution is complete by the seizure under the *fi. facias*. *Lechmere v. Thoroughgood* and *Another*, *Sheriffs of London*, 3 *Mod.* 286, was an action of trespass by the assignees of a bankrupt for taking their goods: on a special verdict it was stated, that *one Toplady, on the 28th of April, became [*242] bankrupt, against whom a judgment was formerly obtained. The judgment creditor sued out a *fi. fa.*, and the sheriff, on the 29th of April, seized the goods of Toplady. After the seizure, and before any *venditioni exponas*, that is, on the 4th of May, an extent issued against two persons who were indebted to the king, and by inquisition Toplady was found indebted to them, whereupon parcel of the goods were seized by the sheriffs upon the extent and sold; but before the sale, or any execution of the Exchequer process, a commission of bankrupt issued against Toplady, and the commissioners, on the 2d of June, assigned the goods to the plaintiff. The question was, whether the extent did not come too late, and it was held it did; or, whether the *fi. fa.* was well executed, so that the assignees of the bankrupt's estate could have a title to those goods which were taken before in execution, and so in *custodiâ legis*;

and it was held they had no title. The same case is reported in 1 Shower, 12; and it is said in a note in Shower, that it was decided entirely with reference to the liability of the officers. It is also reported in Comberbach 123, and Lord Holt there says, "that the property of the goods is vested by the delivery of the fieri facias, and the extent afterwards for the king comes too late, and that, on the statute of frauds and perjuries." The reason given is not a correct one. It is most likely a mistake of the reporter; and taking into consideration the whole of the various reports of this case of *Lechmere v. Thoroughgood*, I do not consider it as having decided this precise point, but only as showing a general opinion of the Judges of that day, that the extent of the crown should not be preferred to that of the subject in a case like the present. *Clerk v. Withers*, though it does not relate to an extent, yet it shows in what light the seizure under a fi. fa. is considered, and *that the execution is thereby *243] in effect considered to be executed. It is reported also in 6 Mod. 290; 2 Lord Raymond, 1072; 1 Salk. 322. This was a writ of error on a judgment in the Common Pleas upon a scire facias by Clerk against the defendant, sheriff of Middlesex. The case appeared to be, that one Dives, as administrator of J. S., had recovered a judgment for 304*l.* against Clerk, and sued out a fi. fa. directed to the defendant, sheriff of Middlesex, and upon that writ the defendant returned that he had seized goods to the value of the debt, and that they remained in his hands for want of buyers. Afterwards, and before the goods were sold, Dives died, and Clerk sued out this scire facias to the defendant to show cause why the goods should not be restored to him, as supposing that now that Dives was dead, there was nobody could have the fruits of the execution: and upon demurrer to this writ, judgment was given for the defendant in the Common Pleas. The point determined is, that the death of a party, who has sued out fieri facias, after the seizure of goods, but before the sale of them, will not abate the execution, or entitle the party against whom the execution was sued out to a restitution. In Lord Raymond Lord Holt says, "After seizure of the goods there is nothing to be done by the sheriff but to bring the money into court." And Mr. Justice Gould says, "The substantial part of the execution is executed in the lifetime of the executor, and there is nothing wanted to complete it but the formal part. For, as soon as the sheriff seizes the goods by virtue of the writ of fieri facias, he gains a special property in them, and may maintain trespass against the defendant if he takes them away." So it is said in *Cro. Eliz.* 635, he may maintain trover against a stranger that takes them away. *Wilbraham v. Snowe*, 2 Saund. 47; 1 Lev. *244] 282. Mr. *Justice Powell says, "An execution is an entire thing, and that sheriff that takes the goods in execution shall go and sell, though he is out of his office, and not the now sheriff." And in the report in 6 Mod. Mr. Justice Powis says, that the selling is but the formal part of the execution. In the judgment of the Court in *Salkeld* it is said, "An execution is an entire thing, and cannot be superseded after it has begun."

I shall now state in what cases the execution has been considered as executed, arising upon questions of the construction and operation of the bankrupt laws. By 21 Jac. 1, c. 19, s. 9, it is enacted, that "all and every creditor and creditors having security for their several debts by judgment, statute, recognisance, specialty, or other security, or having made attachments of the goods and chattels of the bankrupt, whereof there is no execution or extent served and executed upon any of the lands, tenements, hereditaments, goods, chattels, and other estate of the bankrupt before such time as he shall become bankrupt, shall not be relieved upon any such judgment, statute, &c., for any more than a rateable part of their just and due debts with the other creditors of the bankrupt, without respect to any such penalty or greater sum contained in such judgment, statute, &c., or other security." Upon this statute it has been determined that where a creditor has obtained a judgment, and sued out a fieri facias, and a seizure has been made under it, if before sale an act of bankruptcy

intervenes, the judgment-creditor shall not be obliged to come in under the commission, but the sheriff may proceed to sell the goods. The words of the act being, "whereof there is no execution or extent served or executed," it might be contended that the execution under which the sheriff has seized, but not sold, is not an execution executed, because there has been no sale; but the determinations upon the *statute of James show that as soon as goods have been seized under the *feri facias*, that is considered in law as ^[*245] being an execution executed, and the sale is but a formal part of the execution of the process, and has, therefore, no further effect on the goods in respect of the alteration of the property in them. It cannot be necessary to quote any authority for this position, because the constant practice at Nisi Prius, in disputes between the assignees of a bankrupt and the judgment-creditor, is to inquire whether the act of bankruptcy or the seizure of goods under a *fi. fa.* was first, and to consider the execution as executed by the seizure under the *feri facias*. I think, therefore, it appears quite clear that in all cases between subject and subject the execution is considered as executed by the mere seizure of the goods under a *feri facias*. Then the material question is, whether under the process of the crown the same rule is to hold as between subject and subject? There is no doubt but the interest of the crown is to be preferred, all things being alike in the two cases. The crown has a preference by having the goods bound from the *teste* of the extent, which is an advantage which the subject has not; and if the extent be tested before the seizure under the *feri facias* the extent will prevail; but there seems no reason upon principle why if a rule be perfectly well established as between subject and subject, that the execution is executed by the seizure under *fi. fa.*, the same principle should not be applied in all cases even where the crown is concerned. There is no doubt a sort of property remaining in the debtor, upon which, as a second execution may attach, the extent may attach also; but it does not therefore follow that it is not only to attach, but also to do away with the execution in the sheriff's hands. And it should seem that the extent ought only to affect that portion of the property which remains in the debtor, in the same way as the *second execution of a private creditor does. In the case of a pledge of ^[*246] goods by the owner, the crown's extent can only take the goods subject to the pledge, as is admitted by Chief Baron Parker in *The King v. Cotton*, p. 118. So also, in *The King v. Lee*, 6 Price, 269, it was held that if a factor has a lien upon goods in respect of acceptances, it was held that the crown could only take the goods subject to the claim of the factor. So also, according to the case of *Casberd and Another v. Ward and Others*, 6 Price, 4 m, a deposit of title deeds by a simple contract debtor of the crown is an equitable mortgage, and binds the crown. So, a wharfinger has a lien against the crown for his general balance. And if by the charge upon the property by the contract of the party, the crown only takes it subject to the charge, the same reason ought to apply where a creditor has obtained a claim upon the property by the process of the law.

I shall now consider what effect the 33 Hen. 8, c. 39, has upon the case. By the fiftieth section of the act, bonds to the king are put upon the same footing as statutes staple; and in the fifty-second and following sections, up to and including the fifty-seventh, provisions are made for the course of proceeding for the king's debts. A further provision is made in the seventy-third section; and then comes the seventy-fourth, upon which the question arises,— "That if any suit be commenced or taken, or any process be hereafter awarded for the king for the recovery of any of the king's debts, then the same suit or process shall be preferred before the suit of any person or persons, and our said sovereign lord, his heirs and successors, shall have first execution against any defendant or defendants of and for his said debt before any other person or persons, so always that the king's *said suit be taken or com- ^[*247] menced, or process awarded for the said debt at the suit of our said

sovereign lord the king, his heirs or successors, before judgment given for the said other person or persons." And in my opinion, as there was no award or process for the king's debt till after judgment was obtained for the private creditor, and till after the goods were seized under the *fieri facias*, the execution at the suit of those creditors must prevail over the extent. In construing acts of parliament, it is a safe rule to follow the very words of the act, unless so strict an interpretation be not reconcileable with other clauses, or be contrary to the general intent of the act, or be inconsistent with some established principle of law, which it may be supposed it was not intended to interfere with. But general objections are made to this right of the creditors falling within this act of parliament. It is said, first, that this proceeding by extent is not a taking or commencing a suit, or awarding process. It is certainly not taking or commencing a suit, but I think it is awarding process. An extent is a writ, and so constantly called. It commands the sheriff to take the body of the debtor, and so far that part of the execution is complete. It is true that, as to goods, it is not complete till a *venditioni exponas* issues; as it is part of the command of the writ, that the goods are not to be sold till a writ of *venditioni* issues: and so, in the case of a subject, the execution on a statute staple is not complete till a *liberate* issues; but then, when the writ of *liberate* is sued out, it has relation to the writ of extent, and they become but one extent, as is said by the court in *Audley v. Halsey*, Cro. Car. 148. But I cannot doubt that a writ of extent in process,—not only immediate extents in chief, *248] but also extents in aid;—and as soon as a debt *from a third person to the king's debtor is found by inquisition and recorded, it falls within the 55th and 56th sections of 33 Hen. 8, and an *extendi facias*, as there mentioned, may be awarded. The common course of proceeding upon a record debt to the crown, whether it be originally of record, or whether it be not originally of record, but recorded by inquisition under a commission, is by *scire facias*, where the debt is not in danger of being lost; and in that case the *extendi facias* is the ultimate process of execution; but if the debt be in danger of being lost, then an extent may issue in the first instance. But no extent in the first instance, either against the immediate debtor to the crown, or against persons indebted to the crown debtor, ever issues, unless there be an affidavit that the debt is in danger. In *The King v. Pearson*, 6 Price, 292, Chief Baron Thomson says, "In the case of an extent, an affidavit of the insolvency of the debtor is made; but if that cannot be done the *scire facias* is the only course." The crown has not an election, except in cases of insolvency. And the rule in the Exchequer, of 15th Charles, requires that he who desires any debt to be proved by inquisition in his aid, shall make oath, amongst other things, that the debtor is much decayed in his trade, as that unless a speedy course be taken against him, the debt is in great danger to be lost. But it can make no difference as to the nature of the extent, whether it issue upon a judgment obtained upon a *scire facias*, or whether it issue in the first instance. The proceeding by extent in the first instance is alluded to in the 55th section of the statute of Hen. 8, as one way of proceeding by the various modes there mentioned, and amongst others by *extendi facias* if need shall require; *249] and, in this very record, the extent is said to *be according to the form of the statute made for the recovery of the debts of our lord the king; as is the common form. But I do not think it material, whether the extent in aid be in strictness an execution or not; for, at all events, it is a process for the recovery of the king's debt, which is all that the statute mentions; for it is something sued out, by which, in the usual course of the Court, the king's debt will eventually be paid. It is said, the seventy-fourth section applies only to land, and not to goods. I see nothing in the clause so to restrict it. The fifty-sixth section speaks of execution upon the body, lands, and goods of the party, and there seems no reason to suppose that the seventy-fourth section should be less extensive in its operation.

Assuming, then, that the seventy-fourth section applies to the case of extents in aid, and also to goods, it is to be considered whether it increases or abridges the prerogative of the crown, and in what degree. Upon this statute, it was held in Sir Thomas Cecil's case, 7 Rep. 93 b, that the act has given a benefit and advantage to the king. First, in making every bond made to the king in the nature of a statute staple. Secondly, in giving remedy to the king himself for obligations made to others to his use. Thirdly, to recover costs and damages. Fourthly, in suing of executions for all his debts. Fifthly, that the king shall be preferred in his execution before common persons. Sixthly, in charging the issue in tail, and the heir who hath the land of the gift of his ancestor. And, therefore, it was the intent of the act to gratify the subject, that where a new provision was made for the levying of the king's debt in a more speedy and beneficial manner than the king had before, the subject also should have new benefit which he had not before. And it may be said here, that one of the new benefits was to give the *subject a preference in cases where his judgment was obtained before the extent of the king issued. In The [250] King v. Andrew, Hardr. Rep. 27, Mr. Baron Parker says, "The king has many prerogatives, *pro bono publico*; but, in the case in question, the statute 33 Hen. 8, abridges the prerogative and controls the common law. Affirmative statutes do not alter the common law, but negative statutes do, and here is a negative implied." And Mr. Baron Nicholls says, "Before the statute 33 Hen. 8, the king was not bound, but the statute has made an alteration though it sounds in the affirmative; for it enacts a new thing and *ita quod*, which makes a condition precedent and a limitation." Here are, therefore, opinions expressed in different cases as to the general effect of the statute in abridging the king's prerogative. And The King v. Dickenson, Parker's Rep. 262, is a confirmation of this doctrine as to the effect of the statute of Henry 8. A. was indebted by judgment to B., and by bonds to C. and D., and by simple contract to E., and died. E. being a debtor to the king, caused the debt due to him to be seized into the king's hands, and upon this a *scire facias* issued against Dickenson, executor of A., and before the return of it, C. and D., the bond creditors, obtained judgment, and then Dickenson pleaded to the *scire facias* the first judgment and the subsequent judgments. The Attorney-General demurred. The Court held, that the king's debt should be preferred before the subsequent judgments; before any bond; but a precedent judgment should be preferred before it, upon the words of the statute of Henry 8. And Chief Baron Comyns, in his Digest, tit. *Debt* (G. 9), says, "By the statute 33 Hen. 8, c. 39, suit or process for the king's debt shall be preferred before other persons, so always as that the king's suit be commenced or *process awarded before judgment for the said other persons." And in the next [251] *placitum* he says, "and therefore, if the execution be upon a judgment against the king's debtor, and before a *venditioni exponas*, an extent comes at the king's suit, the goods cannot be taken upon the extent." And he refers to 3 Mod. 236 and Hardres, 27. The former of these cases is *Lehmere v. Thoroughgood*, and the latter is *The King v. Andrew*, upon which I have already remarked, and I only quote this passage from Comyns's Digest to show, in a general way, in what light he considered the statutes of 33 Hen. 8. The meaning of the seventy-fourth section seems to me to be, that if the crown proceeds to execution it shall have the first execution; but in order to be entitled to that privilege, the suit must be commenced, or process be awarded at the suit of the king before judgment obtained by the creditor; and that unless it be so, the crown shall have no such priority. By the first execution I understand the prerogative privilege of execution, whatever that privilege may be, and of which the crown may avail itself if there be a process from the crown before judgment by the creditor. But if the process be not awarded before such judgment be obtained, then the crown stands in no other light than a common creditor. The cases of *Butler v. Butler*, and *The Attorney-General v. Aldersey*, there cited, 1

East, 838, may be mentioned as in favour of the crown on the construction of the statute of Henry 8; but there the only question was, whether a penalty constituted a debt, which the Courts held it did; but in both those cases the proceedings on the part of the crown were commenced before the judgments were given for the subject, and therefore they could not avail themselves of the provisions of the statute.

*252] Upon the best consideration I have been able to give *to this case, I think that this writ of extent should not be executed by the sheriff by extending and seizing the goods into the king's hands, and selling them to satisfy the king's debt; and I think it makes no difference whether the extent be in chief or in aid.

BAYLEY, B. The question proposed for the consideration of the judges is in substance this:—Whether, if the sheriff has seized the goods of a debtor under a *feri facias*, and those goods remain unsold in the sheriff's hands, they are liable to an extent of the crown tested after such seizure, and may be seized and sold to satisfy the crown's debt, without regard to the *feri facias*; and I am of opinion that they are so liable.

The writ of extent directs the sheriff to inquire what goods and chattels the king's debtor, against whom it issued, had in his bailiwick at the time it issued, and to take and seize the same into his hands, there to remain until the king's debt be satisfied. The question then is, whether, by the seizure under a *feri facias*, the goods so seized cease, as against the crown, to any and what extent, to be the goods and chattels of the debtor, or whether the crown is not entitled to treat them as the goods and chattels of the debtor, to all intents and purposes, and to the same extent as if there had been no seizure under the *feri facias*.

The command to the sheriff, by a writ of *feri facias*, is, that of the goods and chattels of the defendant he cause to be made the sum for which judgment is given. Till money is made the execution is in progress only. The seizure of goods is only in order that money may be made. The goods are still the debtor's goods. If he satisfies the execution, it is matter of right that they shall be returned to him: he has no occasion for a bill of sale from the *253] sheriff: he is entitled to them upon the *footing of his original ownership. If the act of God destroys them he has no remedy. That the crown is entitled to consider lands and goods as continuing the lands and goods of the king's debtor, notwithstanding a seizure thereof into the king's hands upon an *extendi facias* out of Chancery upon a statute staple, is clear from Stringefellow's case, which has been cited; and the foundation of that right may be collected from the recital in the writ; that is, the prerogative of the crown to be first paid and served by its debtors; and if the prerogative is to prevail against a seizure into the king's hand upon an *extendi facias*, why is it not to prevail against a seizure into the hands of the sheriff, who is the king's minister, upon a *feri facias*? Can any satisfactory reason be given for a distinction? The foundation of the king's right, in the one case, is, that the property remains in the original owner till liberate; and I apprehend it remains, as against the crown, in the other, in the original proprietor, till the things are sold. That the crown is entitled to consider property as continuing to belong to the king's debtor, notwithstanding a commission of bankruptcy, which has been called a statuteable execution, until a conveyance is made thereof under the commission, is established by *Rex v. Hanbury*, in 1668, and *Rex v. Capel*, in 1686, 2 Show, 481; and *Brassey v. Dawson*, Strange, 978, in 1733: and that it is equally entitled, notwithstanding a seizure upon a distress for rent, is taken for granted in *Rex v. Dale*, Bunbury, 42, in the year 1719; and was solemnly adjudged in *Rex v. Cotton*, Parker, 112, in 1751. But I forbear stating these cases at length to the house, notwithstanding the strong analogy they bear to the case supposed in your Lordships' question, because they have been already stated, and because the authorities directly upon

the point are so numerous *and strong. The first authority I am aware of upon the point is the dictum of Mr. Justice Doddridge in Sir Edward Cook's case, 2 Roll. 295. He lays down this position: "If a writ come from the king before the execution of the subject be finished, the king shall be preferred, as may be seen in Brownesoppe's case, and in Stringefellow's case; and though there be sufficient for you and for the king, you must wait till the king is satisfied; and if there be not enough for both, you must suffer not only delay but loss, for when the public and private interests are put in the balance of justice, the public shall weigh down the private, because the public is better than the private." In the Attorney-General v. Capel, in the Exchequer, 2 Show. 481, Shower says, "Extents have been held good that have been made upon goods actually levied by virtue of fieri facias, and in the sheriff's custody, the extent coming before a bill of sale made, so as the property was not altered." In Smallcombe v. Buckingham, 5 Mod. 376, 377, where the question was, which of two subjects' writs of fieri facias should have the priority, it had been said, arguendo, that if the king's writ came after a sale by the sheriff under a fieri facias the goods might be seized again for the king: Shower sets the matter right: "If the king's writ of extent comes out after execution, yet the execution is superseded, and the king's extent shall take up the goods; but if the sheriff had sold the goods by bill of sale, the property is altered, and shall not be divested by the king's writ." In Rex v. Peck, Bunbury, 8, 1716, the sheriff seized upon a fieri facias from C. B. in April; but before he sold an extent was delivered to the sheriff, tested 2d of May. A motion was made to amend his return to the extent. Bunbury makes this note: "N. B. It was taken for *granted that though the goods were levied by fieri facias three days before the teste of the extent, yet that was no bar to the crown; but, quære, had they been sold, for then execution had been executed." At no great distance of time, viz. 9th of June, 1722, Gilbert was made a Baron, and on the 1st of June, 1725, Chief Baron; and his treatise upon the Court of Exchequer will show what was his opinion upon this point. He had just been stating that the king's prerogative could not be less than the right of the subject, and that the levary or fieri facias of the subject bound his debtor's goods from the teste of the writ. This, he says, was found inconvenient, and occasioned the provision in 29 Car. 2, that no execution should bind the property in goods but from the delivery of the writ to the sheriff. "But this act," he continues, "seems not to extend to the king, for an extent of a later teste supersedes an execution of the goods by a former writ, because by the king's prerogative at common law if there had been an execution at the subject's suit, and afterwards an extent, the execution was superseded till the extent was executed, because the public ought to be preferred to the private property; and the rather because the king is supposed by public business not to be able to take care of every private affair relating to his revenue; and therefore, no time occurs to (i. e. hinders or obstructs) the king; and if he was to be prevented from his execution by another person coming in before him, laches must be imputed to him, which the law does not allow." Here, therefore, you have the deliberate opinion of a man of great industry and research upon a point it was peculiarly his duty to investigate, relative to what was the course of proceeding in his own Court, and likely to be of frequent occurrence; and he speaks of it without the least degree of doubt, and gives what has the appearance of a satisfactory reason for the prerogative *priority. In a few lines afterwards he puts the case where the subject has a statute staple, or a judgment prior to the debt of the king, and seizes the debtor's lands before any seizure by the king, and considers the question, what shall be the effect of a subsequent extent by the crown: and he lays down this distinction; that if the subject has the possession delivered to him by a liberate before the extent from the crown, the subject shall hold the land discharged from the king's debt; but if the king's extent come before the possession by liberate, the king's debts shall be preferred, and

the subject wait till the king's debt is satisfied. In *Rex v. Cotton*, in the able and elaborate judgment Lord Chief Baron Parker there delivers (in which he treats Stringefellow's case as good law, and considers, as the line of distinction in those cases, whether the property remains in or is divested out of the king's debtor), he says upon the point now under consideration, "goods taken in execution, and remaining unsold, are liable to seizure upon an extent."

I now come, chronologically, to the case of *Uppom v. Sumner* in the Common Pleas in 1779, and of *Rorke v. Dayrell*, eighteen years afterwards, 1797, in the King's Bench. They are both in point; and if they be law, the judgment in this case ought to be against the crown. I am of opinion they are not law. When *Uppom v. Sumner* first came before the Court, the counsel for the execution creditor (Serjt. Walker) declared he could not support the case, and gave it up. He afterwards desired to argue it, and put it (upon what it had never before been put) the statute of Hen. 8, and said (with what truth the authorities I have just been mentioning will show), it had always been understood that an extent was to be postponed to a judgment. Serjt. Grose, on the other side, does not appear to have brought under the notice of the Court any *257] of the direct *authorities I have mentioned, but contented himself with relying on *Rex v. Cotton*, and the dictum it contained, and upon *Rex v. Badin*, Show. P. C. 72, in which I can find nothing bearing upon the present point; the Court took time to consider, and then decided for the execution creditor, upon the construction they put upon 33 H. 8, c. 89, s. 74, and upon the authorities of *Lechmere v. Thoroughgood*, Comb. 128, 3 Mod. 286, 2 Vent. 169, 1 Show. 12, 146; *The Attorney-General v. Andrew*, Hardr. 23, 2 Comyns's Digest, 588; and *Rex v. Dickinson*, Parker, 262, all of which I shall consider by and by. In *Rorke v. Dayrell* the counsel for the execution creditor again put the case upon the statute 33 Hen. 8, c. 89, s. 74, and relied upon *The Attorney-General v. Andrew*, *Lechmere v. Thoroughgood*, *Uppom v. Sumner*, and the passage in Comyns's Digest. The counsel for the crown brought forward many authorities not noticed in *Uppom v. Sumner*; viz., *Gilb. Exch.* 90; *Doddridge's* dictum in *Sir Edward Cook's* case; the dictum in *Petit v. Benson*, Comb. 452; the dictum in 2 Shower, 481, and the decision in *Rex v. Peck*. It cannot be said, therefore, that the bulk of the authorities were brought before the Court in *Uppom v. Sumner*. Lord Kenyon lays it down, "that wherever the property in goods remains in the king's debtor at the time, and one execution at the suit of the king, and another at the suit of the subject, are sued out, the former will prevail." But he proceeded on the ground (now generally admitted to be erroneous), that by the delivery of the writ to the sheriff the property in the goods was bound and altered so that there remained no property in the debtor upon which the king's prerogative could attach. The other three Judges founded their judgment upon 33 Hen. 8, and upon *Uppom v. Sumner*, but did not notice or discuss any of the authorities *258] cited for the crown. After these two decisions, *the point came again under consideration in *Rex v. Peckham* (or *Rex v. Wells and Allnutt*), in the Exchequer in 1805; and after full consideration of all the authorities, the Court adopted the principle laid down in the earlier cases, and overruled the cases of *Uppom v. Sumner*, and *Rorke v. Dayrell*. This is mentioned in 8 Wms. Saund. 70 e; and the minutes of Lord C. B. M'Donald's judgment are to be found in 16 East, 278. This decision was adhered to in *Rex v. Sloper and Allen*, 6 Price, 114, in the Exchequer, in 1718, dubitante Wood, B.

This being the state of the authorities upon the direct point, I shall not trespass further upon the patience of the House, except to show that the cases relied upon in *Uppom v. Sumner* (with the exception of the passage in Comyns) will not support the judgment, and to state it as my opinion that the statute of 33 Hen. 8, applies only to cases in which the subject's execution is complete before the crown extent is issued, not to cases where it was in progress only. In *The Attorney-General v. Andrew*, Hardr. 23, it is obvious, upon an atten-

That the determination of these two points does in fact involve the whole of the present inquiry, appears from this, that the only two direct authorities for the preference of the subject's execution are grounded on those two points alone; the case of *Uppom v. Sumner*, resting on the application of the statute of Hen. 8, and the case of *Rorke v. Dayrell* being decided by Lord Kenyon on the alteration of the property in the goods, and by the other three Judges on the authority of the above-mentioned statute. And upon the first of these points it appears to me that the property in the goods seized under the *fi. fa.* is not in any manner altered by the seizure, but that it still continues in the debtor, until the actual transfer thereof by the sheriff's sale under the writ to a stranger. If the property is changed by the seizure, it must be transferred either to the judgment-creditor or to the sheriff; but there are no words in the writ to give it to either. The sheriff is directed by the writ of *fi. fa.* "to cause to be made of the goods and chattels of the defendant the debt or damages recovered by the plaintiff;" in this respect the language of the *fi. fa.* differing from that of the *elegit*, by which he is directed "to deliver to the plaintiff all the chattels of the debtor, and a moiety of the land, until the debt be levied." So far, indeed, is the property in the goods from being transferred to the plaintiff in the suit, that the sheriff cannot deliver the goods to the plaintiff in satisfaction of the debt: *Thompson v. Clerk*, Cro. Eliz. 504. Again, if the defendant in the action, after seizure of his goods under the *fi. fa.*, pay the debt to the sheriff, he retains his goods, and is discharged from the execution, and any further remedy of the plaintiff is against the sheriff only, Cro. Eliz. 209. But if the property in the goods had been altered, if it had vested either in the plaintiff himself or the sheriff, or had become an actual pledge or security for the payment of the debt, it is difficult to see upon what principle the defendant should hold his goods again, discharged of the debt, before actual payment thereof has been made to the plaintiff. Again, if the goods, after seizure under the writ, but before sale, are destroyed by any unavoidable means without the sheriff's default, the loss does not fall either upon the plaintiff or upon the sheriff, but upon the debtor, on whose goods a second levy may be made; Hob. Rep. 60; but if the property in the goods had been altered by the seizure, why is not the loss to fall upon that party whose property they have become: as, undoubtedly after the sale, the loss would be that of the purchaser? Again, if the sheriff, having received two writs of *fi. fa.*, sell under that which is last delivered to him, although he make himself liable to the plaintiff who delivered the first writ, the property of the goods is bound by the sale under the second writ, and the party cannot sell them by virtue of his execution first delivered: *Smallcombe v. Cross*, 1 Ld. Raym. 252. And yet if the property was altered by the delivery of the first writ to the sheriff, upon what principle can the sale under the second convey the property to a stranger? The case of *Hutchinson v. Johnston*, 1 T. R. 729, decides the converse of this *last proposition; viz., that if the sheriff seizes under the writ last delivered to him, but before sale discovers that another writ has been delivered to him at an earlier time, and sells under the writ first delivered, and satisfies the debt of the plaintiff in the earlier writ, he is justified in so doing; though if he had sold under the second writ he could not have done so. These two authorities seem decisive, that it is the sale, not the seizure, which alters the property. It has, however, been argued that the rule of the common law by which the property in the goods is bound by the award of the writ of execution, altered, as it has since been, by the statute of frauds, so as to become bound only by the delivery of the writ to the sheriff, implies that the property is divested out of the debtor by such delivery of the writ. But the meaning of those words has been explained and defined by various decisions. It will be sufficient to cite the case of *Payne v. Drewes*, 4 East, 523, in which all the former cases are considered, and in which Lord Ellenborough, C. J., lays down the rule to be, that "the goods are bound by the delivery of the writ to the sheriff as against the party himself, and all claiming by assignment from, or

representation through or under him." In this sense, and to this extent, therefore, may the goods of the defendant be *bound* by the delivery of the writ to the sheriff, without the consequence contended for, that the property in the goods is in any manner altered thereby. It has further been contended, that as the sheriff may maintain an action of trespass or trover against any wrongdoer for taking goods which he has seized, it therefore follows that he, and not the defendant, has the property in the goods so seized. But to this argument it appears sufficient to answer, that any person who has the legal possession of *266] goods, *though not the property, may maintain this action against a wrongdoer; for a mere wrongdoer cannot dispute the title of the party who is in the possession of the goods with any colour of legal title. The sheriff, no doubt, has the legal custody and possession of the goods; after seizure he has a special property in him for that purpose, for the law has directed him to seize and make sale thereof. But this affords no argument that the absolute property in the goods is altered and divested from the defendant; for the very same action is maintainable by the finder of goods against the person who wrongfully takes them from him; or by the carrier of goods for hire; or by the bailee of goods, against a trespasser; and yet in the three cases last put, the absolute property is not divested from, but still remains in the true owner.

But it is argued at the bar, and that appears to be the main ground of argument, that, the sheriff having such special property, the extent can only take the goods of the debtor subject to such special property; just as goods in pawn can only be taken subject to the pledge; and lands mortgaged can only be taken subject to the claims, both legal and equitable, of the mortgagees. In those cases, however, the property has actually been *altered* by the act of the debtor himself, under an express contract made between himself and the other party for the benefit of such other contracting party. It is a contract complete and consummate before the seizure under the extent. It is alienation of the property which amounts, *pro tanto*, to a sale. As, therefore, the crown process could not seize upon property actually parted with and sold, so neither can it seize property so partially sold, except subject to the rights of the partial purchaser. But in the case under consideration, no property has been parted with *267] by the crown debtor, under any contract previously made. *The goods are not sold, they are only in the way to be sold. It would be a better definition of the sheriff's relation to these goods to say, he has them in his custody under a power to sell them, than any actual interest or property in them. His situation, indeed, cannot be better defined than by saying the goods are in *custodiâ legis*; a phrase which plainly distinguishes a mere custody and guardianship of the goods, from a change in the property. So far, therefore, as a special property in the goods is necessary for their safe custody against wrongdoers; and to render the execution of his public duty useful to the judgment-creditor, so far he may be said to have the property; but beyond this, and as against the rights of adverse claimants, there is no authority that he has any property at all. The only question can be, has the property passed from the debtor to any other person?

It has been further contended, that the decisions which have taken place under the statute 21 Jac., c. 29, s. 9, are an authority to show that the execution is executed upon the mere act of seizure by the sheriff, and that the subsequent sale is no more than a formal completion of the execution. By that statute it is enacted, "that the creditors who have security for their debts, whether by judgment, statute, &c., whereof there is no execution or extent served and executed upon the lands and tenements, goods and chattels of the bankrupt, shall come in rateably with the other creditors." And it must be admitted, that under that statute, various decisions have determined, that if the sheriff has once entered and seized, a subsequent act of bankruptcy before sale comes too late to vest the property in the assignees. It is contended, therefore,

that by the seizure of the sheriff, the execution is executed. And, undoubtedly, for the objects and purposes of that statute, the seizure must be taken to be a complete execution of that writ. That *statute was passed before the statute of frauds, at a time when the property in the goods was bound, as against the bankrupt himself and all claiming under him, by the mere suing out and *teste* of execution. In order, therefore, to obviate the manifest inconvenience which would result, if plaintiffs were to lie by, and conceal their writs, and afterwards bring them forward when the effects of the bankrupt had been disposed of by the assignees under the commission; by which means, they would give a false credit to the trader, which it is the direct object of the eleventh section of that statute to prevent; that statute did, for that purpose, compel the plaintiff to put his writ into immediate operation, by making the seizure under the writ the utmost limit of any preference which he could give. But this affords no argument for the general position, that the seizure of the goods, and not the sale, does generally, and in all cases, and for all purposes, alter the property. It was a particular provision made to obviate a particular inconvenience.

It has further been contended, that the seizure under the writ is the completion of the execution, because it has been held, that an execution is an entire thing, and cannot be superseded after it is once begun; and, therefore, if a writ of error is allowed after seizure, but before sale, it is no *supersedas* of the execution, but the sheriff must notwithstanding sell the goods levied under the execution, and return the money into court to abide the event of the writ of error: *Meriton v. Stevens, Willes, 271*. It seems, however, to me, that this rule of practice in the courts affords no grounds for such conclusion. In some of the old cases, the judges appear to have doubted whether the defendant should not have his goods again when the writ of error was *allowed after seizure, but before sale; and the reason assigned for the affirmative of that proposition was, "for that, before sale, the property remains in the defendant." *Shelton's case, Dyer, 67 b*, in margin. But in later cases, the courts have thought it a better exercise of discretion to allow the money to be made under the writ and brought into Court, to abide the event of the writ of error. In this case it is to be observed, the suing of the writ of error is the act of the defendant himself, and the object is to deprive the plaintiff of the fruits of his execution, and it is the laches of the defendant himself that he did not bring his writ of error before the seizure; circumstances which make a manifest distinction between this case, and that of persons who claim under any conflicting rights.

That the actual sale of property seized under the writ issued at the suit of the subject forms the dividing line, so that where the sale is complete before the awarding of the crown process, the property is protected therefrom, but where it is not completed, the property may be seized thereunder, appears from *Fleetwood's case*, where the sale of a lease belonging to the crown debtor, *bona fide* and without covin, before the award of execution for the king's debt, which is analogous to the *teste* of the writ of extent, was held to be good against the crown, and that the crown could not take it in execution, 8 Rep. 171, 2 Roll. Abr. 153. In this case no argument is offered that the seizure alters the property: the whole argument and the judgment of the Court rests on the fact of the actual sale. But, independently of any argument upon principle, a very long series of cases, from the earliest time down to the present, with the exception of the two cases only which have been so often referred to, viz., *Uppom v. Sumner*, and *Rorke v. Dayrell*, *establish the position, that if the subject seizes his debtor's property, either under a writ of execution, a distress, or any other mode which the law allows for the satisfaction of a debt or demand, and an extent issues at the suit of the crown whilst the goods remain in specie, and before anything is done to change the ownership, it is part of the prerogative of the crown to treat this seizure as a nullity, and to proceed to

the satisfaction of the crown debt out of the goods so seized. The first authority is Stringefellow's case, 3 Edw. 6, the more valuable because it took place little more than six years after the passing of the statute 33 Hen. 8; at a time consequently when the object and intention of that statute, and the meaning of its provisions, must have been familiar to all the Judges who were present at its decision. In that case the four Barons of the Exchequer and two of the Judges, namely, Bromley, one of the justices of the King's Bench, and Hales; one of the justices of the Common Pleas, were of opinion, that the actual taking of the goods of Brownesoppe, the debtor, by the sheriff, under an *extendi facias* out of Chancery upon a statute staple, and the seizing them into the hands of the king, but without delivering them to the plaintiff, was no answer to a prerogative writ at the suit of the crown out of the Exchequer, but that the sheriff was bound out of such goods to satisfy the king's debt. And the reason assigned by the reporter for the opinion of the Judges is, "because the property in the goods and lands was not in Stringefellow before they were delivered to him by the liberate." It has been said, however, that this case is to be considered as subject to doubt, on account of the *quære* subjoined to it by the reporter. But it is to be observed, on the other hand, that Rolle inserts the case in his *Abridgment*, 2 Roll. Abr. 158, without the *quære*, expressly *271] stating, "that the sheriff ought to execute the extent for the king's debt, because the property of the goods and lands was not in Stringefellow before they were delivered to him by a writ of liberate, and therefore liable to the king's extent;" and that Lord Hobart, in *Sheffield v. Radcliffe*, Hob. 339, affirms the case to be law. Again, Treby, Chief Justice, in a marginal note to the report, states, that the Barons of the Exchequer agree that this case is law; and the case itself is cited and relied upon as law in the *King v. Cotton, Parker*, 112, where the Chief Baron, in the very elaborate and able judgment upon that case, states, "that he will show Stringefellow's case to be undoubtedly law." And, amongst other instances in which he states it to be recognised, he mentions that Lord Hardwicke, when Chief Justice, in delivering the resolution of the Court of King's Bench in *Brassey v. Dawson*, Mich. 6 G. 2, cited, and relied upon Stringefellow's case as clear law, and said it was grounded on the general rule of preference allowed by law to the king's debts.

The case itself last referred to, of *The King v. Cotton*, which was decided in 1751, was determined on the very same principle which applies to the present case. In that case the goods of Chapman, the king's debtor, were seized under the distress for rent on the 12th of October. On the 14th of October, after the seizure, but before the sale, the extent issued. The Court of Exchequer held, that the property in the goods was not altered by the distress, but until the time of actual sale remained in the king's debtor, and was liable to the operation of the writ of extent. How can any real distinction be made between the landlord seizing the goods for the purpose of making his rent by a subsequent sale, and a sheriff seizing under a *fi. fa.* for the purpose of making the *272] plaintiff's debt by a subsequent sale? Or, if there is any distinction, is it not stronger in favour of the landlord, who might reasonably be supposed to have acquired a special property when he seized for his own benefit? Indeed, both the argument and the judgment in that case proceed on the assumption that the present case is in favour of the crown, and that it could not be disputed but that the extent would operate upon goods seized by the sheriff, but not yet sold. Again, in *The Attorney-General v. Capel*, determined in the Exchequer in 1686, 2 Show. 481, where the extent was tested the 24th of December, after a commission of bankrupt had issued against the debtor, but before the assignment made by the commissioners, it was held by the Court, that if the extent comes before the assignment, it shall and must be preferred; and the case of *The King v. Crump and Hanbury* is cited and relied upon as an authority in point, to which the reporter adds this observation: "Extents have been held good, that have been made upon goods actually levied by virtue

of a fieri facias, and in the sheriff's custody, the extent coming before a bill of sale made, so as the property was not altered."

These two cases, therefore, are direct authorities; the one that in the case of a distress, where goods are *in custodia legis*, after the seizure, but before the sale; and again, in the case of a bankrupt, where goods are also *in custodia legis* between the seizure by the messenger, and the actual assignment by the commissioners; still the goods of the king's debtor are subject to an extent at the suit of the crown, tested before the actual sale under the distress, or before the actual assignment to the assignee; and the just inference would seem to be, that in the case of a seizure by the sheriff under a fi. fa., where the goods are also *in custodia legis*, an extent tested before the sale ought to be entitled to the same operation. But Stringefellow's case, acknowledged as [273] it has been in various and repeated instances, and by the most eminent Judges, is a direct authority on the very point now under discussion. And since that decision, various other cases have been decided in the same way, and after great argument, by the Court of Exchequer. I refer particularly to *The King v. Wells and Allnutt* (16 East, 278, in a note), in 1805, and to the case of *Rex v. Sloper and Allen*, 6 Price, 114, where the Exchequer acted on the authority of the latter case.

The only two cases which have received a contrary decision are those before referred to, viz., *Uppom v. Sumner*, 2 W. Bl. 1251, in Easter term 1779, by the Court of Common Pleas, and *Rorke v. Dayrell*, 4 T. R. 402, in 1793, by the Court of King's Bench; cases undoubtedly entitled to great respect, when the authority of the eminent persons by whom they were adjudged is taken into consideration. I say these two cases only have received a contrary decision; for I cannot consider the case of *Lechmere v. Thoroughgood* and *Another*, 3 Mod. 236, which is sometimes cited, to be an authority upon the present question between the crown and the subject. That was an action of trover by the assignees of a bankrupt against the sheriff, who had entered under a fi. fa.; and upon a special verdict, one of the questions was, whether the fi. fa. was well executed, the sheriff having seized, though not sold under the writ before the commission of bankrupt had issued; and upon that question it was held, that the fi. fa. was well executed, so that the assignees of the bankrupt's estate could not have a title to those goods which were before taken in execution, and, therefore, *in custodia legis*. So far, *undoubtedly, the [274] case is an authority. But it was further stated in the special verdict, that after seizure under the fi. fa., and before any venditioni exponas, viz., 4th May, an extent in aid issued, whereupon parcel of the goods mentioned in the declaration was seized by the sheriffs upon the same extent, and sold, and the money paid to the creditor. And one question stated by the reporter is, whether the extent did not come too late? And he says it was held, that it did. Now upon this point the case cannot be an authority; for the priority between the extent and the fi. fa. was perfectly immaterial to the plaintiffs; in that action they were out of court upon the title of the judgment creditor. All further discussion was *res inter alios acta*. No one appeared for the crown. No argument took place before the Court on behalf of the crown. The only inference, therefore, to be drawn from that case is, that the plaintiffs, the assignees, had no right against the judgment creditor; but whether the crown, who had received payment out of part of the goods seized, had such right or not, is left undetermined, and, indeed, untouched.

The question, therefore, is, whether the two cases above referred to are of such authority as to overturn the decisions which, both before and since, have been given by the Court of Exchequer. These two cases, as I have already observed, are decided, partly upon the ground that the property in the goods is altered by the seizure under the fi. fa., and partly upon the ground, that by the statute 33 Hen. 8, c. 39, such a restriction was put upon the king's prerogative, that the preference now contended for ceased to exist. And these are the only grounds upon which these cases are rested.

As I have already stated the reasons for the opinion which I have formed, that no alteration takes place until the actual sale under the *fi. fa.*, I shall confine my remaining observations to the consideration of the second *point
 *275] in this case, viz., the statute of Hen. 8. By the 33 H. 8, c. 39, s. 74, it is enacted, "that if any suit be commenced or taken, or any process be hereafter awarded for the king, for the recovery of any of the king's debts, the same suit and process shall be preferred before the suit of any person. And the king shall have first execution against any defendant, of and for his said debts, before any other person, so always that the king's said suit be taken and commenced, or process awarded, for the said debt at the suit of the king before judgment given for the other person."

That this clause of the statute is not to be interpreted according to the strict letter of it, has been at all times admitted. Taken literally, it would give the subject a greater advantage against the execution at the suit of the crown, than he possessed against that of any subject. If the subject has obtained judgment before the teste of an extent, such judgment, according to the letter of the statute, would postpone the crown's remedy under the extent for an unlimited time, whereas the same judgment would have no operation whatever against an execution at the suit of a subject, even though issued in a suit which was commenced after such judgment was signed. In the case of the crown, the subject's judgment would give him the preference though his execution were last in point of time. In the case of a subject, the first execution against the goods must be preferred. The exact literal sense of the statute must therefore be departed from; and, if that sense is once given up, we are at liberty to adopt that which appears to be the nearest to the letter of the statute, and at the same time which best carries into effect the object and intention of the legislature. For this purpose it should be considered, what the exact state of the prerogative of the crown was at the time this statute was passed, in order that we may be the better able to judge how much of it was intended to
 *276] be abolished by the statute. By the ancient prerogative of the crown as stated by Lord Coke in 1 Inst. 131 b, "The king was to be preferred in payment of his duty or debts by his debtor, before any subject, although the king's debt or duty be the latter; and the reason hereof is, for that *thesaurus regis est fundamentum belli et firmamentum pacis*. And, thereupon, the law gave the king remedy by writ of protection to protect his debtor, that he should not be sued or attached until he paid the king's debt." So the law remained until the statute 25 Ed. 3, c. 19, which was introduced, as Lord Coke says, "from the inconvenience that grew, that for to delay other men of their debts, the king's debts were the more slowly paid." By that statute it was enacted, "That notwithstanding such protections, the parties which have actions against their debtors shall be answered in the king's court by their debtors; and if judgment be thereupon given for the plaintiff or demandant, the execution of the same judgment shall be put in suspense till gree be made to the king of his debt; and if the creditors will undertake for the king's debt, they shall be thereunto received, and shall have execution against the debtors of the debt due and adjudged to them, and also shall recover against them, as much as they shall pay to the king for them." The law, therefore, at the time of passing the statute Hen. 8, was, that although the king granted his protection to his debtors, the subject might, nevertheless, sue his debtor, and continue his suit to judgment; but still the execution was suspended until the king's debt was paid. The crown, therefore, might still postpone the execution of the subject to an unlimited time, simply by delaying to take out execution in its own suit: but by the statute of Hen. 8, this power of the crown to postpone the execution of the subject's judgment to an unlimited time is taken away, except
 *277] in one single case; viz., where the suit of the crown is *commenced before the judgment has been obtained by the subject. In that case, I consider the old prerogative still remains. Since the statute, therefore, where

the crown has commenced its suit before the subject's judgment, there can be no race between the crown and the subject, which shall sue out the first execution; the debt of the crown must be first satisfied, before the subject can execute his writ. But where the crown has not commenced its suit, or awarded its process, before the subject's judgment is signed, there the field is open both to the crown and the subject, and if the subject can first complete his execution before the crown issues its writ, he may enjoy the fruit of it. Still, however, even in this case, if the execution of the crown is concurrent with that of the subject, if it is actually issued before the subject's execution is complete, the statute of Hen. 8 does not provide for the case, but leaves the old common law to operate, "*quando jus domini regis et subditi concurrunt, jus domini regis preferri debet.*" The rule of law has always been, that the prerogative of the crown cannot be taken away, except by express and unambiguous words; but it is difficult to find any words in the statute which apply to two writs of execution in competition with each other; one at the suit of the crown, the other at the suit of the subject. It is enough, however, to say it is left in doubt; for at the time in which this statute passed, it is impossible to believe such a prerogative was abandoned by the crown, if there are no express words to show the intention.

After all, the important point is, that the line should be distinctly drawn and well defined, which forms the boundary between the right of the crown and the right of the subject, with respect to executions of the subject's judgments. It is admitted on all hands, that if the extent issues before the seizure, it is entitled to preference. Suppose the sheriff actually seizes, and the *extent then issues, and the law says, that as it issued *before the sale* it is to be preferred? The expense of the entry and execution will not fall upon the plaintiff in the action, for his debt has not been levied; those expenses will be allowed by the exchequer upon payment of the king's debt. The only consequence is, that the subject discovers, a very few days later, that his execution cannot be satisfied until the crown debt is paid.

For these reasons, the opinion which I have formed upon the first question proposed to us is, that the actual sale under the *fi. fa.* forms the dividing line between the right of the crown and the right of the subject; and, consequently, that the extent is in the present case to be preferred to the writ of *fi. fa.* issued at the suit of the subject.

Upon the second question proposed by your Lordships I shall say no more, than that it appears to me to make no difference whether the extent is an extent in aid, or an immediate extent at the suit of the crown; all the authorities agreeing that the same privileges extend to the one which belong to the other.

I have the authority of Mr. Justice Park, who is unavoidably absent on this occasion, to express his entire concurrence with the opinion formed by the majority of his Majesty's Judges.

Lord TENTERDEN, C. J. My Lords,—In the case between Daniel Giles, the late sheriff of the county of Hertford, plaintiff in error, and Harry Grover and James Pollard, defendants in error, which was argued some time ago before your Lordships, the learned Judges have given their answer to certain questions that were proposed to them by the House. By these answers a very great majority of the Judges coincided in that opinion upon which I propose to submit to your Lordships, that the judgment of the Court of *Exchequer should be affirmed, two only being of a different opinion.

The case may be shortly stated thus: An execution having issued at the suit of a subject, the sheriff took possession of the goods of the debtor, but before he made any disposition of those goods by bill of sale to the creditor, or in any other way, an extent came at the suit of the crown; and the question is, whether an extent thus coming at the suit of the crown, while the goods remain in the hands of the sheriff, is to be preferred to the execution taken out by the subject. The majority of the Judges on the question proposed are of opinion in the affirmative, namely, that the crown's extent should be preferred. It is in con-

formity with that opinion, in which I most heartily concur, and have long entertained,—for the subject is by no means new in the courts of justice,—that I shall take the liberty of delivering my opinion, that the judgment of the Court of Exchequer should be affirmed.

As I have already stated, the question has arisen more than once in courts of law, and there are two recorded decisions, in two cases so often alluded to, upon the subject; one, the case of *Uppom v. Sumner*, decided in the Common Pleas several years ago, and the other, the case of *Rorke v. Dayrell*, decided in the Court of King's Bench after the decision of the other case. Not to notice the prior decisions in the Court of Exchequer, it may be sufficient for the present to say, that there have, since the last of those decisions, namely, the decision of *Rorke v. Dayrell* by the Court of King's Bench, been two or three decisions in the Court of Exchequer to the contrary of those two prior decisions.

Your Lordships well know that the Barons of the Court of Exchequer are very peculiarly conversant with the revenue of the crown. It is their peculiar *280] duty to *attend to and enforce the rights of the crown against the subject, as connected with that revenue.

The two cases which are reported, and which are against the rights of the crown, appear to have proceeded upon two grounds; one ground was, that by the seizure of the sheriff the property of the goods was divested out of the debtor; another ground was, that according to the true interpretation of the statute passed in the time of Henry VIII. the execution of the crown was not to be preferred.

Now, with regard to the first point, namely, the supposal that the property was divested out of the debtor by the seizure of the goods,—by the act of the sheriff in seizing the goods,—it appears to me, upon due consideration, and so the majority of the Judges thought, that the proposition could be maintained. Property cannot be divested out of one person without being vested in another; and it is impossible to say in whom the property does become vested, if the investment be taken out of the debtor. It has been argued that the property is vested in the sheriff, because there are authorities to show that the sheriff, if the property be taken out of his hands, may maintain an action of trover against the wrongdoers. These actions are maintainable upon a ground perfectly distinct from the right of property; they are maintainable upon the ground of possession: any man in possession of goods, whether as the bailee or otherwise, may in his own name maintain an action against any party who shall deprive him of the possession. The power, therefore, of bringing an action of this kind does by no means prove that the property is in the sheriff.

It has been supposed by some that the property is in the judgment-creditor: but it is perfectly clear, upon consideration of the subject, that the judgment- *281] creditor has no property in the goods while they *remain in the hands of the sheriff. If the sheriff executes the process of the Court, and makes a bill of sale to the plaintiff in the action, then the judgment-creditor obtains the property; but until that is done, while the goods are in the possession of the sheriff they are in the custody of the law, but still remain the property of the debtor to whom they originally belonged. If the property were divested, some ceremony would be necessary to revest it; but there is no such ceremony. If the debtor pays the money to the sheriff, the sheriff withdraws; he executes no conveyance; he does not even go through any ceremony; but all he does is to withdraw and leave the goods where they were. It appears to me, therefore, that putting the case shortly upon that ground of a supposed divesting of the property, it can by no means sustain the two cases which I have referred to, and which were decided against the right of the crown.

It remains to consider the effect of the statute upon which so much reliance was placed. That was the statute passed in the reign of Henry VIII.; and upon the first view of it, considering that statute by itself, and without regard to the state of the law as it previously existed, it might seem that the argument founded upon it was correct. By that statute it is enacted, "That if

any suit be commenced, or any process be hereafter awarded for the recovery of any of the king's debts, the same suit and process shall be preferred before the suit of any person or persons, and the king, his heirs and successors, shall have first execution against any defendant or defendants of and for his said debts, before any other person or persons, so always that the king's suit be taken and commenced, or process awarded for the said debt at the king's suit, before judgment given for the said other person or persons."

*As I have already intimated, if that statute were read without regard to the state of the law as it existed at that time, it certainly [282] would furnish an argument against the right of the crown; but that act of parliament, like every other, is to be construed with regard to the state of the law as it previously existed; and so construing that statute, it will be found not to apply to a case like the present.

By the common law, the king had a right of preventing any subject from suing any of his debtors; it was the practice, and it was a right which was sometimes exercised, of granting to those who were his debtors a protection, which prevented any of his subjects from bringing any suit against them. Thus the law stood, until an act of parliament passed, which I shall draw your Lordships' attention to, namely, the statute of the 25 Ed. 3, c. 19. That statute shows what the law was before it was passed, and introduces an alteration in favour of the suitor; and it is in these terms; "Forasmuch as our lord the king hath made before this time protections to divers people which were bounden to him in some matter of debt, that they should not be impleaded of the debts which they owed to other till they had made satisfaction to our lord the king of that which to him was due by them, by reason of his prerogative; and so during such protections no man hath dared to implead such debtors;" your Lordships will observe that the preamble recites the law to be as I have stated it, namely, that the king, by his protection, was in the practice and had a right to prevent any person from commencing any suit against his debtor;—then it goes on to enact, "It is accorded and assented, that, notwithstanding such protections, the parties which have actions against their debtors shall be answered in the king's court by the debtors; and if judgment be thereupon given for the plaintiff or demandant, the *execution [283] of the same judgment shall be put in suspence till satisfaction be made to the king of his debt. And if the creditors will undertake for the king's debt, they shall be thereunto received, and moreover shall have execution against their debtors of the debt due to them, and also shall recover against them as much as they shall pay the king for them." This statute, therefore, so far altered the law as that it enables the subject to bring an action against his debtor, although he be a debtor to the crown; which before he could not do: but nevertheless it prevents him from taking out execution unless he first satisfies the debt of the crown.

This was the state of the law before the passing of the statute to which I have referred; namely, the statute of 33 Hen. 8. The subject might commence an action, and might have proceeded even to judgment, but could have no execution without satisfying the king's debt. All, therefore, that the statute of Hen. 8 does, is to allow a party to have execution without satisfying that debt; it authorizes him to take out his writ, but does not apply to a case in which there are conflicting executions, which is the case in question. If it should be taken literally that the king should not have execution unless his suit were commenced before a judgment given for the subject, the consequence would be, that the subject might obtain judgment against the king's debtor, and forbear taking out execution for a considerable length of time, and during all that time prevent the crown from recovering its debt by taking out execution: that would be open to collusion on the part of the subject, and operate to the great prejudice of the king's revenue and his rights.

I am therefore of opinion that the true effect of this statute is to allow the subject to obtain judgment, and even to sue out execution, without first making

*284] satisfaction to the king; but, nevertheless, to leave the law in *all other respects as it stood before; namely, if the king's execution comes while the goods remain the property of the debtor,—and, as I have already stated, my opinion is, that they do remain the property of the debtor, although they be taken possession of by the sheriff,—the king's execution shall prevail. The contrary of that has been decided in the two cases of *Uppom v. Sumner* and *Rorke v. Dayrell*; but there are two or three decisions of the Court of Exchequer in accordance with my view of the subject. I do not know that it is necessary to trouble your Lordships with referring to those cases; they were very much considered in the Court of Exchequer; and the decision in one of them afterwards became the subject of inquiry in the Court of King's Bench. The case is reported by the name of *Thurston v. Mills*: the point of law, which is the question in the present case, was twice argued before that Court, and a third time upon a question, preliminary to the question argued on the two first occasions, and which was really the question in the cause. Upon that preliminary question, which regarded only the form of the action, the Court of King's Bench decided against the plaintiff. The main question was there left untouched; but I think it may be collected, though not very clearly, that the opinion at least of some of the judges who sat in the court at that time,—Lord Ellenborough being at the head of them, and Mr. Justice Le Blanc being one of them,—was in favour of the crown. I cannot assert positively that it was so; but, in reading the report of the case, and from my own recollection of the questions introduced into the argument of it, I am strongly inclined to think that it was so, and I formed that opinion at the time.

The ground upon which those two decisions of *Uppom v. Sumner* and *Rorke v. Dayrell* have proceeded as to the divesting of the property out of the debtor *285] and vesting it in another, failing, in my opinion, and the *argument also that was founded upon the construction of the statute of Hen. 8, failing, on a due consideration of that statute with regard to the law as it existed before, my opinion is, that the crown has a right of priority in this case before the subject; and, consequently, that the judgment of the Court of Exchequer must be affirmed. I should further say, that according to the practice at the time, although the law has since been altered, the judgment of the Court of Exchequer in this case was removed by a writ of error, and argued before the Chief Justices of the King's Bench and of the Common Pleas, of whom I was one, and my Lord Wymford the other: we did not come to the same conclusion upon that occasion, and, therefore, we affirmed the judgment, understanding and meaning that the question, which was one of great importance, should be brought to this house: I have since conferred with my Lord Wymford upon the subject, and I have learned from him that he is now perfectly satisfied with the opinion which I have ventured to give to your Lordships, and by which I affirm the judgment of the Court of Exchequer.

Lord BROUGHAM, C., after reviewing the cases, said, I certainly entertain a strong opinion, that the judgment of the Court of Exchequer in this case is right, and ought, by your Lordships, to be affirmed. I entirely go along with the opinions pronounced by the majority of the learned Judges in answer to the questions put to them. It is of much more importance that this question should be settled, than it is in which way it shall be settled.

Judgment affirmed.

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*MEMORANDUM.

John Williams and C. C. Pepys, Esquires, having resigned their respective offices of Attorney and Solicitor-General to the Queen, were succeeded in the same by Mr. Serjeant Taddy and Mr. Serjeant Merewether.

C A S E S

ARGUED AND DETERMINED

IN THE

COURT OF COMMON PLEAS,

AND

OTHER COURTS,

IN

Michaelmas Term,

IN THE THIRD YEAR OF THE REIGN OF WILLIAM IV.

SHAW *v.* ARDEN and Another, Two, &c. *Nov. 3.*

In considering an attorney's bill, the jury may discard an item for work entirely useless, though upon an item for work partly useless, or in respect of which there has been any negligence, the client's remedy is only by a cross-action.

To an action for the recovery of 19*l.* 8*s.* 11*d.*, the defendants, attorneys, pleaded a set-off of 21*l.* 13*s.* 6*d.* for business done for the plaintiff in the palace-court, and paid 3*l.* 10*s.* into court.

At the trial before Tindal, C. J., the plaintiff contended that the business, in respect of which the defendants claimed a set-off, ought never to have been done; and that the defendants, therefore, were not entitled to make any charge.

That transaction was as follows:—The plaintiff had employed the defendants, as his attorneys, to sue one *Cooper and his son, in the palace-court, upon a joint and several promissory note. The defendants commenced two actions. [288]

When the causes were on the eve of judgment. Cooper, the father, came to the plaintiff and offered terms of compromise; upon which it was agreed that a deposit should be made of two carts as a security, and that 4*l.* 10*s.* should be paid towards the debt and costs up to that time. Notwithstanding which, the plaintiff addressed the following letter to his attorneys, the defendants:—“Cooper left with me 4*l.* 10*s.* on Wednesday evening, and was to have deposited property in my hands, part yesterday and part this morning, which he has not done; therefore, I now will show them no more indulgence.”

Upon the receipt of this letter, the defendants signed judgment and issued execution against the Coopers, who then obtained a rule, calling on the plaintiff, Shaw, to show cause why the judgment should not be set aside as having been signed contrary to good faith. The defendants, on the part of Shaw, showed cause, but the rule was made absolute with costs; which costs, paid by the defendants to Cooper's attorney, together with the plaintiff's cost of opposing the rule, and the charge for signing judgment, constituted the defendants' set-off in this action.

The Chief Justice directed the jury to consider, whether the judgments had been signed and supported by the defendants in the exercise of a proper discretion, with a view to the interest of their client; or, whether those proceedings were unnecessary and improper.

The jury having found a verdict for the plaintiff with 16*l.* damages, *Adams*, Serjt., now moved to set it aside, on the ground of an alleged misdirection, and the improper admission of evidence touching the utility of the proceedings in the palace court.

*289] *The claim by way of set-off ought to have been dealt with in the same way as if the defendants had brought an action to recover the amount of their bill. To such an action, allegations of negligence, or of want of skill or judgment, would be no answer, but must form the subject-matter of a cross action; Templer v. M'Lachlan, 2 N. R. 136. The defendant in such an action may, perhaps, be permitted to show that the whole of the work done was useless; Hill v. Featherstonhaugh, 7 Bingh. 569; but he cannot divide the bill, admitting some of the items and resisting others, on the ground that he has derived no benefit from them. Charges must often be made for work which ultimately turns out to be useless, but which, at the time, the attorney may have entered on in the exercise of a sound discretion, or honestly deeming it useful. And it is clear, that an attorney is liable only for gross negligence or gross want of skill, and not for a mere error in judgment: it would be fatal to him if he were responsible for the success of every step in a cause. Nor is it necessary for the safety of the client that he should be let into such a course of defence; for the officer of the Court, on taxation of the bill, will strike out all charges for work improperly undertaken. Here, after the plaintiff's letter, the charge for signing judgment, at least, was unexceptionable, whatever may be thought of the charge for showing cause against the rule for setting judgment aside: so that the whole of the defendants' charges cannot be rejected as improper, and therefore the whole must stand.*

TINDAL, C. J. The verdict in this cause having been given for a sum under 20*l.*, the rules of the Court do not permit a new trial unless the Judge has misdirected the jury, or has received or rejected evidence improperly. The question, therefore, now is, whether evidence was improperly admitted, or the *290] cause was improperly left to the jury. The defence to the action was a set-off to more than the amount of the plaintiff's demand. The plaintiff denied the validity of the claim of set-off, and there is no safer way of determining that point than by considering it as if the defendants were suing on a bill for business done.

The defendants were retained by the plaintiff to sue the Coopers, father and son, for the amount of a promissory note. Two actions were brought in the palace court, and judgment was about to be signed, when terms of compromise were offered, under which a deposit was to be made, and costs paid up to that time, by the Coopers. The defendants, however, signed judgment, as Cooper alleged, against good faith; and a rule to set it aside on that ground was opposed by the defendants unsuccessfully. The claim of set-off in the present action was made up of the charges for signing judgment; for unsuccessfully opposing the rule to set it aside; and for the costs of that rule paid to Cooper's attorney. Would the defendants have been entitled to recover these charges in an action on their bill?

This is not a case for considering whether the bill be divisible or not, for the whole of the items objected to relate to one transaction, and no principle of law is more clearly established than this, that a party cannot enforce a charge for doing business which is useless to his employer. The question therefore was, whether this work was necessary for the plaintiff, or was entered on from the defendants' over-zeal, and a view of making business for their own advantage. That it was useless to the plaintiff, appears from the result. The result, alone, would not indeed be conclusive to show it was improperly undertaken, but that was a question for the jury, and one on which the evidence was conflicting. Upon these facts, therefore, there was nothing improper in leaving it to the jury to consider, whether, in signing judgment, the defendants acted with the discretion due to the plaintiff's *interests, or whether it was altogether a [*291 useless work. That was the direction given to the jury, who by their verdict disallowed the set-off. Therefore, even if the verdict were wrong, the case falls within the rule which prohibits a new trial for sums under 20*l*.

GASELEE, J. The jury have come to a conclusion different from that which I should have thought correct; but the jury having decided, upon a proper direction, the case falls within the general rule.

BOSANQUET, J. I abstain from entering into the facts, because a rule for a new trial cannot be granted, unless the jury were misdirected, or evidence improperly received or rejected. Here the case was properly left to the jury, and even admitting one of the charges to have been justifiable, the jury had a right to discriminate between the items, and reject charges for work useless to the plaintiff.

ALDERSON, J. I am of the same opinion. The first question is, whether the jury are authorized to discriminate between the items, and decide which constitute charges for useful work, and which for useless. And I am of opinion they are so authorized. If, indeed, an entire item be for work, partly useful, the jury would be precluded from reducing that item, in an action to recover the amount of the bill, and the client must, in such a case, resort to a cross-action; but entire items for useless work may be discarded by the jury. That was established in *Hill v. Featherstonhaugh*, which is an express authority for dividing an attorney's bill.

The next question is, whether this case was properly left to the jury? I have no doubt that it was; and if so, we cannot inquire into the propriety of the verdict, the amount recovered being under 20*l*. Rule refused.

*WILLIAMSON and Another v. DAWES. Nov. 7. [*292

To a plea of coverture the plaintiff replied, that before the cause of action accrued, the defendant's husband became bankrupt, absconded without appearing to his commission, and continued to reside in foreign parts: Held, ill.

To a plea of coverture the plaintiffs replied, that James Dawes, the husband of the defendant, long before the making of the several promises and undertakings in the declaration mentioned, and continually afterwards, until the suing out of the commission of bankrupt thereinafter mentioned, was a dealer and chapman, and sought his trade of living by buying and selling. That afterwards, to wit, on the 7th of October, 1824, the said J. Dawes being indebted to one James Pool in the amount of 100*l*., and more, committed an act of bankruptcy within the meaning of the several statutes then relating to bankrupts; and thereupon, to wit, on, &c., at, &c., a certain commission of bankruptcy under the great seal, bearing date at Westminster the day and year last aforesaid, was duly awarded and issued against the said J. Dawes upon the petition of the said J. Pool, a creditor then and at the time of the act of bankruptcy of

the said J. Dawes to the amount of 100%. and more, according to the form of the several statutes then in force concerning bankrupts. That by virtue of the said commission, and by force of the said several statutes, the said J. Dawes was, afterwards, to wit, on, &c., at, &c., in due form of law found and declared bankrupt by the major part of the commissioners named in the said commission, within the true intent and meaning of the said several statutes, upon an act of bankruptcy committed before the date and issuing forth of the said commission, to wit, at, &c. That afterwards, to wit, on, &c., at, &c., due notice was given to the said J. Dawes, and was also given and published in the *293] London Gazette, that such commission of bankruptcy had been and was

awarded and issued forth against him the said J. Dawes, and that he had been declared a bankrupt thereon, and was required to surrender himself to the major part of the commissioners, in and by the said commission named and authorized. That the several meetings were duly appointed for the said J. Dawes's surrendering himself and making a full disclosure and discovery of his estate and effects, and finishing his examination under the said commission according to the form of the statutes in such case made and provided, and then in force, to wit, on the 6th and 13th days of November, and on the 11th of December in the said year 1824, and finally on the 29th day of January, 1825, until which last day the time for the said J. Dawes surrendering to the said commission had been duly enlarged, and notice thereof duly published in the London Gazette, to wit, on the 7th of December, 1824, aforesaid. But that the said J. Dawes after the issuing of the said commission, to wit, on the 8th of October, 1824, absconded and departed from and out of this kingdom, and went and resided in parts beyond the seas, to wit, in the kingdom of France; and that he the said J. Dawes never surrendered himself to the major part of the said commissioners in and by the said commission named and authorized, nor suffered himself to be examined by them touching the disclosure and discovery of his estate and effects, although warned by proclamation to surrender himself according to the form of the statute in such case made and provided, and then in force concerning bankrupts. Which said commission was still in force, to wit, at, &c. And the plaintiffs further said, that J. Dawes had always from the time of his so absconding and departing from and out of this kingdom as aforesaid, hitherto lived in exile in parts beyond the seas as aforesaid, and that *294] during all the *time aforesaid the defendant had lived in this kingdom separate and apart from the said J. Dawes, and traded and carried on business as a single woman and a sole trader, to wit, at, &c., and that the plaintiffs did not give credit to the said J. Dawes, but traded and dealt with the defendant as a feme sole, and on her sole credit; and that she the defendant made the said several promises and undertakings in the declaration mentioned as such *feme sole* as aforesaid: and that, they the plaintiffs were ready to verify, &c.

Demurrer and joinder.

Bompas, Serjt., appeared for the defendant, but the Court called on

Taddy, Serjt., to support the replication. Where the husband is abroad with no probable expectation of return, the wife, with a view to her necessary support, must be considered in the situation of a *feme sole*. This was the principle laid down in *De Gaillon v. L'Aigle*, 1 B. & P. 357; *Sparrow v. Caruthers* (cited in 1 T. R. 7, 2 Bl. 1197), and *Walford v. Duchess De Pienne*, 2 Esp. 554, and recently confirmed in *Ex parte Franks*, 7 Bingh. 762, where the wife of a felon, sentenced to transportation for seven years only, was held competent to carry on trade as a *feme sole*, although her husband still remained in the hulks. In *Belknap's case* (Co. Lit. 138, a; 1 B. & P. 357, note), the wife was entitled to sue, although her husband was only banished till he should obtain the king's favour; Year Book, 1 H. 4, 1 a: and *Margery Weyland's case*, Co. Lit. 138 a, is to the same effect. *Marshall v. Rutton*, 8 T. R. 545, *295] only decides that the receipt of a separate maintenance does not *expose a wife to the liabilities of a *feme sole*. [ALDERSON, J. The replica-

tion here does not contain any averment that the defendant's promise was made while the husband was abroad.] That is involved in the allegation that her husband became bankrupt and absconded before the promises, and the want of a more precise averment can only be objected to on special demurrer.

TINDAL, C. J. The replication is bad in substance, for it contains no express averment that the defendant's promise was made during the absence of her husband, nor any equivalent allegation; so that the question meant to be raised cannot be determined on this record. A mere slip of the pleader, however, we should allow to be amended, if the groundwork of the plaintiff's argument were not entirely wanting. The principle established by the case of *Marshall v. Rutton* is, that nothing but the civil death of the husband, or something tantamount, will subject a wife to the liabilities of a *feme sole*; and looking at the facts of this case which cannot be altered, the replication does not state such an involuntary absence of the husband, as, within the principle of former decisions, can communicate to the wife the privileges, or affect her with the liabilities of a *feme sole*. It alleges no more than a temporary absconding.

GASELEE, J. I am of the same opinion. In the cases in which the wife has been held liable during her husband's absence abroad, the husband has either been a foreigner, or in a situation which precluded return. No such absence appears in the present case; and if this replication were held sufficient, the wife would be liable whenever a husband absconds.

BOBANQUET, J. I am of the same opinion. In the case of transportation, it is the duty of the party to stay *abroad; here, it was his duty to return. Here, too, the husband is an *Englishman*. In *De Gaillon v. L'Aigle*, and *Walford v. Duchess de Pienne*, the husband was a foreigner, which makes an essential difference in the case. If this absence were sufficient, a wife must be considered a *feme sole* whenever a husband absconds.

ALDERSON, J. Lord Coke explains what is meant by calling abjuration a divorce between husband and wife: "*Sed opus est interprete*; for by law no subject can be exiled or banished his country, whereby he shall *perdere patriam*, but by authority of parliament, or in case of abjuration; and that must be upon an ordinary proceeding of law, as it was in this case of *Weyland*." He had before said, "An abjuration, that is, a deportation for ever into a foreign land, like profession (whereof our author speaketh here), is a civil death; and that is the reason that a wife may bring an action, or may be impleaded during the natural life of her husband. And so it is if by act of parliament the husband be *attainted* of treason or felony, and during his life is banished for ever, as *Belknap, &c.*, was; this is a civil death, and the wife may sue as a *feme sole*." Here, there is no more than a *charge* of felony.

Judgment for Defendant.

*GIBSON and Another v. LUPTON and WOOD. Nov. 13. [297]

Two persons, not partners, who concur in giving an order for one undivided parcel of goods, are not therefore liable jointly to the seller, if upon the whole of the transaction the intention of the parties appears to have been that the buyers should be severally responsible for the amount of their respective interests in the goods.

ASSUMPSIT for the price of corn sold and delivered by the plaintiffs to the defendants. Plea, general issue. At the trial before Alderson, J., York Spring assizes, 1832, a verdict was taken for the plaintiffs for 623*l.* 7*s.* 5*d.*, subject to the opinion of the Court on the following case:—

The plaintiffs were partners, trading at Hamburgh, under the firm of Messrs. John Fisher and Co. The defendant, Lupton, was an oil merchant at Leeds, and had had previous dealings in corn with the plaintiffs. The defendant,

Wood, was a corn miller at Headingley, near Leeds, and before the transaction of the 1st December, 1830, hereinafter mentioned, and out of which this action arose, had not had any dealings with the plaintiffs.

The defendants were never in partnership as general partners. On the 1st December, 1830, the defendants gave an order to Slater, the plaintiffs' agent, which was reduced into writing by the defendant, Lupton, in the following terms:—"Ordered of the house of John Fisher and Co., Hambro', a small loading of wheat, say 750 or 800 quarters of the best red wheat, selected from the most favoured districts, where it can be procured the most free from sprouts, the heaviest in weight, and the best in colour. As to the price, it is left to their discretion, minding to pay proper attention to our interests, both in that as well as time of purchase; and to effect said purchase immediately, if it is imagined betwixt the present time and Christmas, to be done the *best."

*298] Payment for the same to be drawn upon each of us in the usual manner; supposing that this is for one-third part thereof to be drawn on the purchase, and the other two-thirds at the time of shipment and handing bill of lading."

Slater transmitted a copy of this order to the plaintiffs, and in a letter from him accompanying it, was the following remark: "Mr. Wood lives at Headingley, near Leeds, a very good man, and imported last season from Tiedeman."

The plaintiffs, in pursuance of the order, purchased a quantity of red wheat in granary at Königsberg, which was to be shipped free on board at Pillau, in the spring; and on the 11th of January, 1831, wrote a letter of that date, addressed to "Jonathan Lupton, Leeds, and Thomas Wood, Headingley, near Leeds," in which, among other things, they stated, "We have made a purchase for your joint account, of 756 quarters fine red wheat."—"For the first one-third of the price, amounting to 756*l.*, we have this day drawn at three months, payable in London,

378*l.* Mr. J. Lupton, }
378*l.* Mr. T. Wood, } own order."

756*l.*

"And we hereby bind ourselves to you for the regular delivery of this wheat."—"On the 25th of February we will value on each of you in like manner at three months date, for 378*l.*"

The plaintiffs drew two bills, dated the 11th of January, in conformity with this advice.

February 17, 1831, Lupton wrote as follows to the plaintiffs:—"Neighbour Slater has informed myself and T. Wood of what you have done for us regarding the wheat."—"I feel disposed to give you directions to make sales again *299] of that wheat, if you can realize for us *a price of 67*s.* or 70*s.* per quarter. I have not altogether the authority of my Co. in the business, but I think he will approve of this measure."

February 25, 1831, the plaintiffs wrote an answer, addressed, as their letter of the 11th of January, to Jonathan Lupton, Leeds, and Thomas Wood, Headingley, near Leeds, dissuading a resale of the wheat, and adding: "Meantime, agreeable to the terms of the contract, we have again paid one-third amount on account of the purchase, and we this day took the liberty of valuing for our reimbursement, at three months, payable in London,

180*l.* }
195*l.* } our order on Jonathan Lupton,
200*l.* }
175*l.* } our order on Thomas Wood."

"And we hereby renew our guaranty given on the 11th ult., that we hold you both harmless for the advance up to the period of lading and invoice."

The plaintiffs drew bills in conformity with this advice, and apprised Lupton by letter of April 26, 1831, that they had despatched the wheat; at the same time they forwarded an invoice, and drew upon him one bill of exchange of the same date as the letter, for 448*l.* 7*s.* 5*d.* at three months, and a similar bill for

4487. 7s. 5d. on the defendant, Wood: this was for the remaining one-third of the price of the wheat, and for charges. The letter was addressed like those which preceded it, to Lupton, at Leeds, and Wood, at Headingley, near Leeds; and the invoice stated the wheat to be shipped by order and on account of Lupton, Leeds, and Wood, Headingley, near Leeds. The wheat was duly shipped from Pillau for Goole; the bill of lading was forwarded from Pillau to the plaintiffs, at Hamburg; and by them was endorsed and forwarded to the defendants in the letter of the 26th of April, and on coming to the *possession of the defendants, was endorsed by each of them. The wheat [300 was delivered at Goole, the port of discharge, and the freight and charges were paid by Lupton, partly in cash and partly by a bill drawn by Wood. It was afterwards shipped for Leeds, and on its arrival was forthwith equally divided between the defendants, before it was warehoused. The bills drawn on the 11th of January, 1831, were regularly paid, when due, by each of the defendants; but on the delivery of the wheat, they began to complain of the quality, and on the 8d of May, 1831, Lupton sent to Slater, the plaintiffs' agent, a sample, with a note complaining of the bad quality of the wheat. On the 11th of May, the defendant, Lupton, in consequence of the dispute respecting the quality of the wheat, wrote a letter of complaint to the plaintiffs, in which he styled the defendant, Wood, "the half owner." And afterwards addressed a letter to Slater on the same subject, in which he said, "J. L. and T. W. mean to pay 20s. per pound, but they can only pay after being fairly dealt with."

Ultimately, the bills dated the 25th of February, 1831, were accepted by each of the defendants, but were dishonoured when due, in consequence of the dispute as to the quality of the wheat. One of the plaintiffs was then at Leeds, and a negotiation took place as to the renewal of these bills, and an allowance on account of the bad quality of the wheat; and renewed bills were ultimately accepted in lieu of the dishonoured bills of February 25, 1831.

The two dishonoured bills of 25th of February, 1831, drawn upon defendant, Lupton, were delivered by Slater to him, in lieu of his renewed acceptance; and the two bills of the same date, drawn upon Wood, were delivered to him in like manner, upon his accepting a renewed bill for the amount of them. The defendant, Lupton's, *renewed acceptance was regularly paid when due; but the defendant, Wood's, was dishonoured, and he became bank- [301 rupt in July, 1831.

This action was brought to recover that part of the price which remained unpaid, in consequence of Wood's acceptance being dishonoured. A deduction of 200*l.* from the price was agreed to on the trial of the cause, on condition that the defendant Lupton would undertake not to bring any action against the plaintiffs for deficiency of quality; and the question for the opinion of the court was, whether, at the commencement of the action, the defendants were jointly liable for so much of the price of the corn as then remained unpaid.

Taddy, Serjt., for the plaintiffs. The defendants, although not general partners, having concurred in giving an order for an undivided parcel of wheat, are jointly liable to the plaintiffs. *Waugh v. Carver*, 2 H. Bl. 235. Whatever might have been the arrangement between themselves, their contract, as it respects the plaintiffs, is a joint contract, rendering each defendant responsible for the whole. The order is given by both; they speak in it of "*our interests*," the plaintiffs in answer, say, "we have made a purchase on your *joint* account; and bind ourselves to you for the regular delivery." Lupton, in his letter of February 17th, 1831, styles Wood his Co.; the plaintiffs, in their letter of February 25, guarantee *both* up to the time of lading, and forward only one invoice and one bill of lading. If the plaintiffs had failed to observe their guaranty, the defendants must have joined in an action for damages: for the mere fact of payment by separate bills will not render a contract several, which was in its inception joint. Thus, in **Anderson v. Mar-* [302 *tindale*, 1 East, 497, it was held, that a covenant to and with A., his executors, administrators, and assigns, and to and with B., and her assigns,

to pay an annuity to A., his executors, &c., during B.'s life, was a joint covenant to A. and B., in which they had a joint legal interest, although the benefit were for A. only; and, that therefore on the death of A., the right of action survived to B., and A.'s administrators could not sue on the covenant: and in *Heaketh v. Blanchard*, 4 East, 144, where A., having neither money nor credit, offered to B., that if he would order with him certain goods to be shipped upon an adventure, if any profit should arise from them, B. should have half for his trouble, it was held, that such a contract constituted a partnership, *quoad* third persons, though as between A. and B. it was only an agreement to pay for trouble and credit.

Wilde, Serjt., for the defendants, contended, that taking the whole of this transaction into consideration, it was manifestly the intention of the parties on both sides, that the contract by Lupton and Wood should be several. By the terms of the order, the bills in payment were to be drawn on *each* of the defendants; the plaintiffs' letters, the invoice, and bill of lading, were addressed to the defendants at their several residences, Leeds and Headingley; the bill of lading was endorsed by each separately; and separate bills of exchange were drawn upon and accepted by them. These circumstances, taken together, far outweighed a few loose expressions which seemed to point to a joined interest; and the effect of the contract must depend upon the intention of the parties, as it was to be collected from the whole of their conduct and writings.

*303] *Taddy* having been heard in reply, the court took time to look into the correspondence, and judgment was now delivered by

TINDAL, C. J. There is no question in this case as to any partnership, *inter se*, between the defendants; for the case states expressly that there was no general partnership between them: and the further statement, that each was to pay for his own moiety of this particular cargo; that the freight and charges were paid by the money of each; and that the cargo was, upon its arrival at Leeds, equally divided between them before it was warehoused; sufficiently show there could be no such joint interest, in profit and loss, in this particular transaction, as is essential to constitute a partnership. But the question is, whether the wheat was sold to the defendants upon a joint contract; that is, whether, upon the correspondence, and other facts set out in the case, the defendants gave the plaintiffs reason to understand and believe that they had the joint security of both defendants for the whole cargo; or whether the fair inference to be drawn by any reasonable men,—and if so, the plaintiffs must be taken to have drawn such inference themselves,—was not, that each of the defendants contracted separately for his moiety of the joint cargo. And upon looking at the whole of the correspondence, and other circumstances of the case, the latter appears to us to be the proper conclusion. That there are some expressions in the letters, which, if taken separately, raise an ambiguity, must be admitted; unless such had occurred, no dispute or question could have arisen; but we think the preponderance very great in favour of the construction, that the contract of sale was separate, and not joint. The plaintiffs rely on the original order being signed by both the defendants; and that the defendants *304] are informed, in reply, that a purchase has been made on their *joint* account. This is the strongest expression in favour of the plaintiffs' construction. But, on the other hand, the original order itself states that "payment for the same is to be drawn upon *each* of the defendants," which imports more clearly a separation of interest and of liability: and the further fact, that the plaintiffs, on each occasion, draw a bill for one moiety of the price on one, and for the other moiety on the other defendant,—a circumstance by no means usual in a joint contract,—leads to the same conclusion. Why should the plaintiffs' agent, on transmitting the order, give information of the solvency of the defendant Wood, who was before a stranger to them, if the defendant Lupton, who had dealt with them before, was liable to the whole of the demand? The very form of the address of each letter to each defendant,

with his separate place of abode, the form of the invoice, and the endorsement of the bill of lading by each defendant separately, agree with the supposition that the contract was several, not joint. The proposal to the plaintiffs by the defendant Lupton, in his letter of the 17th February, that the plaintiffs should resell, in which he states that he has not altogether the authority of Wood, whom in that letter he calls his "Co.," but in the letter of the 11th May, calls "the half owner," all point to separate interests in the distinct moieties. In the plaintiffs' letter of the 20th February to both the defendants, the expression occurs, "we hold you both perfectly harmless for the advances, up to the period of the bill of lading;" an expression more compatible with the supposition that the plaintiffs were treating with the defendants separately, than as jointly liable. It is from these, and some other expressions of a similar nature, that we infer the defendants purchased each of them a moiety of the cargo by the order, and that the plaintiffs must have known such to be the fact: and as this is the *conclusion to which we think the jury ought to have arrived upon this statement of facts, we direct the *postea* to be delivered to the de- [*305] fendants.

Judgment for defendants.

SWANSBOROUGH v. COVENTRY. Nov. 13.

The plaintiff purchased a house of A., and the defendant at the same time purchased of A. the adjoining land, upon which an erection of one story high had formerly stood. In the conveyance to the plaintiff, his house was described as bounded by building ground belonging to defendant: Held, that defendant was not entitled to build to a greater height than one story, if by so doing, he obstructed plaintiff's lights.

CASE, for a nuisance committed by obstructing the plaintiff's ancient lights. Plea, not guilty.

At the trial before Tindal, C. J., London sittings after Easter term, it appeared that, as well as the plaintiff's dwelling house, as also the site upon which the defendant had since erected the house which formed the subject of this action, and which site adjoined immediately to the plaintiff's dwelling house, were, in the year 1831, the property of the postmaster-general, forming part of the old post office; and that on the 6th May of that year, both were put up to auction in two lots, among several others, and were sold at the same time; the former lot to the plaintiff, the latter to the defendant. The plaintiff's dwelling house was conveyed to him by deed of feoffment of the 29th August, 1831, "with all the lights, easements, rights, privileges, and appurtenances to the same belonging, or in any way appertaining;" and was described in the deed as "bounded on the east by a piece of ground, described in the particulars of sale as a piece of freehold building ground, constituting Lot 11 at the aforesaid sale purchased by John Coventry." It appeared further, at the trial, that the plaintiff's house was an ancient house, having enjoyed the use of the front windows of the first and upper stories free from interruption; but *that there had been, for a long time, erected upon the site of the [*306] defendant's lot, a building of one story high, belonging to the post office, which obstructed the enjoyment of the windows upon the ground floor of the plaintiff's house. That building had been pulled down, and the materials removed, about a year before the sale took place, by order of the postmaster-general; and upon the site of that building the defendant had erected the dwelling house which was now complained of, which exceeded the height of the former building, and obstructed as well the lower as the upper windows of the plaintiff's house.

A verdict having been obtained for the plaintiff, with 7l. 10s. damages, subject to a rule for increasing them to 15l., or for entering a nonsuit, as the Court should think fit,

Jones, Serjt., obtained a rule nisi to enter a non-suit. He contended, that the plaintiff, having purchased under the same title as the defendant, at the same time, and with full notice that the land purchased by the defendant was to be appropriated to building, must be taken to have purchased subject to that inconvenience, and, therefore, could not sustain this action.

Wilde, Serjt., showed cause. The defendant cannot stand in a better situation than the vendor under whom he claims. But the vendor, having granted to the plaintiff a house, with all lights, rights, easements, and appurtenances, could not afterwards derogate from his own grant by obstructing the plaintiff's lights; and if so, neither can the defendant. In *Palmer v. Fletcher*, 1 Lev. 122, it was resolved that where a man builds a new house on part of his *307] lands, and after sells the house to one, and *the lands to another, he cannot obstruct the lights. So in *Riviere v. Bower*, 1 Ry. and Mo. 24, where the owner of a house divided it into two tenements, and let one of them; it was held, that the lessee was liable to an action on the case for obstructing windows existing in the landlord's house at the time of the demise, though of recent construction, and though no stipulation was made against the obstruction. At all events, the defendant should have confined his building to a single story, the height of the erection which had formerly existed. No argument can be raised on the custom of London, because the defendant gave no evidence of the custom, which he should have done if he meant to rely on it. *Day v. Savage*, Hob. 85.

Jones. The building by the defendant is no derogation from the grant to the plaintiff, because, by the express language of that grant, the plaintiff took his house, bounded by the defendant's building ground. He took it, therefore, subject to future erections, or the words building ground are without meaning. And the ground being clear at the time of the purchase, the defendant had no means of knowing the height of erections formerly standing. He took the land, therefore, as any other building ground, applicable to any kind of erection.

Cur. adv. vult.

TINDAL, C. J. In this action, which is brought for a nuisance alleged to have been committed by the defendant, in obstructing the ancient lights of the plaintiff's messuage, the question made by the parties is, whether the defendant is justified in obstructing all or any of the plaintiff's windows: the defendant *308] insisting upon *his right to obstruct all, the plaintiff denying such right as to any. It appears, that as well as the plaintiff's dwelling house, as also the site upon which the defendant has since erected the house which forms the subject of this action, and which site joined immediately to the plaintiff's dwelling house, were, in the year 1831, the property of the postmaster-general, forming part of the old post office; and that on the 6th May of that year both were put up to auction in two lots (amongst several others), and were sold at the same time; the former lot to the plaintiff, the latter to the defendant. The plaintiff's dwelling house was conveyed to him by deed of feoffment of the 29th August, 1831, with "all the lights, easements, rights, privileges, and appurtenances to the same belonging or in anywise appertaining," and was described in the deed as "bounded on the east by a piece of ground described in the particulars of sale as a piece of freehold building ground constituting Lot 11, at the aforesaid sale, purchased by John Coventry." It appears further at the trial, that the plaintiff's house was an ancient house, having enjoyed the use of the front windows of the first and upper stories free from interruption; but that there had been for a long time erected upon the site of the defendant's lot, a building of one story high, belonging to the post office, which obstructed the enjoyment of the windows upon the ground floor of the plaintiff's house. This building had been pulled down, and the materials removed about a year before the sale took place, by order of the postmaster-general; and upon the site of this building the defendant has erected the dwelling house which is now complained of, which exceeds the height of the former building, and obstructs

as well the lower as the upper windows of the plaintiff's house. Upon this state of facts, the plaintiff contends that the defendant had no right to erect a building on the lot purchased by him, *so as to obstruct any of the windows of the plaintiff's dwelling house. The defendant, on the other [309 hand, contends that he had a right to build to any extent he thought proper, notwithstanding the obstruction of all the plaintiff's lights.

It is well established by the decided cases, that where the same person possesses a house, having the actual use and enjoyment of certain lights, and also possesses the adjoining land, and sells the house to another person, although the lights be new, he cannot, nor can any one who claims under him, build upon the adjoining land so as to obstruct or interrupt the enjoyment of those lights. The principle is laid down by Twisden and Wyndham, J., in the case of *Palmer v. Fletcher*, 1 Lev. 122, "That no man shall derogate from his own grant." The same law was adhered to in the case of *Cox v. Matthews*, 1 Vent. 287; by Holt, C. J., in *Rosewell v. Pryor*, 6 Mod. 116; and, lastly, in the later case of *Crompton v. Richards*, 1 Price, 27. And in the present case, the sales to the plaintiff and the defendant being sales by the same vendor, and taking place at one and the same time, we think the rights of the parties are brought within the application of this general rule of law. It is contended, however, on the part of the defendant, that the circumstances of this case form an exception to the general rule, inasmuch as it appears, by the description of the plaintiff's own conveyance, that his house was bounded by a piece of ground, described in the particulars of sale as *building ground*, and purchased by the defendant; that such description operated as notice to the plaintiff that he bought subject to the defendant's right to build; and as there was no restriction or limitation as to the exercise of such right, he might build *to any [310 extent or height which he thought proper, although to the obstruction of the plaintiff's lights, without any derogation of the grant of the vendor to him. But we think, with reference to the facts in this case, this conclusion cannot follow. The vendor conveyed to the plaintiff a messuage, with all its lights and easements, without any restriction or qualification; and we think it would be attributing too much force to the description of boundary in this case, if it was to be held to operate, indirectly, to the destruction of the rights expressly conveyed by the deed. The very term "*building ground*" is a loose and general expression; and may be satisfied as well by the power of erecting a building which should leave the plaintiff's lights altogether undisturbed, or partially obstructed only, or altogether blocked up. The question therefore is, what is the meaning most consistent with the grant of the vendor to both parties? And, as we find that, in point of fact, there had been a building on the ground in question, for a very long period of time, and recently demolished, which extended only to the height of the first floor of the plaintiff's house, we think this gives the limit and extent intended by the terms in the description, so as at once to satisfy those terms, and at the same time to prevent the vendor from frustrating his own grant. This is in effect not a contradiction, but an explanation of the terms of the grant. It is urged that the defendant could not be aware of any such restriction at the time of his purchase, as the building was no longer in existence. But it is clear that the defendant could not, under a conveyance to himself by such a description, erect a building which should injure the rights of strangers; some inquiry, therefore, would be necessary on his part before he could know the extent of his rights; and the same inquiry which would inform him as to the rights of strangers would also *give [311 him information as to the rights belonging to the plaintiff's house. By this construction, both parties have the benefit of their respective grants; the plaintiff has the enjoyment of those rights which the premises possessed in the hands of the vendor, and the defendant has the right to build to the extent of the former building. As to the custom of London, as no evidence was given, it is altogether unnecessary to discuss it. We, therefore, think the verdict

should stand 7*l.* 10*s.*, being the damages occasioned to the plaintiff by the defendant's building to a greater height than he had the right to do.

Judgment for plaintiff accordingly.

EVANS, Demandant; GRIFFITH, Tenant; JONES, Vouchee. Nov. 13.

By 1 W. 4, c. 70, s. 14, the jurisdiction of the courts of great session in Wales, as to recoveries, is transferred to the Court of C. P.

The officer of the court of great session having omitted to enter of record a recovery duly suffered at bar in 1804, the Court of C. P. ordered it to be done *nunc pro tunc*, under sect. 27 of 1 W. 4, c. 70, which gives that Court the like power to amend a recovery of the court of great session, as if it had been suffered in C. P.

In the above recovery, suffered in the court of great session for the county of Carnarvon, in the year 1804, a writ of entry was sued out by the proper demandant against the proper tenant; and, as well from that writ as from notes on the back of it, and other documents which accompanied it, and which were upon the files of the court, it was evident that the recovery between the parties was arraigned at bar; that the tenant appeared in person and vouched over to warranty the tenant in tail, who also appeared in person and vouched over the common vouchee. It appeared further, from a note on the back of the writ,
 *312] that the deputy prothonotary of the *court received the sum of 8*l.*, the usual fee upon suffering a recovery where the parties appeared in person, and for entering the same on the roll, and for a transcript thereof. But, upon the strictest search, no record of that recovery, nor any *incipitur* of a record, was found upon the rolls of the court, although some recoveries were entered upon the rolls of the same great session.

It was not the practice of the court to issue or return a writ of seisin, and none had been issued in this case. The tenant died some years after the recovery.

Upon affidavit of these facts, an order having been obtained that the person in whose custody the records of the court of great session are kept should enter the above recovery upon record, *nunc pro tunc*,

Mereuether, Serjt., on the part of the tenant in tail, obtained a rule nisi to discharge this order, on the ground that the jurisdiction of the court of great session in these matters was abolished by the statute 1 W. 4, c. 70, and transferred to the Court of Common Pleas; and that the twenty-seventh section of that act only empowers the Court of Common Pleas to amend a recovery, not to enter it *ab initio* on record. But this recovery was never executed, for no writ of seisin was sued out or returned: until the return of that writ, a recovery is incomplete; *Swan v. Broome*, 3 Burr. 1596, *Sheepshanks v. Lucas*, 1 Burr. 410; and the tenant being now dead, the writ cannot be executed: *Lewis d. Earl of Derby v. Witham*, 1 Wils. 48.

Wilde, Serjt., in support of the order. The affidavit states that a writ of seisin was never issued in these recoveries in Wales; and, at all events, the issuing it would have been no more than a formal act of the officer of the court.

*313] In the cases referred to, the *questions merely turned upon the sufficiency of allegations upon a special verdict; and in *Goodright v. Rigby*, 5 T. R. 179, Lord Kenyon said, "Lord Derby's case has always been considered as a strange case; and the Judges of succeeding times have been astonished that no application was made to the Court of Common Pleas to rectify the defect in that recovery, according to the usual practice of that court. There the objection was, that there was no writ of seisin, which (it is well known) is never in fact executed."

The only question, therefore, is whether this Court has authority to make a proper record of this recovery under 1 W. 4, c. 70, s. 27, which enacts, that "the Court of Common Pleas shall have the like power and authority to amend

the records of fines and recoveries passed heretofore in any of the courts abolished by this act, as if the same had been levied, suffered, or had, in the Court of Common Pleas."

As the court of great sessions has no longer any jurisdiction, great inconvenience and injustice may be done, unless an extended construction be put on the word *amend*, which is only used by way of example, as the mention of the Warden of the Fleet in 1 R. 2, c. 12, on which it has been held, that debt for an escape lies against every gaoler; or the mention of the bishop of Norwich in the statute of *circumspecté agatis*, 13 Ed. 1, which has been held to extend to all other bishops. The clear object of the legislature was to give this Court, in the matter of Welsh recoveries, all the power which before belonged to the court of great session; and it cannot be contended, that while that Court had authority, the entry now required might not have been made at any time as a matter of course.

**Merewether*. By no principle of construction can the word *amend* be taken to signify *create*. [*314
Cur. adv. vult.]

TINDAL, C. J. The question in this case arises out of an application made by certain persons claiming under Ellen Jones, who suffered a common recovery in the court of great session for the county of Carnarvon in the year 1804, which application calls upon this Court to direct the person, in whose custody the records of the said court of great session are kept, to enter such recovery upon record. It appears by the affidavits which have been laid before us, that a writ of entry was sued out by the proper demandant against the proper tenant, and as well from that writ as from notes on the back of it, and other documents which accompany it, and which are upon the files of the Court, it is evident that the recovery between these parties was arraigned at bar; that the tenant appeared in person, and vouched over to warranty the tenant in tail, who also appeared in person, and vouched over the common vouchee. It appears, further, from a note on the back of the writ, that the deputy prothonotary of the Court received the sum of 3*l.*, which is stated to be the usual fee upon suffering a recovery where the parties appeared in person, and for entering the same on the roll, and for a transcript thereof. But upon the strictest search, no record of this recovery, nor any *incipitur* of a record, is found upon the rolls of the Court, although some recoveries are entered upon the rolls of the same great session. It seems, therefore, established with sufficient certainty, that a recovery was actually suffered at bar in the usual form, but that the officer of the Court, after receiving the fee for entering the same on record, in violation of his duty, neglected to make up the record. The *enrolment of common recoveries on the rolls of the Court is merely for the security of the parties; the suing out of the writ, on which the recovery is suffered, the appearance of the tenant, the voucher and appearance of the tenant in tail, the voucher over of the common vouchee, and the consequent judgment of the Court on his default, are of the substance and essence of the recovery. The practice of entering these proceedings on the rolls of the Court not improbably originated from the statute 23 Eliz. c. 3, s. 1, by which it is enacted that the enrolment shall be made at the request or election of any person; and such enrolment is declared to be of as good force and validity in law, as the writs, &c., being extant or remaining, were or ought by law to be. There can be no doubt, therefore, but that the court of great session, if it had still existed, would, upon this application, have supplied the defect occasioned by the negligence of their own officer, by directing the enrolment to be made, *nunc pro tunc*; and that this Court would have done the same, had the common recovery been suffered therein. But the objection made to this application on the part of the tenant in tail is, that all the power and authority of the courts of great session in Wales ceased and determined at the commencement of the act of 1 W. 4, c. 70, under the provision of the fourteenth section of that act; and that the twenty-seventh section gives no authority to this Court

to direct the recovery to be entered on record. The words of the latter section, if construed strictly, and to the letter, might certainly be held to give no authority to this Court beyond that of *amending* a record already put upon the roll; but we think this provision of the statute is remedial, and, consequently, that it should receive, not a strict, but so far a liberal construction, as will meet and remove the difficulty which the act itself has created. For, *316] as the act has abolished the *ancient jurisdiction, it has taken away from the subject that remedy which he would otherwise have possessed against the consequences of the neglect of the officers of the Court; the enactment, therefore, "that the Court of Common Pleas shall have the like power and authority to *amend* the records of fines and recoveries passed heretofore in any of the courts abolished by this act, as if the same had been levied, suffered, or had in the Court of Common Pleas," may be well understood as a power to enter up the whole record where the materials are found upon the files of the Court; to make a good record altogether; and not to be confined to the amending of a faulty record, or the completing of a record where a formal *incipitur* only has been put upon the plea roll. Many instances occur in the books, of a similar construction of statutes: the 9 Rich. 2, c. 3, gives a writ of error to him in *reversion*, if a tenant for life lose in a *præcipe*; but it was resolved, that though the statute speaks only of reversions, yet remainders are also taken to be within the purview thereof. Winchester's case, 3 Rep. 4. The action of debt for an escape, which lies against every sheriff and gaoler where the prisoner escapes out of execution, is grounded upon the statute 1 Rich. 2, c. 12, which is altogether silent about sheriffs and gaolers, and mentions only the Warden of the Fleet. So the statute of *Circumspectè Agatis*, 13 Edw. 1, which mentions only the Bishop of Norwich, has been always extended to include all other bishops, 2 Inst. 487. The statute of Westminster 1, gives a remedy where "outrageous toll is taken;" by construction of law that remedy applies "either where a reasonable toll is due, and excessive toll is taken, or where no toll at all is due, and yet toll is unjustly usurped," 2 Inst. 220. In these, *317] and many other instances, the particular expression used in the statute *is looked upon only as an example of other cases lying within the same mischief, and, therefore, calling for the same remedy. It has been urged that no writ of seisin has been sued out, and that, until the return of such writ by the sheriff, the recovery is not executed; but the answer to this objection is, first, the fact disclosed in the affidavit, that it was never the practice or custom in the court of great session to issue any writ of seisin, nor to procure any return thereof. And if the issuing of such writ were necessary to perfect the common recovery, it is a mere formal proceeding, which ought to have been taken by the officer of the court, who had received his fees for making the recovery complete. And as to the objection that the tenant is now dead, such objection can only be valid where he dies before the recovery could have been completed by the rules of the court; but here the parties long outlived the giving of judgment in the action.

We think, therefore, this Court has, by the proper construction of the statute, power to give the relief prayed for; and that to doubt it, would be to put in hazard the titles of many of the estates in Wales. We direct, consequently, that the rule which has been obtained for rescinding a former rule, calling on the deputy prothonotary to enter this recovery on record, must be discharged.

Rule discharged.

*318]

*ORCHARD v. GLOVER. Nov. 18.

An affidavit that the party did not procure sufficient bail, because he expected to settle the cause, is not a sufficient reason to entitle him to change his bail.

Andrews, Serjt., had obtained a rule nisi to add and justify bail, upon an affidavit of merits, and that the defendant did not procure sufficient bail at first, because he expected to settle the cause.

Bompas, Serjt., who showed cause, contended that this was not a sufficient reason for omitting to put in good bail at first; and that, under the new rule of Court, Trin. 1 W. 4, the bail could not be changed without leave of the Court, who would require a sufficient reason.

TINDAL, C. J. That rule would be of no use, unless the party who proposes to change his bail assigns an adequate reason for not having put in sufficient bail at first. The reason now assigned is not satisfactory, and the rule must be
Discharged.

*STANBURY v. GILLETT. Nov. 14.

[*319]

The Court will discharge a rule for a special jury, where it has not been duly acted on, and appears to have been obtained for the purpose of delay.

TROVER for a dog. Notice had been given for trial by a common jury at the sittings after Easter term, and the cause stood fifth on the list; but on the 14th of May, the first day of the sittings, the defendant served on the plaintiff a rule for a special jury. In consequence of this, the cause stood over till the sittings after Trinity term, and was fixed for trial by a special jury on the 25th of June. On the 22d, however, when it was too late for the plaintiff to procure the attendance of his witnesses within the time appointed for common jury causes, the plaintiff was apprized by the defendant's attorney that he had not received any directions to proceed with the special jury, and up to the present time the special jury had not been struck.

Under these circumstances,

Wilde, Serjt., obtained a rule nisi to discharge the rule for a special jury, on the ground that it must have been obtained only for the purpose of delay.

Spankie, Serjt., showed cause, and offered to strike the jury forthwith; but

The Court thought there had been an abuse of its process, and made absolute the rule for the discharge of the rule for a special jury.

Rule absolute.

*PATERSON v. POWELL. Nov. 14.

[*320]

An engagement, in consideration of forty guineas to pay 100*l.* in case Brazilian shares should be done at a certain sum on a certain day, subscribed by several persons, each for themselves: Held, a policy of insurance, and void under 14 G. 3, c. 48.

THE declaration stated that heretofore, to wit, on the 29th of April, 1829, to wit, at London, in consideration that plaintiff would pay to defendant a certain sum of money, to wit, the sum of forty guineas, defendant then and there assumed and faithfully promised plaintiff to pay to him a certain sum of money, to wit, the sum of 100*l.*, in case the Imperial Brazilian Mining shares should be done at or above 100*l.* per share on or before the 31st day of December, 1829. And plaintiff averred that he did afterwards, to wit, on, &c., at, &c., pay to defendant the said sum of forty guineas; and that afterwards, and before the said 29th day of December, 1829, to wit, on, &c., at, &c., the said Imperial Brazilian Mining shares were done at 100*l.* per share; of all which several premises defendant afterwards, to wit, on, &c., at, &c., had notice. And although defendant, afterwards, to wit, on the 1st day of January, 1830, at, &c., was requested by plaintiff to pay him the said sum of 100*l.*, yet defendant not

regarding his promise and undertaking, but contriving and fraudulently intending craftily and subtilty to deceive and defraud plaintiff in that behalf, did not, nor would, when he was so requested as aforesaid, or at any time afterwards, pay the said sum of 100*l.*, or any part thereof, to plaintiff, but wholly neglected and refused so to do, to wit, at, &c.

Plea, general issue.

In support of this declaration, the plaintiff, at the trial before Tindal, C. J., put in the following contract, stamped with a 20*s.* stamp.

*921] “In consideration of forty guineas for 100*l.*, and according to that rate for every greater or less sum, received of _____, we who have hereunto subscribed our names do, for ourselves severally, and for our several and respective heirs, executors, administrators, and assigns, and not one for the other or others of us, or for the heirs, executors, administrators, or assigns of the other or others of us, assume, engage, and promise that we respectively, or our several and respective heirs, executors, administrators, or assigns, shall and will pay, or cause to be paid unto the said _____, heirs, executors, administrators, and assigns, the sum and sums of money, which we have hereunto respectively subscribed, without any abatement whatever.—In case the Imperial Brazilian Mining shares be done at or above 100*l.* per share on or before the thirty-first day of December, one thousand eight hundred and twenty-nine :—

£100. James Powell. One hundred pounds. 29th of April, 1829.

£100. Henry Hodges. One hundred pounds. 29th of April, 1829.

£100. A. P. Johnson. One hundred pounds. 29th of April, 1829.”

A verdict having been found for the plaintiff with 100*l.* damages, a rule nisi to enter a nonsuit instead was obtained by the defendant in Hilary term last, on the ground that the defendant's name did not appear in the body of the contract, and that the transaction was illegal and void under 18 G. 2, c. 34.

These points were discussed at considerable length, when the Court suggested that the contract was a policy of insurance, and void under 14 G. 3, c. 4, which, *922] after reciting that “it hath been found by experience that the *making insurances on lives or other events wherein the assured shall have no interest, hath introduced a mischievous kind of gaming,” for remedy thereof enacts, that “from and after the passing of this act no insurance shall be made by any person or persons, bodies politic or corporate, on the life or lives of any person or persons, or on any other event or events whatsoever, wherein the person or persons for whose use, benefit, or on whose accounts such policy or policies shall be made, shall have no interest, or by way of gaming or wagering; and that every assurance made contrary to the true intent and meaning hereof, shall be null and void to all intents and purposes whatsoever.”

An argument on this question was directed by the Court, and now entered on by

Coleridge, Serjt., for the plaintiff. The plaintiff is entitled to recover his whole demand; for the contract on which he sues constitutes, in effect, a wager on an innocent topic, and not a policy of insurance prohibited by 14 G. 3, c. 48. That an action will lie for the recovery of a sum depending on an innocent wager, cannot now be disputed. *Cousins v. Nantes*, 3 Taunt. 518. The present contract falls within the definition of a wager, and not within any of the definitions of a policy of insurance. Johnson defines a wager, “any thing pledged upon a chance of performance:” and cites, “love and mischief made a wager which should have most power in me.” A bet he defines “something laid to be won on certain conditions.” A wager, therefore, is a contract for the payment of an absolute value. But a policy of insurance is essentially a contract of indemnity; for every policy of insurance must insure *923] some thing or person from some risk to which that thing or person *is liable; i. e., must indemnify the assured from the consequences attendant on the happening of that risk, and the risk insured against ought to be

one in which the party insured has an interest. In *Lucena v. Crawford*, 2 N. R. 270, among the reasons advanced for reversing the judgment below, it is said, "There is a material distinction between a contract of wager and a contract of insurance; the first may have for its subject any speculative chance or expectation, however vague or uncertain, and may be claimed without proof of loss or damage having accrued to the party for whose benefit it is demanded; but a contract of insurance cannot have such chance or expectation for its object, because bare chance or expectation, though liable to failure and disappointment, are not susceptible of loss or damnification, and therefore cannot be made the objects of an indemnity, which presupposes the loss of some right of property either in possession or in action."

That distinction runs through every good definition of a policy of insurance. At p. 295, Mansfield, C. J., says, "The definition in Valin is, '*assecuratio est conventio de rebus tuto aliunde transferendis pro certo præmio, seu est aversio periculi.*' In Loccen. lib. 2, c. 5, note, '*aversio periculi, ita dicta, quod alterius periculum in mari aversum it; aut in se recipit.*' In Roccus, '*assecuratio est contractus quo quis alienæ rei periculum in se suscipit obligando se sub certo pretio ad eum compensandum si illa perierit. Ideo valet pactum ut si merces salvæ venierint in portum solvetur certa summa, si vero illæ perierint teneatur assessor solvere damnum vel estimationem istarum mercium.*'" At p. 300, Lawrence, J., says, "These definitions, by writers of different countries, are in effect the same, and amount to this,—that insurance is a contract by which the one party, in *consideration of a price paid to him adequate to the risk, becomes security to the other that he shall not suffer loss, [324 damage, or prejudice, by the happening of the perils specified to certain things which may be exposed to them." And he cites from Scaccia (p. 302), "*assecuratio contractus habet locum in quâvis re, seu de quâvis re quæ subjacere possit periculo seu interitui.*" Potier, *Traité d'Assurance*, c. 1, s. 1, pl. 2, gives the following definition: "Le contrat d'assurance est un contrat, par lequel l'un des contractans se charge du risque des cas fortuits auxquels une chose est exposée, et s'oblige envers l'autre contractant de l'indemniser de la perte que lui causeraient ces cas fortuits, s'ils arrivaient, moyennant une somme que l'autre contractant lui donne, ou s'oblige de lui donner, pour le prix des risques dont il le charge;" pl. 4, "C'est une espèce de contrat de vente; les assureurs sont les vendeurs, l'assuré est l'acheteur; la chose vendue est la décharge des risques aux quels est exposée la chose assurée. Les assureurs vendent en quelque façon à l'assuré, et s'obligent de lui faire avoir et de lui procurer la décharge de ces risques, en prenant sur eux ces risques, et en s'obligeant d'en indemniser l'assuré. La prime, que l'assuré paie ou s'oblige de payer aux assureurs, est le prix de cette vente." And s. 2, pl. 10, p. 439. "Il faut, 1^o qu'il y ait une ou plusieurs choses qui soient la matière du contrat, et que l'une des parties fasse assurer par l'autre;" pl. 11. "Il est d'essence du contrat d'assurance qu'il y ait une ou plusieurs choses qui en soient la matière, et qu'on fasse assurer par le contrat."

According to these definitions the contract in the present case must be esteemed a wager. There is no thing or person exposed to injury; no indemnity to be received upon the occurring of injury; but merely a sum of money to be paid in a certain event. Then comes the question, *has the 14 Geo. 3, c. 48, made any difference between this and an ordinary wager? [325 In consequence of the mischief occasioned by wagering policies on marine risks, the legislature first prohibited such policies on ships or their cargoes by the statute 19 Geo. 2, c. 37; and afterwards, by 14 Geo. 3, extended the prohibition to policies on lives, and other events; but from the title of that act, which is confined to insurance on lives, it is clear that the object of the legislature was directed to policies of insurance strictly so called, and "events" must be intended to mean such risks as are the ordinary subjects of insurance. Now the mere circumstance of reducing a wager to writing, and procuring several

persons to engage in it, will not make it a contract of insurance. A wager on a legal horse-race, reduced to writing, and subscribed by many betterers, would not be a policy within this act. And in *Good v. Elliott*, 3 T. R. 698, although Buller, J., was dissentient, the Court held, that a wager that A. had purchased a wagon of B. was not void at common law, nor prohibited by 14 Geo. 3, c. 48. In *Thornton v. Thackeray*, 2 Young & J. 156, the contract was that A. should pay B. 7500*l.* in consideration that B. should pay A. 10,000*l.*, or such proportion of that amount as C. paid his legal general creditors: and the Court decided upon it as a wager. *Roebuck v. Hamerton*, Cowp. 787, will be relied on for the defendant; but that case only decides that a wager on the sex of the Chevalier D'Eon, which had been held illegal in *Dacosta v. Jones*, could not be rendered legal by being dressed up in the form of a policy; the question, therefore, on the 14 Geo. 3, was extrajudicial, and not well considered.

But supposing this instrument to be a policy within the meaning of the 14 Geo. 3, the plaintiff is entitled to recover back the premium, as a sum paid *326] without *consideration. Where, indeed, the party to an illegal contract has paid money in pursuance of the contract, and the contract has been executed (see the language of the Court in *Tappenden v. Randall*, 2 B. & P. 471; *Aubert v. Walsh*, 3 Taunt. 277), as in *Lowry v. Bourdieu*, Doug. 468, such party being *in pari delicto* cannot recover his money back; but here the contract is only executory; for whether a contract shall be deemed executed or executory, must depend, not on the happening of the event which is to determine it, but on the performance of the stipulations contracted for on both sides: and the plaintiff is rather in the condition of a party who has deposited money with a stakeholder upon an illegal wager; which money he may recover from the stakeholder, if not actually paid over. *Cotton v. Thurland*, 5 T. R. 406; *Smith v. Bickmore*, 4 Taunt. 474; *Bate v. Cartwright*, 7 Price, 540; *Hastelow v. Jackson*, 8 B. & C. 221.

Taddy, Serjt., for the defendant. The instrument declared on is a policy of insurance, and void under the statute 14 Geo. 3. The definitions which have been relied on are definitions of legitimate policies, but the statute is directed against illegitimate policies, and would have nothing to act on if it were held to apply only to instruments which have all the incidents of a legal policy. The obvious intent of the statute is, that instruments bearing the form of a policy, and subscribed by underwriters, shall be held void, if the party assured have no interest in the event or peril insured against. The word *event* was introduced for the express purpose of meeting such a transaction as the present, and the case of *Roebuck v. Hamerton* is in point. The contract there was as *327] follows (2 East, 391):—"In consideration of *thirty-five guineas for 100*l.* received of Messrs. Roebuck and Vaughan, we, whose names are hereunto subscribed, do severally promise to pay the sums of money which we have hereunto subscribed, on the following conditions, viz., in case the Chevalier D'Eon should hereafter prove to be a female. Valued at the sum insured, without farther proof of interest than this policy. In witness whereof we, the assurers, have subscribed our names." And the same argument was used as upon the present occasion; so that the decision of the Court was not given without consideration. So, in *Wharton v. De La Rive*, Park. Ins. 578, the policy was on the contingency that the colonies of America should be declared independent; and Lord Mansfield thought the case too clear for argument.

The Court relieved *Taddy* from arguing the question as to the return of premium, and after hearing *Coleridge* in reply, pronounced judgment as follows:

TINDAL, C. J. In the view which the Court takes of this case, it becomes necessary to recur to the grounds on which the rule for a new trial was obtained, because we are all of opinion, that the instrument on which the plaintiff has sued is a policy of insurance within the statute 14 G. 3, c. 48, the plaintiff having no interest in the subject-matter of the insurance, and no disclosure being made of any party who has such interest: the policy in that respect pre-

sents only a blank. First, what was the object of the statute 14 G. 3? To prevent gambling under the form and pretext of a policy of insurance by parties who have no interest in the subject-matter of such assurance. There is a statute of the former reign, 19 Geo. 2, c. 37, confined indeed to marine insurances, but the preamble of which is not *immaterial in considering the intention of the legislature in passing the statute 14 Geo. 3. After re- [*328 citing, that "it had been found by experience, that the making assurances, interest or no interest, or without further proof of interest than the policy, had been productive of many pernicious practices, whereby great numbers of ships, with their cargoes, had either been fraudulently lost and destroyed, or taken by the enemy in time of war: and by introducing a mischievous kind of gaming or wagering, under the pretence of assuring the risk on shipping and fair trade, the institution and laudable design of making assurance had been perverted," it goes on to prohibit insurances on ships or their cargoes, interest or no interest, or without further proof of interest than the policy, *or by way of gaming or wagering*. The object, therefore, was to prevent gambling insurances: but, in the next reign, it was found that the legislature had not gone far enough, and then came the act of 14 Geo. 3, entitled "An act for regulating insurances upon lives, and for prohibiting all such insurances, except in cases where the person insuring shall have an interest in the life or death of the person insured." It is a well-established rule of construction, that the title of an act will not extend its effect beyond the meaning of the operative words; but neither will it confine the effect; and the operative words here are larger than the title. "No insurance shall be made by any person or persons, bodies politic or corporate, on the life or lives of any person or persons, *or on any other event or events whatsoever*, wherein the person or persons for whose use, benefit, or on whose account such policy or policies shall be made, shall have no interest, *or by way of gaming or wagering*." Nothing can be more clear than that these operative words were inserted in furtherance of the principle of the former act. It has been argued, that the *provisions of the act are confined to cases where there is a subject-matter of insurance exposed to peril. If so, [*329 what construction are we to put upon those more general words, "*or on any event or events whatsoever*," which appear to have been inserted, as it were, in anticipation of such an argument? Then, the only two cases on the statute are insurances on *events* in which the parties were not interested. In *Roebuck v. Hamerton*, a policy upon the sex of the Chevalier D'Eon was holden to be a policy within the statute 14 Geo. 3, c. 48; and in *Mollison v. Staples, Park. Ins. 840 n.*, where a policy was made on the event of there being an open trade between Great Britain and the province of Maryland on or before the 6th July, 1778, Lord Mansfield said "that it was clear the plaintiff could not recover." In both cases, therefore, the decision turns not on the statute's applying to insurances where the subject-matter of insurance is legitimate, but to *events* in which the parties insuring have no interest.

Our decision, therefore, in this case, must turn on the provisions of the 14 Geo. 3, if this instrument can be deemed a policy. Upon that point we entertain no doubt. Here is a premium paid, in consideration of the insurers incurring the risk of paying a larger sum upon a given contingency. The instrument is open to all who may choose to subscribe, that is, without restriction of persons or numbers. It then proceeds, in the usual language of policies of insurance, "We respectively will pay or cause to be paid to the sum and sums of money which we have hereunto respectively subscribed, without any abatement whatever, in case," &c. If the instrument in *Roebuck v. Hamerton* was rightly held to be policy, I can make no just discrimination between that instrument and the present. It *is true, that the policy [*330 contains no clause about average, because the circumstances of the risk do not require it. But if the instrument can be deemed a policy without that clause, we should impair the efficacy of the act of parliament if we were to con-

sider it as an ordinary contract. I cannot consider it as other than a policy, and if so, the plaintiff's claim must receive the same answer as was given by Lord Mansfield, in *Roebuck v. Hamerton*; first, that this is an insurance on an event in which the party had no interest; or, if he had, the policy does not disclose the name of any party interested.

As to the claim for a return of premium, the concurrent effect of the decisions is, that if money be paid on an illegal contract to receive a larger sum upon a certain event, the contract is executed when the event takes place, and the money paid cannot be reclaimed.

GASELER, J. It is not necessary for us to decide what is the distinction in law between a wager and a wagering policy, because this instrument is manifestly a policy within the meaning of the 14 Geo. 3. The instrument, as appears from the several signatures, was carried round from underwriter to underwriter; the language is the same as in other policies; and to every signature there is the date of the receipt of premium; no words are left out but such as would not apply to an insurance of this nature, namely, the stipulation as to average; and the rise or fall of Brazilian shares is clearly an event within the meaning of the statute.

BOSANQUET, J. I think the contract in this case falls within the mischief and prohibitions of the statute 14 Geo. 3. The preamble of the act states, that "it hath been found by experience, that the making insurances on lives, or other events, wherein the assured shall have no interest, hath introduced a *331] mischievous *kind of gaming." That this was a gaming or wagering transaction cannot be disputed, for the parties have no interest in the event insured; and although, after the decisions which have been pronounced, the Courts cannot now say that a simple wager may not be the subject of a suit, yet they will not extend the principle of those decisions; and if the wagering transaction assumes the form of a policy of insurance, it is prohibited by the 14 Geo. 3. Does this contract assume such a form? It begins, "In consideration of forty guineas for one hundred pounds, and according to that rate for every greater or less sum received of _____, we, who have hereunto subscribed our names, assume and engage that we respectively will pay to the said _____ the sums which we have respectively subscribed, in case," &c. So that here we have a premium; an indefinite number of subscribers contemplated, who engage, not each for the other, but separately, on a given event, to pay a larger sum than the premium; while the separate dates for each receipt of premium, lead to the inference that all the signatures were not obtained at the same time. These are so much the leading features of a policy of insurance, that we cannot doubt that this contract falls within the meaning of the statute, which enacts, that such an instrument shall be void, if the parties insuring have no interest in the event insured against. Here, at all events, the instrument does not disclose the name of any party interested in the risk. That circumstance, indeed, has been relied on as an argument to show that the instrument is not a policy; but to draw such an inference from the omission, would render the statute in a great degree nugatory.

As to the premium, I agree with the rest of the Court; the party is not to take the chance of the event, and after that to recover the premium, if the contract turn out to be illegal.

*332] *ALDERSON, J. Under the 14 Geo. 3, the policy is void if the party have no interest in the event insured, or the name of the party interested do not appear. Here the event was one in which the plaintiff was not interested, and even if he were, the policy does not disclose the name of any party interested: in either case it falls within the prohibition of the statute.

Rule absolute.

WICKHAM, Demandant; FOREMAN and Wife, Deforciant. Nov. 15.

Fine allowed to pass without affidavit on parchment, under what circumstances.

UNDER the following circumstances, the Court, on the motion of Wilde, Serjt., allowed this fine to pass, notwithstanding the affidavit of acknowledgment was on paper instead of parchment:—

The consors lived at Leghorn, whither the præcipe and concord were sent, together with the affidavit prepared on parchment according to the rules of this Court. The documents were all returned, except the affidavit, in lieu of which, and of the certificate of swearing required by this Court, authenticated copies only were sent, engrossed on Tuscan stamped paper, annexed to the præcipe and concord; from which copies it appeared that the affidavit had been sworn before a competent authority, and the certificate duly made and authenticated, the original affidavit being deposited in the tribunal, according to the laws of Tuscany. These copies were attested by the auditor of the Court, and signed by a notary public; a translation by the translator of the tribunal was attested by the consul.

*RAMADGE v. RYAN. Nov. 15.

[*333]

1. It is a ground for new trial, if a juror before being sworn expresses a determination to give the verdict one way.
2. The defendant had pleaded truth in justification of a libel, part of which alleged that a physician in refusing to act with plaintiff, also a physician, had "honourably and faithfully discharged his duty to his medical brethren." Held, that it was not competent to the defendant to offer in evidence the opinion of a medical witness on this head.

LIBEL. The plaintiff sought to recover damages for the following article, which appeared in the London Medical and Surgical Journal, a periodical publication conducted by the defendant:

"Tweedie v. Ramadge. Dr. Ramadge was in attendance on a case of typhus. The patient, a young lady, was bled from the arm on a Friday, and eight dozen (ninety-six) leeches applied to the head and neck. On Saturday both temporal arteries were opened; the patient fainted, and the apothecary, who was likewise in attendance, left her. The nurse brought her round with wine and water. On the Sunday another dozen leeches were applied, and immediately she became delirious, when Dr. Tweedie's advice was requested by the relatives. Dr. Tweedie having spoken apart with Dr. Ramadge, addressed Mrs. Reynolds, the sister of the patient, and said, that having attended the family before, he should be happy now to give his assistance to the young lady; but that Dr. Ramadge's conduct in a late correspondence with John Long(a), had been such that no medical man of respectability could call him in or consult with him without injuring himself in the eyes of his brethren. That he bore no private pique against Dr. Ramadge—he believed him indeed to be clever, but his character, as regarded the above transaction, rendered it imperative for all medical men to decline acting with him, and Mrs. Reynolds must, therefore, choose which she would *intrust. Dr. Ramadge replied, in great anger, [*334 that he was a gentleman by birth, education, and profession, but that Dr. Tweedie was neither * * *. Dr. Tweedie answered him by turning coolly on his heel and walking out of the room. Dr. Tweedie was retained,

(a) This Long professed to cure consumption, and was twice tried at the Old Bailey for the manslaughter of his patients. Dr. Ramadge wrote a letter in vindication of Long's practice.

and cured the patient by exactly opposite treatment. Dr. Ramadge, it is said, is frequently at supper with John Long.—*Lancet*. *Dr. Tweedie has honourably and faithfully discharged his duty to his medical brethren; and we hope every one else will do the same. We are well aware who it is, and a medical man to boot, that makes the trio in these family suppers. Let him be warned in time,—he takes upon him to defend this nefarious quack and manslaughter in the face of the whole profession. Let him take warning, or we will not spare him.—Ed.*"

The defendant pleaded the truth of the allegations in justification, and issue was joined upon his pleas.

The alleged libel, with the exception of the seven lines in italics, had been copied from a periodical journal called *The Lancet*, the article in which was headed, "Result of upholding Quacks."

For that article the plaintiff brought an action against Wakley, the editor of the *Lancet*, who pleaded only the general issue; defended himself; and upon the trial of his cause, on the day preceding the trial of the present cause against Ryan, got off with a verdict for $\frac{1}{2}$ damages.

Upon the trial of the present cause, the defendant's counsel, after showing under his plea of justification, what had been the treatment of Mary Bullock, and what had passed upon the interview between the plaintiff and Dr. Tweedie, proposed to call Mr. Brodie, an eminent surgeon, to say whether he would meet the plaintiff in consultation; but the Chief Justice held such evidence to be inadmissible. It was then proposed that Mr. Brodie should be asked, *335] whether Dr. Tweedie, in *refusing to consult with the plaintiff, had honourably and faithfully discharged his duty to the medical profession. The Chief Justice thought the question ought not to be put, and the plaintiff obtained a verdict for 400*l*.

Taddy, Serjt., moved for a new trial, on the ground that Mr. Brodie's testimony ought to have been received upon the same principle as the opinion of scientific men upon matters of science; *Beckwith v. Sydebotham*, 1 Campb. 116, *Severn v. Olive*, 3 Brod. & Bingh. 72; or of foreign lawyers on questions of foreign law; because the jury must be ignorant of the conventional rules and etiquette established in each profession, which can only be known, or only accurately known, by members of such profession. None, for example, but members of the bar can appreciate the infamy attendant on obtaining practice by courting and feasting attorneys; so that it is only from the estimation of his brethren that the public can judge whether an individual conducts himself uprightly in those matters with which he is most concerned. The evidence excluded, therefore, was indispensable for the defendant's justification.

TINDAL, C. J. Witnesses skilled in any art or science may be called to say what, in their judgment, would be the result of certain facts submitted to their consideration; but not to give an opinion on things with which a jury may be supposed to be equally well acquainted. If in this case any specific rules of the medical profession had been given in evidence, the defendant perhaps might have been allowed to show that the plaintiff, by violating those rules, had rendered himself unworthy of the countenance of his brethren. But the question *336] here was, whether a physician, in refusing to *consult with the plaintiff, had honourably and faithfully discharged his duty to the medical profession. The answer to that might depend altogether on the temper and peculiar opinions of the individual witness, and was a point on which the jury were as capable of forming a judgment as the witness himself. On this ground, therefore, there is no reason for granting a rule for a new trial.

Taddy then sought to obtain a rule on the ground that one of the jurors had come to the trial predetermined to give heavy damages against the defendant. As to which, he read an affidavit of two members of the College of Surgeons, who were present at the trial of the cause of *Ramadge v. Wakley*, that at the conclusion of that trial, a person whose name was not then known to them came

up and expressed his surprise at the small amount of damages which had been given to the plaintiff in that case, and at the same time said, "I shall be on the jury to-morrow, and I will take care that the verdict does not go that way," or words to the like effect; that one of the deponents then remarked, that the individual addressing them had not yet heard any evidence; to which the individual replied, that "he had heard quite enough, and that his mind was made up as to the verdict he should give:" that on the following day, June 26, 1832, the deponents were again respectively present in the Court of Common Pleas at Westminster, and that when the cause of *Ramadge v. Ryan* was called on for trial the deponents saw the individual who had on the previous day made the before-mentioned remark to them sitting as a juror on the trial of that cause: that having reason to believe the individual in question was John Minter Hart of Mornington Crescent, they went to his residence on the 31st of October, and having obtained an interview, asked if he had been one of *the jurymen on the trial of this cause; he said, he admitted that he had; that he [337 had conversed with the deponents at the door of Westminster Hall on the 25th of June on the subject of the verdict in the cause of *Ramadge v. Wakley*, and recollected the remark he then made: that he supposed deponents had come to him about a new trial in *Ramadge v. Ryan*, and that he knew something that would get a new trial; or words to that effect.

Other affidavits disclosed that Hart had been struck off the roll of attorneys for fraud and misconduct.

The Court were referred to *Wynn v. Bishop of Bangor*, 2 Com. Rep. 601, which was an action of ejectment in which a view had been granted. On making the view, one of the showmen for the plaintiff having made certain observations upon the subject in dispute, one of the jurors observed, that by what they had seen, they should soon determine the dispute; and afterwards, on the day before the trial, he said that the plaintiff was a neighbour, and right or wrong, he would give it for him. The Court held, that though that might form a ground of challenge, yet it was proper to allege the matter as cause for a new trial, and granted the rule. The case of *Herbert v. Shaw*, 11 Mod. 111-118, was cited against the application, but overruled by the court. In *Dent v. Hundred of Hertford*, 2 Salk. 645, a new trial was granted on an affidavit that the foreman had declared that plaintiff should never have a verdict, whatever witnesses he produced.

A rule *nisi* having been granted upon the matters disclosed in the affidavits,

Wilde and *Spankie*, Serjts., showed cause upon an affidavit in which the expressions alleged to have been *used by Hart at his house on the 31st of October, were altogether denied, and in which Hart explained [338 the conversation in Westminster Hall by deposing that his words were, "Well! I am surprised at such small damages; had I been upon the jury I certainly should have given very heavy damages."—"I am upon the jury to-morrow." That no other words escaped him; and that he never said, "I will take care the verdict shall not go that way to-morrow."

They referred to *Onions v. Nash*, 7 Price, 203, where the Court of Exchequer refused to grant a rule for setting aside a verdict on an affidavit of the failing party, stating, that one of the jury was a relation of the successful party, and that they were in habits of friendship and intimacy together, and particularizing various instances and expressions on the part of the jurymen, of partiality and prejudice;—and offered an affidavit from the foreman of the jury, on the ground, that though in general an affidavit from a jurymen, as such, cannot be received, yet here, where the conduct of one of the jurors was impeached, it ought to be open to the other jurors to show that the verdict was not occasioned by the practice of that individual.

The Court, however, refused to receive this affidavit, observing, that the affidavits on the other side applied only to the conduct of the juror before he entered the jury-box.

Taddy, in support of his rule, urged, that the expression which Hart admitted he had used, "I am on the jury to-morrow," if spoken, as it doubtless was, in a significant way, showed such a predetermination as was incompatible with fair trial, and sufficiently accounted for the disparity between the two verdicts.

*339] *TINDAL, C. J.* If the ground of application for a new trial disclosed by the affidavits on the part of the defendant had remained unanswered and uncontradicted, I should have thought the court justified in making this rule absolute; for it would go to create a prejudice against trial by jury if verdicts were to be the result of previous determination; and expressions such as those imputed to the juror Hart, would have been a good ground of challenge if proved to the extent to which they have been alleged in the affidavit. In *R. v. Cook*, 6 St. Tr. 337, expressions of this nature were deemed so improper that the juror ought not to be asked whether he had used them, but that they ought to be proved by such as had heard them spoken. If, therefore, the expressions imputed to Hart had remained unanswered, this cause must have been referred to a new jury. But the conversation on the 31st of October is denied altogether, as is also a portion of that alleged to have taken place on the 25th of June; and the effect of the residue appears to me to be sufficiently answered by Hart's affidavit. This is not a case, therefore, in which the existence of such injustice has been established as to call for a new trial; and the precise ground of application having been answered, the rule must be discharged.

GASKELL, J., concurred in thinking, that the affidavit in support of the motion had been answered.

BOSANQUET, J. The rule nisi was properly granted upon the affidavits then before the court, but I think they have been answered as far as regards the application for a new trial. The situation of Hart, as an attorney struck off the roll, must be put out of our *consideration, because the defendant *340] need not have left him on the panel; but the expression imputed to him, that "he would take care the verdict should not go the same way," falls within the principle of the case in *Salkeld*, and if unanswered, would have afforded ground for a new trial; but Hart denies having used that expression, and the sting of the accusation is answered.

ALDERSON, J. This rule was obtained on an affidavit that one of the jurors had, before he entered the jury-box, made up his mind as to the verdict he should give; and if that charge had remained uncontradicted, the rule must have been made absolute. But the whole sting of the charge is answered; and though the expressions which the juror admits himself to have used were imprudent, yet, his entertaining a strong opinion on a former verdict is not incompatible with his giving a correct verdict on the case which was to come before him.

There was no reason why he should speak in a significant way to mere strangers, and there is nothing in the language which he admits which would lead one, independent of manner, to assume that he had prejudged the verdict he was himself to give.

Rule discharged.

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*COCKS v. NASH. Nov. 16.

To a plea that the plaintiff had released one of two joint obligors, the plaintiff replied that the release was given with an undertaking on the part of the defendant, the other obligor, that the release should not operate in his discharge: Held ill.

THE declaration stated that the defendant, by his certain writing obligatory sealed with his seal, and shown to the Court, the date whereof was, &c., acknowledged himself to be held and firmly bound to the plaintiff in the sum of 200*l.* of lawful money, to be paid to the plaintiff; which said writing obligatory

was under and subject to a certain condition thereunder written, whereby it was declared that if one Mary Nash in the said condition mentioned, and the defendant, their heirs, executors, and administrators, or either of them, should well and truly pay or cause to be paid unto the plaintiff the full sum of 200*l.* with 5 per cent. interest, the interest to be paid half yearly from the date of the said writing obligatory (and on condition that half a year's notice should be given by the plaintiff to the defendant or the said Mary Nash, in a lawful manner, before requiring payment of the said 200*l.* in the condition mentioned), without fraud or further delay, then the last-mentioned obligation should be void and of none effect, or else to remain in full force and virtue. The plaintiff then averred that he did on the 14th of October, 1831, to wit, at, &c., in a lawful manner give notice to Mary Nash and the defendant to pay to him the plaintiff, at the expiration of half a year after the receipt of that notice, the said principal sum of 200*l.* in the condition of the writing obligatory mentioned, and all interest thereon: but that the said Mary Nash and the defendant did not, nor did either of them at the expiration of half a year from the receipt of the last-mentioned notice, or at any time before or after, well and truly or in *any manner pay to the plaintiff the said principal sum of 200*l.* in the condition of the said writing obligatory mentioned, and the interest thereon, or any part of such principal or interest. [*342]

The writing obligatory was set out in the first plea on oyer, as follows:—“Know all men by these presents, that I, Mary Nash, of the town of Ludlow, widow, and Folliot Nash, of the said town of Ludlow in the county of Salop, gentleman, are held and firmly bound to William Cocks of Dodmore Farm in the parish of Stanton Lacy, and county of Salop, in the sum of 200*l.* of good and lawful money of Great Britain, to be paid to the said William Cocks or his certain attorney, executors, administrators, or assigns; for the true payment whereof we bind ourselves, our heirs, executors, and administrators, firmly by these presents. Sealed with our seals; dated this 14th day of October in the sixth year of the reign of our sovereign lord George the Fourth.” The condition corresponded with the statement in the declaration.

The defendant pleaded, first, *non est factum*; secondly, that after the making of the same writing obligatory in the declaration mentioned, and whilst the same was in full force and virtue, and before the commencement of this suit, to wit, on, &c., at, &c., the plaintiff by a certain deed, sealed with his seal, to wit, a certain deed of release, for the considerations therein expressed, released, and discharged the said Mary Nash of and from the same writing obligatory, and all actions in respect thereof. The plaintiff replied,

That the said supposed deed of release was made and executed by the plaintiff to Mary Nash, with the knowledge, privity, and consent, and at the request of the defendant, and on the condition and express promise and undertaking by and on the part of the defendant to the plaintiff, that the said release should not operate to release the defendant from, or in any way prejudice *the rights, claims, or remedies of the plaintiff against the defendant, upon [*343] or in respect of the said writing obligatory.

Demurrer and joinder.

Adams, Serjt., in support of the demurrer. The replication is ill, for it sets up a parol undertaking to vary the release set out in the plea, an instrument under seal. By express provision or apt recital in the release itself, the operation of that instrument might have been confined to one of the co-obligors; *Simons v. Johnson*, 3 B. & Adol. 175; *Payler v. Homersham*, 4 M. & S. 423; *Solly v. Forbes*, 2 B. & B. 38. But a mere parol agreement cannot alter the language of the instrument under seal, which being an unqualified release of one of the co-obligors, operates as a release of both.

It will perhaps be contended, that the plea is ill, for want of an averment that the bond on which the release was to operate, was sealed with the seal of Mary Nash; but such an objection can only be taken on special demurrer, for

the fact that Mary Nash sealed the bond, is involved in the allegation that the plaintiff released her from it. Besides, the plea states, that the plaintiff discharged Mary Nash from the same *writing obligatory*, and writing obligatory is a term of art which implies sealing by the obligor, 1 Wms. Saund. 291; Ashmore v. Rypley, Cro. Jac. 420; Penson v. Hodges, Cro. Eliz. 737.

Wilde, Serjt., contrd. In those cases the word of art was used in the declaration; but a plea, and particularly a plea which seeks to set an estoppel, requires more precision: the law will not intend that the party sealed the deed unless it be expressly averred: *Fitzgerald v. Cragg*, Com. Rep. 139: and though a *344] bond set out on oyer recites, "In witness whereof we have set our hands and seals," that does not amount to an averment that the party sealed the bond: the averment must be made expressly; *Moore v. Jones*, 2 Ld. Raymd. 1536. The plea, therefore, is ill, and the replication is sufficient; for although a parol agreement cannot be set up in opposition to a deed by one of the parties to the deed, yet it may be binding in the nature of collateral undertaking on one who is not a party to the deed. Now the defendant was not a party to the deed of release given to Mary Nash; that deed therefore cannot operate by way of estoppel between the defendant and plaintiff, for estoppel can only be between parties; and a release by operation of law being construed more favourably for the releasor than a release by deed,—Co. Lit. 264 b, Vin. Abr. *Release*, Z. 3, pl. 3,—the apparent release by operation of law accruing to the defendant, out of the plaintiff's deed to Mary Nash, may be connected with the defendant's parol agreement, and in order to give effect to the manifest intention of the plaintiff and defendant, that deed may be construed, not as a general release of the plaintiff's claim, but as a covenant not to sue Mary Nash: and such a covenant will not operate in discharge of a co-obligor; *Dean v. Newhall*, 8 T. R. 168; *Hutton v. Eyre*, 6 Taunt. 289; *Twopenny v. Young*, 3 B. & C. 208. Thus, in *Solly v. Forbes*, 2 B. & B. 38, a release was given by plaintiffs to A., one of two partners, with a provision that it should not prejudice any claims which plaintiffs might have against B., the other partner; and that in order to enforce the claims against B., it should be lawful for plaintiffs to sue A., either jointly with B. or separately: in an action by plaintiffs against A. and B., that release having been pleaded by A., and set out in oyer in the replication, with an averment *345] that the action was prosecuted against A. jointly with B., for the purpose of enabling plaintiffs to recover payment of moneys due from B. and A. to plaintiffs, either out of the joint estate of B. and A., or from B., or his separate estate, the replication was demurred to, and the demurrer overruled. In *Goodtitle v. Bailey*, Cowp. 600, an instrument in the form of a release was, in order to effect the intention of the parties, allowed to operate as a grant; and Lord Mansfield said, "The rules laid down in respect of the construction of deeds are founded in law, reason, and common sense; that they shall operate according to the intention of the parties, if by law they may; and if they cannot operate in one form, they shall operate in that which by law will effectuate the intention."

Adams in reply was stopped.

TINDAL, C. J. The first question is, whether the matters disclosed in this replication operate so in avoidance of the plea as to entitle the plaintiff to sustain his action. The plea states that, before the commencement of the action, the plaintiff by a certain deed of release, sealed with his seal, released and discharged Mary Nash, one of the obligors in the bond on which the plaintiff has declared, of and from the same, and all actions in respect thereof. The replication alleges, that the supposed deed of release was executed to Mary Nash with the knowledge, and at the request of the defendant, and on the condition and undertaking, on his part, that the release should not operate to release him, or in any way prejudice the plaintiff's claim against him. And the objection to the replication is, that it seeks, by the introduction of parol evidence, to put on an instrument under seal, a construction differing from the import of

*that instrument. That is an objection which was esteemed fatal as early as the time of Lord Coke, who lays it down in the Countess of Rutland's case, 5 Rep. 26, that there could not be any bare averment against indentures, parcel of an insurance, that, after the making of the indentures, and before completing the assurance, "by mutual agreement of the parties, it was concluded and agreed that the assurance should be to other uses; but if other agreement or limitation of uses be made by writing, or by other matter as high or higher, then the last agreement shall stand; for every contract or agreement ought to be dissolved by matter of as high a nature as the first deed; —dissolvi eo ligamine, quo ligatum est."—"It would be dangerous to purchasers, and all others in such cases, if nude averments against matter in writing should be admitted."

The effect of the argument on the part of the plaintiff is, that this instrument, which purports to be an explicit release of an entire demand, ought to operate only as a covenant not to sue one of two joint obligors. What is that but an instance of the danger apprehended by Lord Coke? It is urged that, though it might be objectionable to vary the express terms of the instrument as to the re-lessee Mary Nash, the same objection does not apply in the case of a third person only incidentally affected. But I am not aware of any such distinction in the effect of a single instrument, or that it can be properly drawn. In *Davey v. Prendergrass*, 5 B. and Ald. 187, the Court of King's Bench adopted no such distinction, but held, that the legal effect of an instrument under seal could not be altered by parol averment. There it was held, that it was not any defence at law to an action on a bond against a surety, that by a parol agreement time had been given to the principal.

*The cases which have been referred to are answered by merely looking to the statement of them in the books: as *Hulton v. Eyre*, in which the deed was merely a covenant not to sue, and if this had been such, there would have been no difficulty in the case. *Solly v. Forbes* turned on the effect of a deed, as it was to be collected from the whole instrument taken together; and if we could collect from the whole of this deed that it was not intended to operate as a release, that case would have had some application. The first ground of answer, therefore, to the construction contended for on the part of the plaintiff, is, that he cannot by parol averment vary an instrument under seal; and the agreement which he proposes to set up is in itself destitute of consideration.

The plaintiff then objects to the defendant's plea, that it does not allege the bond to have been ever executed by Mary Nash; but looking to the whole of the record, we think this objection is answered, particularly by the matter contained in the replication. After setting out the bond on oyer, and describing it as the bond of the defendant and Mary Nash, which of itself would not be a sufficient averment that it had been executed by her, the defendant alleges that the plaintiff released Mary Nash from the same writing obligatory. It requires no more than a common intendment to say that the allegation of a release of Mary Nash from the bond set out on oyer, involves the supposition that she executed it as well as the defendant; for unless she executed it, from what was she released? and the plaintiff in his replication does not deny, but confesses and avoids such allegation, for he admits that he executed the release to Mary Nash. If he did, we must intend on his own showing that she executed the bond, otherwise how could he grant the release? *The plea, therefore, is sufficient, and on the whole, our judgment must be for the defendant. [348]

GASELEE, J. I agree with my Lord Chief Justice on both points. No doubt a deed may be construed as a release or a covenant not to sue, according to the intent of the parties, manifested by the contents of the deed; but the plaintiff cannot show that intent by parol evidence. In all the cases cited, the Court has extracted the meaning of the parties from the deed itself. We come then to the question as to the sufficiency of the plea; which, if it had stood alone,

might have given rise to some doubt, inasmuch as it contains no averment that the bond was executed by Mary Nash; but when we come to the replication, the plaintiff admits the release of a writing obligatory, executed by the defendant and Mary Nash.

BOSANQUET, J. I am of the same opinion. If Mary Nash were a party to the bond, the release to her operates as a release to the defendant, unless the plaintiff shows something to alter its effect. Now a deed of release may be explained by recital or other matter, contained in the same deed, as appears by the case of *Solly v. Forbes*; but the Court cannot look at an instrument of a lower degree, in explanation of an instrument under seal. The only question remaining is, whether Mary Nash were a party to the bond, and that the plaintiff admits by pleading over and endeavouring to avoid the release by new matter. The plea sets up a release of Mary Nash from the writing obligatory; when the plaintiff in his reply confesses the release, he sufficiently acknowledges her to have been a party to the bond.

ALDERSON, J. concurring, the Court gave Judgment for the defendant.

*349] *RIDLEY and Others, Assignees of WHITE, a Bankrupt,
v. GYDE. Nov. 19.

On the 25th of October, W., a trader, being pressed by L. for the payment of a debt, promised to give security the next day. Instead of doing so, W. went away immediately, gave security to G., and did not see L. again till the 20th of November, when he had a conversation with L. about the security given to G.

W. having been declared a bankrupt, and his assignees relying on an act of bankruptcy alleged to have been committed in giving this security to G., Held, that the declarations made by W. to L. on the 20th of November, were admissible evidence towards establishing the act of bankruptcy.

TROVER by the assignees of White, a bankrupt. The validity of the commission being disputed, the act of bankruptcy, on which the plaintiffs relied, was a warrant of attorney and bill of sale, alleged to have been given by White to the defendant, by way of fraudulent preference, and in contemplation of bankruptcy; as to which,

It appeared that White had long been indebted to the defendant, who was one of his relations, and, from the summer of 1827, had been frequently pressed for payment; that on the 18th of October, 1830, the defendant's solicitor apprised White, the defendant was determined to take proceedings unless security were given, and suggested that White should give a warrant of attorney; White said, "I cannot do it, whatever may be the consequence;" but, upon being further pressed, asked and obtained leave to consult his own solicitor. On the 19th, he consented to give the securities required, and executed the bill of sale at Cheltenham on the 25th October. On the part of the plaintiffs, Loveday, the solicitor of Hare, another of White's creditors, stated, that he had been long pressing White from day to day for the payment of the debt due to Hare; that White made various excuses up to the 25th October, 1830, when he promised to give Hare security on the following day, instead of which he immediately left Leamington, the place of his residence, for Cheltenham, and Loveday never saw him *again till the 20th of November following. In the

*350] interval, however, he received a letter from White (which was read to the jury), in which White admitted he had given securities to Gyde, who would have arrested him if he had not done so; that Gyde, however, had no intention of putting in his claim, if he, White, could go on without molestation, but that if driven by his creditors to extremity, he must take the benefit of the insolvent act. In consequence of this letter, Loveday had an interview with White on the 20th of November, and gave the following account of the conversation between them: "I asked what the security was which he had given to Gyde; he

told me he did not know. I asked if he had made an assignment to Gyde; he said he did not know. I asked if he had given a warrant of attorney; he said he did not know what the security was. I told him he must be a very great rascal to go and give security after his promise to me; he said he owed Mr. Gyde the money, and no one could blame him for taking care of his relations."

The admissibility of this evidence was contested by the counsel for the defendant, but Tindal, C. J., before whom the cause was tried, thought it might properly be received, and a verdict was found for the plaintiffs.

Jones, Serjt., obtained a rule nisi for a new trial, on the ground that though declarations of a bankrupt accompanying an act of bankruptcy are admissible in evidence to show the quality of such act, yet they are not admissible to affect the interests of a *bonâ fide* grantee, at all events not unless made in his presence. And that declarations made so long after the act are not admissible at all.

Bompas, Serjt., showed cause. The declarations in question were properly received as part of the *res gestæ* *which constituted the act of bankruptcy. From the 18th of October to the 20th of November, the pre-ference of Gyde, by the deception practised with regard to Hare, was one continued transaction. The expressions of a bankrupt with reference to the state of his affairs at the time, are almost the only evidence by which it can be ascertained whether a contested assignment has been fraudulent or not. In *Rawson v. Haigh*, 2 Bingh. 104, Park, J., said, "I am satisfied that declarations made during departure and absence are admissible in evidence to show the motive of the departure. It is impossible to tie down to time the rule as to the declarations; we must judge from all the circumstances of the case; we need not go the length of saying that a declaration made a month after the fact would of itself be admissible; but if, as in the present case, there are connecting circumstances, it may, even at that time, form part of the whole *res gestæ*."

Jones. The *res gestæ* in question upon the trial of this cause, were the execution of securities on the 19th and 25th of October; and expressions used by the bankrupt on those days, or perhaps the day after, might have been admissible in evidence to show the state of his intentions upon the occasion. But no case has gone the length of admitting declarations made a month after the transaction to which they refer. If declarations made a month after the fact are held admissible, it will be difficult to draw a line, or to hold that they may not be received, though made after an interval of two, or even twelve months. No transfer by a trader would be safe if open to impeachment by declarations made so long after the fact.

TINDAL, C. J. The ground on which this rule has been obtained is, that conversations between the *bankrupt and Loveday, touching a security which was demanded on the part of one of the bankrupt's creditors, ought not to have been admitted in evidence, to show that securities previously given by the bankrupt to the defendant were fraudulent. It is objected that these conversations passed in the absence of the party to be affected, and that evidence of declarations is not admissible where the party who made them is alive, and may be examined on oath. It is admitted, however, that if these conversations had been part of the *res gestæ*, they were admissible in evidence; for many cases have gone the length of deciding, that when a bankrupt has done an equivocal act, his declarations accompanying the act are admissible to explain his intentions, as, where he has left his dwelling-house, which he may have done either in furtherance of his business or to avoid payment of a debt; so, where he has been denied to a creditor, or has begun to keep house. And the rule is not confined to the precise time of the act in question; for, in *Bateman v. Bailey*, 5 T. R. 512, a declaration made the day after was received in evidence. The Court must in each case consider, whether the declaration proposed to be received does or does not come within a reasonable time of the disputed act. Now the act of bankruptcy on which the plaintiff relied in the pre-

sent case was a fraudulent transfer by way of preference, which is not capable of being proved by any single incident, but can only be established by showing the situation of the bankrupt, and his conduct and language with reference to the whole transaction; and the question is, whether the conversations objected to are not to be considered as accompanying the act of preference. The point to be ascertained is, what was the motive which induced the bankrupt to give a security to his relation Gyde, when another creditor was pressing for security in
 *353] vain. The *witness Loveday stated, that he had from day to day been pressing the bankrupt to give security to Hare, one of his creditors; that the bankrupt made various excuses up to the 25th of October, when he promised to give the security required on the following day; instead of giving it, however, he went to Cheltenham, and was not seen again by Loveday till November the 20th. Loveday then renewed the pressure which the bankrupt had eluded by his retreat to Cheltenham, and the conversation of that day is no more than a resumption of the conversation broken off on the 25th of October. He then asked him where he had been, and what security he had given to Gyde. It seems to me not immaterial, but extremely material and a part of the entire transaction, that on the 20th of November the bankrupt being questioned about the security he had given in the interval of his absence, gave a false account of the matter, pretending that he did not know the nature of the security, when it appears clearly that he had not executed the warrant of attorney to Gyde till after a consultation with his professional adviser as to the nature of the instrument. To shut out this conversation would be to shut out the best evidence in the cause. The letter from the bankrupt was admitted on the same principle, that it formed part of the matter on which the Judge and jury had to decide, namely, why the bankrupt had yielded to the pressure of one creditor after having refused to yield to the pressure of another. I think it fell within the principle on which similar declarations have been admitted in other cases, and that it was not too distant in point of time.

PARK, J. I do not say that isolated and distinct declarations of a bankrupt are to be received in evidence, but when the effect of an equivocal act depends upon the motives by which the bankrupt was actuated, a knowledge of these motives can only be obtained by evidence of the expressions he has used, coupled
 *354] with the *circumstances in which he was placed at the time, and the whole course of his conduct in the matter. I adhere, therefore, to what I said in *Rawson v. Haigh*. It is not necessary to lay down the precise time within which such declarations shall be admissible or excluded; but the nature of an act depending, not on declarations alone, but on the conduct of the bankrupt, it must always be considered whether there are any and what connecting circumstances between the declaration and the act.

Here the bankrupt goes away at a time when he is under pressure by one of his creditors; during his absence, he executes in favour of a relation an instrument of the nature of which, on his return, he falsely professes a total ignorance. Those circumstances are all connected together as part of the same transaction, and the declarations are admissible, affording a principal clue to the intentions of the bankrupt.

GASELEE, J. I entertain great doubt on the point which has been argued, and cannot concur with the rest of the Court that these declarations were admissible. I have great doubts whether declarations of a bankrupt, made behind the back of a person to whom he has given a security, can be given in evidence against that person. Where a party has conveyed an estate, no subsequent declaration of his can be admitted as evidence against the interest of his grantee; and a trader's giving security for a debt is not like his leaving his house, which is an act of bankruptcy of itself, unless explained. Here, the first security impeached was given on the 19th of October, and the first conversation admitted in evidence took place on the 25th. How soon, after the party returned from Cheltenham, does not distinctly appear, but it was not till many

days after the security was given there to Gyde that the second conversation took place, and that, when Gyde was not present. It seems to me that that is a *distance of time too great for the admission of declarations made in [*355 the absence of the party.

BOSANQUET, J. I am of opinion that the two conversations of the 25th of October, and the 20th of November, were admissible in evidence. The letter of November was not objected to at the trial, and therefore I confine my opinion to the two conversations. As a general rule, no doubt, a bankrupt who has executed a security cannot be allowed to impeach it as against the grantee; but the question here is, whether the security in question was given by way of fraudulent preference; and in such cases the material inquiry is what was the situation, conduct, and language of the bankrupt with reference to the whole transaction. Here, two conversations, have been given in evidence, from which it appears that the bankrupt, being pressed by one of his creditors to give security for a debt, made false and frivolous excuses, which of themselves would be evidence of an embarrassed state of affairs. But they are evidence on another ground: about the time that the security was given to Gyde, the other creditor was also pressing the bankrupt. Now, if a trader, being pressed by one creditor, makes excuses for not giving security, and at the same time is found to be giving security to another, that raises a question for the jury, whether the creditor who obtains the security, obtains it without pressure: to establish this, the declarations of the bankrupt must be admitted, not so much as declarations, but as a part of his conduct from which the inference is to be drawn that the security was given without pressure. Without infringing on the general rule as to the admissibility or inadmissibility of such declarations, I think, in this case they ought to have been received as being part of the conduct of the bankrupt.

Rule discharged.

*DOE dem. ROBERT PRICE v. THOMAS PRICE. Nov. 20. [*356

"Unless you pay what you owe me, I shall take immediate measures to recover possession of the property," addressed to a tenant at will, by the party entitled in fee: Held, a sufficient determination of the will.

At the trial of this cause before Bosanquet, J., last Gloucestershire assizes, it appeared that about seventeen years ago, Thomas Price, the defendant, went to France, and conveyed the property in question to his brother Robert, the lessor of the plaintiff, in fee. About two years after, Thomas Price returned, was let into possession by his brother, and remained in occupation ever since, but it did not appear that he had paid rent.

The following letter, written by Robert Price's attorney to Thomas Price's attorney, was given in evidence, to show a demand of possession previous to action:—

"Mr. Thomas Price cannot have given you a correct statement of the transactions between him and his brother. Mr. Robert Price has a conveyance of the property mentioned in your letter, as well as the original title-deeds; but he will be very happy to convey back the property, and deliver up the title-deeds, if his brother will pay him what he owes him; unless, however, he does that, Mr. Robert Price will not only not deliver up the title-deeds, but, as his brother has threatened hostilities, he will without delay take measures for recovering possession of the property. The money due to Mr. Robert Price you will find to amount to a great deal more than the value of the property conveyed to him.

"April 2, 1832."

A verdict having been found for the plaintiff, with leave for the defendant to

move to enter a nonsuit instead, if the Court should be of opinion that there had been no sufficient demand of possession,

*357] *Jones*, Serjt., obtained a rule nisi accordingly, which, when the time arrived for making it absolute, the Court called on him to support.

He contended that the defendant was a tenant at will, and that the letter in question contained no express determination of the lessor's will; the letter was only conditional, and no time was fixed within which the defendant was to accede to the conditions proposed. But the defendant could not be treated as a trespasser until there had been an absolute determination of the lessor's will. *Goodtitle v. Herbert*, 4 T. R. 680; *Right d. Lewis v. Beard*, 13 East, 210. In *Deen v. Rawlins*, 10 East, 262, a case of permissive occupation, in which there had been no regular determination of the landlord's will, *Le Blanc, J.*, asked, "from what time before the ejectment brought, it could be said that the defendant became a trespasser?" and it would be difficult to answer that question in the present case.

TINDAL, C. J. Upon the facts reported in this action it appears that Thomas Price, the defendant, had conveyed the land in question to his brother Robert Price, the lessor of the plaintiff, seventeen years ago. There was some dispute whether Robert Price had or had not paid a consideration for the property; the one asserting and the other denying that a debt was due from Thomas to Robert Price, to the amount of the value of the land. Thomas Price, after an absence of some length, was let into possession by his brother about fifteen years ago, upon what terms does not appear, but he continued in possession till the present time and cropped the land. It cannot be contended, therefore, that he had a less interest than a tenancy at will; because, after an occupa-
*358] tion of such length, it would be hard, if, *on the determination of the tenancy, he were not entitled to the emblements, which a tenant at will may always claim. The question therefore, is, whether the letter of Robert Price's agent was sufficient to determine the holding at will; and I am of opinion that it was, because anything which amounts to a demand of possession, although not expressed in precise and formal language, is sufficient to indicate the determination of the landlord's will. Now it is impossible to read this letter without seeing that it is an answer to some former letter, and that the correspondence was passing between two attorneys clothed with the character of agents. It equally appears that Thomas Price had made claim to the title-deeds, a claim inconsistent with any interest other than that of landlord. That alone would be a disclaimer. But, besides that, there is a sufficient manifestation that the tenancy, if any, was to determine. "Unless Mr. Thomas Price pays what he owes, Mr. Robert Price will not only not deliver up the title-deeds, but will, without delay, take measures for recovering possession of the property." The intimation that the lessor of the plaintiff would without delay take measures, unless a certain demand were complied with, throws it on the other party to act. Upon the ground, therefore, that the defendant has made a disclaimer, and that the offer not accepted was a sufficient indication of an intention to eject, I am of opinion that the defendant's tenancy at will was determined, and that this rule must be discharged.

GASELEE, J. I am of the same opinion. It is manifest, from the plaintiff's attorney's letter, that he was making a claim of the property: if he claimed as owner, that claim was inconsistent with the defendant's further occupation; if he claimed as mortgagee, it has been held that a demand, without
*359] notice to quit, is a sufficient *determination of the will. *Doe d. Roby v. Maisey*, 8 B. & C. 767. In either way, therefore, the defendant's right to occupy was at an end.

BOBANQUET, J. It is clear that the title to the freehold was in the lessor of the plaintiff, and that, except through his permission, the defendant had no claim to the occupation of the property. Under these circumstances, a letter is written on the part of the lessor of the plaintiff, from which it appears that

the defendant had made some claim to the title-deeds, and we must read that letter as it would be read by any man of plain understanding. It is impossible, so reading it, not to see that the defendant was no longer to have permission to hold the property, unless he acquiesced in the terms proposed by the lessor of the plaintiff, and those terms being rejected, the permission was at an end.

ALDERSON, J., concurred.

Rule discharged.

MORGAN v. MORGAN. Nov. 21.

Where an attesting witness could not be found after sufficient inquiry, Held, that evidence of his handwriting was admissible, although a letter, not disclosing his retreat, had been received from him a few days before the trial.

UPON the trial of this cause, an action of debt on bond, the Chief Baron permitted evidence to be given of the handwriting of Jones, an attorney, who was the attesting witness, on the ground that he could *nowhere be found after an inquiry, the circumstances of which were as follow:— [*360]

A month before the trial, application was made to the defendant to admit the execution of the bond; but the defendant declining to do so, a fortnight before trial inquiry was made for Jones of his agent in London, and of his clerk, but neither could tell where he was to be found. Five or six days before the trial, which took place on the 14th July, inquiry was made at Jones's residence; but neither his wife, his servant, nor his brother could state where he was.

On the 11th July his clerk had received a letter from him, dated the 6th of July, but the letter did not disclose his retreat; and a bailiff, from whom he had escaped, stated that search had been made for him a twelvemonth in vain.

A verdict having been found for the plaintiff, with leave for the defendant to enter a nonsuit, if the Court should be of opinion, that under these circumstances evidence of Jones's handwriting ought not to have been received,

Merevether, Serjt., obtained a rule nisi accordingly, against which

Bompas, Serjt., who showed cause, contended, that sufficient inquiry had been made for the attesting witness; relying on *Cunliffe v. Sefton*, 2 East, 183, and *Crosby v. Percy*, 1 Taunt., 364; when the Court called on

Merevether. In all the cases in which evidence has been received of the handwriting of the attesting witness, it has appeared from the inquiries made, not only that the witness could not then be found, but that there was *no reasonable expectation of producing him at a future day. In the pre- [*361] sent case, admitting the inquiry to have been sufficient, which it was not, because it ought to have prosecuted earlier than five or six days only before the trial, it is plain from the circumstance of the witness's clerk having received a letter from him a short time before the trial, that he was alive and at no great distance, and might reasonably be expected to be forthcoming before long: the trial, therefore, ought to have been postponed. The validity or nullity of the bond might depend altogether upon his testimony; and in *Wardell v. Fermor*, 2 Campb. 282, in an action on a *post obit* bond, it appearing that the attesting witness was an attorney who formerly had an office in London, and resided in Sydenham, it was held, that it was not enough to let in evidence of his handwriting to prove the execution of the deed, that he had disappeared from his office in London for a twelvemonth before the trial, and had not been heard of during that period by persons who knew him, without showing that search had been made after him at the house he occupied at Sydenham. And Lord Ellenborough said, "I will admit the secondary evidence, if you show that you could not, by any means, find out the attesting witness."

But I will watch, very narrowly, your proof of search. This extension of the rule may lead to dangerous consequences. If the attesting witness knows too much of the transaction, and his examination would hazard the validity of the deed, he may be sent out of the way, and we may be amused at the trial, with an account of his having absconded."

TINDAL, C. J. This case falls within the principle established by *Crosby v. Percy*, and *Cunliffe v. Sefton*, and the only question is, whether every effort was *362] made *to procure the attendance of the witness, and the court was satisfied that he was not kept back to serve the purposes of the party. Now, a month before the trial, an application was made to the defendant to admit the execution of the bond; a fortnight before, inquiry was made in vain of the agent and clerk of the attesting witness, and five or six days before the trial, of his wife and servant at his own house; none of those persons could give any information where he was to be found; and further than this, a bailiff who was responsible for his escape, stated that he had looked for him a twelvemonth to no purpose. Under these circumstances, I think sufficient diligence has been used to preclude all suspicion that the witness was kept back for sinister purposes, and that evidence of his handwriting was properly received.

GASELEE, J. It would have been more satisfactory if the wife of the attesting witness had been called; but, upon the whole, I cannot say that sufficient diligence has not been used.

BOSANQUET, J. I think the various inquiries were sufficient. The only circumstance which appeared to give a clue to finding the witness, was the letter received by his clerk; but that communicated no more than that he was alive.

ALDERSON, J., concurred.

Rule discharged.

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*VARLEY v. MANTON. Nov. 21.

Pleading: a general averment of performance, "*according to the provisions of the said agreement*," is sufficient on general demurrer, although the agreement contains conditions precedent, specific averment of the performance of which would have been indispensable on special demurrer.

THE plaintiff declared that, on, &c., at, &c., by a certain agreement then and there made between the plaintiff and the defendant, the plaintiff agreed to make the defendant a three-horse power portable threshing machine, to be worked by a four-horse works; to thresh from twenty to twenty-five quarters of wheat in a day; to put up the new machine at Tanholt, where an old one then stood, in a complete workmanlike manner; and to take down, at the plaintiff's own expense, the old one then standing at Tanholt; the defendant to deliver the old machine at the plaintiff's yard at Peterboro', and also to fetch the new one to Tanholt; the old one to be taken by the plaintiff at 20*l.*, and the defendant to pay the plaintiff 30*l.* in exchange for the new one: the new machine to be put down in a complete working state, in two months from the date of the agreement. That the plaintiff and the defendant then and there undertook, and faithfully promised each other respectively, to perform and fulfil the said agreement in all things. That the plaintiff, confiding in the said agreement and undertaking of the defendant, afterwards and within the time mentioned in the agreement, at, &c., made the said three-horse portable threshing machine for the defendant, and did, within such time aforesaid, put up the new machine at Tanholt in a complete workmanlike manner, and took down the old one at his own expense, and did then and there take the same at 20*l.*, according to the provisions of the said agreement, to wit, at, &c. And although the said new machine was put down in a complete working state

within the time in that behalf mentioned, whereof the *defendant then and there had notice, and was then and there requested by the plaintiff [*364 to pay him the sum of 30*l.*, according to the tenor and effect of the said agreement, yet the defendant did not, nor would, when he was so requested as aforesaid, or at any other time, before or since, pay the plaintiff the said sum of 30*l.*, or any part thereof, &c.

General demurrer and joinder.

Jones, Serjt., in support of the demurrer. The declaration is ill, for it omits the averment of no less than three conditions precedent: 1. That the new machine was capable of threshing from twenty to twenty-five quarters of wheat. 2. That it was capable of being worked by a four-horse works. 3. That it was erected on the spot where the old one stood.

The words, "according to the provisions of the said agreement," at the end of the plaintiff's averments of performance, apply only to the taking of the old machine, at 20*l.*, or, at most, to the particulars in respect of which the plaintiff has alleged performance, and cannot be extended to conditions precedent, the observance of which ought to be expressly stated.

TINDAL, C. J. We must take the words of the averment of performance as they would strike any ordinary person. "*According to the provisions of the agreement*," overrides the whole of the preceding averments, and it would be a violent construction to confine it to the last member of the sentence. That brings the case within the rule, that where there is a general allegation of performance, if the other party wants a more specific averment he must demur specially.

GASELEE, J. I am of the same opinion: "*According to the provisions of the said agreement*," comes at the end *of the whole sentence, and [*365 applies to the whole, as it might have done if it had been placed at the beginning. There might have been some ground for doubt if those words had been placed in the middle.

BOSANQUET, J. "*According to the provisions of the said agreement*," overrides the whole averment of performance: it is not strictly formal, but the objection should have been taken on special demurrer.

ALDERSON, J., concurred.

Judgment for the plaintiff.

BELTON v. HODGES. Nov. 22.

A commission of bankrupt against an infant is void, and not merely voidable.

THE plaintiff having been declared a bankrupt, sued the defendant, his assignee, to try the validity of the commission. It appeared that the trading on which the plaintiff was declared bankrupt, was carried on, the petitioning creditor's debt incurred, the act of bankruptcy committed, and the commission sued out, during the plaintiff's infancy; and that the parties came to the trial of this cause with the full knowledge on the part of the defendant, that the fact intended to be disputed was, whether the plaintiff was an infant at the time of the trading and issuing the commission. All the evidence for and against the infancy was brought before the jury, who found that the plaintiff was an infant at the time of the commission; but no notice of an intention to dispute the validity of the commission had been given under 6 G. 4, c. 19, s. 90. A verdict having, under these *circumstances, been found for the plaintiff, [*366 with leave for the defendant to move to enter a nonsuit instead,

Taddy, Serjt., obtained a rule nisi accordingly, on the ground that in a court of law, this commission, not having been superseded by the plaintiff, was valid; and that, at all events, its validity could not be disputed by the plaintiff in this action, for want of the notice prescribed by 6 G. 4, c. 16, s. 90. This last objection, however, had not been taken at the trial.

Wilde, Serjt., who showed cause, contended that the commission was absolutely void, because an infant cannot contract a trading debt. In *Ex parte Watson*, 16 Ves. 265, a bankrupt having petitioned to supersede his commission on the ground of infancy, the Chancellor refused to interfere, because he had held himself forth to the world as an adult, but left the bankrupt to bring his action at law; whence it followed, that if the infancy should be proved, there would be a remedy at law. But that remedy could be no other than holding the commission to be void. And an infant is not estopped from disputing his commission, even though he may, to prevent loss, have assisted his assignees in the disposal of his property. *Heane v. Rogers*, 9 B. & C. 577. Then, the commission being void to all intents, notice to dispute it was not necessary under sect. 90, 6 G. 4, c. 16; particularly where, as in the present instance, the parties came prepared to try, and actually tried the fact in dispute,—the infancy.

Taddy. The commission was voidable only, not absolutely void; and the plaintiff having done nothing to supersede it, could not sue his assignee: at all *367] events, not without notice of an intention to dispute the validity of the commission. If a deed executed by an infant be only voidable, *Zouch v. Parsons*, 3 Burr. 1805, by the stronger reason his liability in respect of a trading debt, must continue till he has done some act to disaffirm it. And in *Goode v. Harrison*, 5 B. & Ald. 147, where an infant held himself out as in partnership with J. S., and continued to act as such till within a short period of his coming of age, but there was no proof of his doing any act as a partner after twenty-one, it was held, that it was his duty to notify his disaffirmance of the partnership on arriving at twenty-one; and as he had neglected to do so, that he was responsible to persons who had trusted J. S. with goods subsequently to the infant's attaining twenty-one, on the credit of the partnership. Here, no act was done to disaffirm the petitioning creditor's debt, or to supersede the commission; the merely bringing an action against the assignee, without notice to dispute the commission, cannot be esteemed a disaffirmance. [TINDAL, C. J. In *Rex v. Cole*, 1 Ld. Raym. 448, the defendant was indicted for that, he being a bankrupt, and brought before the commissioners, refused to give them an account of his effects, &c., and at the trial pleaded that he was an infant at the time of the debts contracted; and it was holden by Holt, C. J., that a man could not be a bankrupt for a debt contracted in his infancy, for that no man can be a bankrupt for debts which he was not obliged to pay.] That was an indictment, and a minor may be civilly, though not criminally, responsible. In *Ex parte Sidebotham*, 1 Atk. 146, it appears that Lord Macclesfield had held that a commission might issue against a minor: Lord Hardwicke, indeed, superseded such a commission; but it may be thence inferred that till it was superseded it was voidable only, not void. A *commis-
*368] sion of bankrupt is in the nature of a statute execution. If an infant does not plead his infancy in an action, he cannot afterwards discharge himself; so, if he does not take steps to supersede his commission, he affirms it. *Ex parte Moule*, 14 Ves. 602; *Ex parte Bass*, 4 Madd. 270; *Ex parte Abel*, 1 Jac. & W. 499, and *Ex parte Cutten*, Buck. 69, show that it is a matter of discretion with a court of equity, whether a commission shall be superseded or not.

At all events, in the absence of notice to dispute the commission, the proceedings under it are sufficient evidence to support it, even though they do not disclose a perfect petitioning creditor's debt. *Macbeath v. Coates*, 4 Bingh. 84.

Cur. adv. vult.

TINDAL, C. J. This is an action brought by the plaintiff, who has been declared a bankrupt, against the defendant, the assignee under the commission issued against him, for the purpose of trying the validity of such commission. It appears in this case, that not only the petitioning creditor's debt was contracted by the plaintiff, and the trading upon which he was declared bankrupt was carried on by him, and the act of bankruptcy committed during his infancy,

but also the commission of bankrupt itself was issued out against him whilst he still continued an infant. Upon this short state of facts two questions arise: first, whether the commission of bankrupt is a valid commission in a court of law; and, secondly, whether the plaintiff can dispute its validity against the assignee, without giving notice, under the ninetieth section of 6 G. 4, c. 16. That a commission of bankrupt issued against an infant would, under ordinary circumstances, be superseded upon the *ground of infancy, by the Lord Chancellor, has been held to be the law, at least since the case of *Ex parte Sidebotham*, 1 Atk. 146, where Lord Hardwicke, on superseding a commission on that ground, said, "Notwithstanding Lord Macclesfield held, in the case of one Whitelock, that an infant might be a bankrupt, yet it has been determined otherwise since." But the question before us is, whether, without applying to the Chancellor for a supersedeas, the commission may, under these circumstances, be held invalid by a court of law. And upon that point we are of opinion that the commission is altogether invalid. We are not called upon to consider whether a commission taken out against a person after his full age, upon a petitioning creditor's debt, a trading and an act of bankruptcy during his infancy, may, or may not be supported. In that case, the conduct and acts of the bankrupt, after he attained his full age, may have been such as to confirm the debt of the petitioning creditor, and the several contracts which he made in his trade, so as to enable him to be considered such a trader as might commit an act of bankruptcy. But this is a commission taken out against an infant upon a trading carried on, a debt contracted, and an act of bankruptcy committed during his nonage. The statute 6 G. 4, c. 16, after describing the particular callings and occupations which shall be considered to constitute a trading within the statute, proceeds to enact that *all such traders* who shall commit certain acts therein enumerated, shall be deemed to have thereby committed an act of bankruptcy. A *trading*, therefore, by the party at the time the act is committed, is one of the conditions upon which such act receives its character of an act of bankruptcy; and it is only against such a trader that the Chancellor has jurisdiction to issue the *commission. But by the law of England, an infant cannot trade, because he cannot be made liable on contracts entered into by him in the course of trade. 1 Roll. Abr. 729; Dyer, 104 b. in marg.; 1 Mod. 187; Strange, 1083. And accordingly, in the case of *Ex parte Moule*, 14 Ves. 602, where the bankrupt applied to the Lord Chancellor to supersede the commission, on the ground that the trading was during his infancy, Lord Eldon, C., although he refused to supersede the commission, as the bankrupt had obtained his certificate under it, observed, that "A trading, of a sort, had been deposed to, but that was during infancy;" and afterwards stated, "That there was enough to have authorized the petitioning creditor to claim the right to try the fact of trading after he became adult, which would support the commission." In the case *Ex parte Watson*, 16 Ves. 265, where the bankrupt petitioned that the commission against him might be superseded, on the ground that he was under the age of twenty-one when it was issued, the Lord Chancellor said, that as it appeared in this case that the petitioner had held himself forth to the world as an adult, and *sui juris*, and traded in that character, and contracted debts to a considerable amount, for two years previous to the commission, he would make no order, but leave the bankrupt to bring his action at law, if he should think proper so to do. Words which imply that *at law*, if the infancy should be proved, there would be a remedy; and certainly there could be no remedy at law but by holding the commission invalid. The Chancellor further added: "I consider him no more entitled to any favour or assistance than a feme covert who lives apart from her husband, and holds herself out as a feme sole, and contracts debts, is entitled to any summary relief from the Judges at common law, who always leave a woman of *that description to make the best she can of her plea of coverture in any action brought against her; and constantly refuse to interfere so as to afford

her any summary relief." The same appears from the case in 1 Ves. & B. 494, where it is expressly stated by Lord Eldon, "That a minor cannot be bankrupt;" and from the case of *O'Brien v. Currie*, 2 C. & P. N. P. 283, in which it was ruled by Mr. Justice Burrough, that a commission of bankrupt issued against a minor is absolutely void. See also *Thornton v. Illingworth*, 2 B. & C. 826.

The second point raised on the part of the defendant is, that, even if the commission cannot be supported by reason of the infancy of the plaintiff, still, that the evidence was inadmissible, as no notice had been given under the ninetieth section of 6 G. 4, c. 16. As to that point, it is to be observed, that the parties came to the trial of this cause with the full knowledge on the part of the defendant of the fact intended to be disputed, viz., whether the plaintiff was an infant at the time of the trading and the issuing of the commission. All the evidence for and against the infancy was brought before the jury, and the jury found that he was an infant. In a case, therefore, where there was actual knowledge of the point in dispute, although no formal notice; where the allowing of the objection, if a valid one, would go no further than to a new trial, in which the court would still allow the plaintiff to give the formal notice; where, if such notice was given, the same facts would by themselves be conclusive against the commission; and where the objection itself does not appear upon the judge's notes, and the parties do not agree between themselves whether it was distinctly taken at the trial, we do not feel ourselves called upon to give *372] an opinion whether *the case falls within the ninetieth section of the bankrupt act or not. Upon the whole, therefore, we think the rule for entering a nonsuit ought to be discharged. Rule discharged.

CROWFOOT and Others, Assignees of STREATHER, a Bankrupt,
v. W. B. GURNEY. Nov. 21.

S. being indebted to I., and G. being indebted to S., S. requested G. to pay whatever might be due from G. to S. G. promised I. to do so as soon as the amount was ascertained.

After the amount had been ascertained, and before it was paid, S. became bankrupt. Held, that notwithstanding the bankruptcy of S., I. might sue G. for the amount of his debt to I.

AN arbitrator, to whom this case was referred, found that Streather, before his bankruptcy, had been employed by the defendant, who was the treasurer of the Baptist College Chapel, to erect the Baptist College Chapel and other buildings. The works were completed in July, 1830; and on the 16th December, 1830, there was due to Streather from the defendant, as treasurer of the chapel, a considerable balance for work done and materials supplied by Streather in respect of the buildings aforesaid; but the works were not measured until a subsequent period, and the amount of balance due to the said Streather was not ascertained before the 11th of April, 1831. On the 16th December, 1830, Streather, being indebted to Messrs. Isaac Solly and Sons, gave them the following letter addressed to the defendant: "I shall feel obliged by your paying to Messrs. Isaac Solly and Sons the balance due to me for building the Baptist College Chapel and buildings at Stepney, and their receipt shall be a sufficient discharge to you as treasurer of such chapel." On the same day Solly and Sons sent the above letter to the defendant, enclosed in a letter from themselves, which was as follows: "We beg to hand you annexed an order from *373] Mr. Streather, to pay to us the balance *due to him for building the chapel, &c., at Stepney; and we shall feel obliged by your informing us when such balance will be in course of payment. Requesting your due attention to said order, we are, &c." To that letter the defendant, on the 20th

December, 1880, sent the following answer to Solly and Sons: "I have received your letter, enclosing Mr. Streather's, and shall be happy to make the payment to you instead of to him as requested; but I have not yet received the surveyor's report, and am therefore ignorant of the amount, and the time at which he may direct it to be paid."

Those letters were stamped with an agreement stamp. On the 21st April, 1881, a commission of bankrupt was issued against Streather, under which commission the plaintiffs were duly chosen assignees, and the bankrupt's effects were assigned to them previously to the time when the notice hereinafter mentioned was given by the plaintiffs to the defendant. At the time of the bankruptcy, the balance of account due from defendant in respect of the buildings, &c., was 528*l.* 4*s.* On the 11th May, 1881, the plaintiffs, as assignees under the commission, applied to the defendant for payment of that balance, and gave him notice not to pay the same to Messrs. Solly and Sons. On the 31st May, 1881, Solly and Sons claimed from the defendant the payment of the balance, and gave him notice not to pay it to the plaintiffs as such assignees. On the 10th August, 1881, the defendant paid the balance to Solly and Sons under an indemnity from them against the claim of the assignees in respect of the balance. The action was brought by the plaintiffs as such assignees, to recover the said sum of 528*l.* 4*s.*

Upon the above facts, the arbitrator was of opinion that the plaintiffs were not entitled to recover. But if the court should be of opinion that the plaintiffs were *in point of law entitled to recover the said sum of 528*l.* 4*s.* [374 from the defendant, then the arbitrator awarded and determined that they were so entitled, and ordered and adjudged the defendant to pay the plaintiffs the said sum of 528*l.* 4*s.* within one fortnight after the court should have so determined. (a)

The case having been appointed for argument upon a rule nisi obtained for setting aside so much of the award as adjudged that the plaintiffs had no right to recover,

Spankie, Serjt., for the plaintiffs, now contended, first, that the order given by Streather should have had a bill of exchange stamp; but the court being of opinion that there was no ground for considering the instrument a bill of exchange, *Spankie* argued that the instrument was revokable by Streather if he had been *sui juris*, and, therefore, by operation of law, revoked by his bankruptcy. As Gurney's debt to Streather was a *chose in action*, and not assignable by Streather, Solly could have no right to sue except by virtue of Gurney's assent. But to give any effect to that assent, it ought to have been for a sum ascertained and specified. No sum being specified, there was nothing executed or final in Gurney's undertaking, and Streather might have revoked so indefinite an order at any time before the money was paid. In *Gibson v. Minet*, 1 Ry. & Mo. 68, where A. gave B. an order on his bankers, directing them "to hold over from his private account 400*l.* to the disposal of B.," and the bankers accepted the order, it was held that such order was revokable, and might be countermanded before payment made to B., or appropriation to his *credit. [ALDERSON, J. In *Smith v. Everett*, 4 Br. Ch. C. 64, it was [375 ruled by Lords Commissioners Eyre and Ashurst, that an order to pay money out of a particular fund gave the party a *specific lien* thereon.] But here there was no adequate consideration for the assignment, for upon Gurney's refusing to pay, Solly might still have had recourse to Streather; *Cuxon v. Chadley*, 3 B. & C. 591; and per Bayley, J., in *Wharton v. Walker*, 4 B. & C. 165; and it has been expressly laid down in *Fairlie v. Denton*, 8 B. & C. 395, and *Wilson v. Coupland*, 5 B. & Ald. 228, that to make such an assignment as this available, there must be a defined and ascertained debt due to the assignor, as well as an assignment agreed to by all the three parties.

(a) See *Ex parte Alderson*, 1 Madd. 58. *Ex parte South*, 3 Swanst. 392. *Hodgson v. Anderson*, 8 B. & C. 842. *Jones v. Simpson*, 2 B. & C. 818.

TINDAL, C. J. It appears to me that the assignees of Streather are not entitled to recover from the defendant under the circumstances stated on this award. A sum of money was due from the defendant Gurney to Streather; the precise amount is not stated, but it may be collected from the terms employed by Streather, that it was larger than a debt due from Streather to Solly, which Streather desires Gurney to discharge; Gurney gives his assent; an assent which, it may be observed, is wanting in many of the cases referred to. These circumstances amount to an equitable assignment of the debt due from Gurney to Streather; for Solly might have gone into a court of equity to compel a formal assignment, and no answer could have been given to such an application. There was consideration enough for such an assignment, for Solly, from the time of the order, appears to have abstained from making any application to Streather, and to have looked to Gurney alone.

*376] It has been objected that such an assignment could not take place except in respect of a precise and ascertained amount. I cannot concur in that proposition, because all that can be required is, that the debt assigned should not be larger than the sum due to the party assigning. Here the balance was ascertained before Streather's bankruptcy. If it was ascertained while Streather was master of his own acts, it is the same thing as if it had been ascertained at the time of the order. The transaction must be considered, therefore, as an equitable assignment; and then the rule applies, that the assignees must stand in the same situation as the bankrupt, and the defendant is entitled to retain his verdict.

GASELEE, J., concurred.

BOSANQUET, J. If Solly had any right, in law or equity, against Streather upon the order, the assignees cannot recover. I am of opinion that he had a right in equity to claim a formal assignment, and that, therefore, this rule must be discharged.

ALDERSON, J. I am of the same opinion. In *Hodgson v. Anderson*, 3 B. and C. 842, the order given by Hodgson was, "as soon as you have funds belonging to James Anderson of Trinidad, I will thank you to pay, on my account, to the Commercial Banking Company in your city, 291*l.* 19*s.*, being the amount of my promissory note in favour of E. Robertson, Esq., or any part of the same, advising me of the amount, and I will credit Mr. J. Anderson, having received his order to this effect, as he is indebted to me more than this order." This note was delivered to Messrs. Anderson and Rhind, agents to James Anderson, *377] and they orally promised the banking company to pay to them according to the terms of the order as soon as they should have funds of the defendant in hand. It appeared that Hodgson afterwards gave an order to another creditor, authorizing James Anderson to pay to such creditor the amount of the debt due to him, Hodgson; and James Anderson entered into an obligation to pay the same to such creditor, but there was a clause annexed to the obligation, stating that it had been alleged that a payment had been made by some person to Hodgson, on account of James Anderson, and it was declared, that should such payment be proved to have been made, the amount should be deducted. The creditor to whom that order was given demanded payment of the debt from James Anderson, on his arrival in this country, but the latter refused to pay it, on the ground that his agents were liable to pay it to the Commercial Banking Company, and the same was, in fact, afterwards paid to that company. The Court held, that although a creditor had a right to insist on payment to himself or to his appointee, yet, having once given an order for the payment of his debt to a third person, he had no right to revoke that order, provided there was a pledge by the person, to whom the authority was given, that he would pay the debt according to the authority. That case is decisive of the present. Gurney promised to pay, when the amount should be ascertained; the amount was ascertained before Streather became bankrupt; and, therefore, this rule must be Discharged.

*WHITE, Assignee of CATLING, Insolvent, v. BARTLETT. [*378
Nov. 22.

Defendant, an auctioneer, was employed by C., a person in embarrassed circumstances, to sell his property; defendant sold, and paid the proceeds to C.'s order: C. having shortly afterwards been declared insolvent, Held, that the defendant was not liable to C.'s assignee, although the defendant, when he sold the property, was aware of C.'s embarrassment.

ASSUMPSIT for money had and received to the use of Catling, and upon an account stated with him before he petitioned the insolvent debtor's court for his discharge, and also for money had and received to the use of the plaintiff as White's assignee.

In December last, the defendant, an auctioneer, was employed by Catling, then in embarrassed circumstances, to sell his household furniture, with a view that the proceeds should be applied in discharge of his debts. The defendant accordingly circulated an advertisement that the goods would be sold for the benefit of the creditors, and the sale took place December 27.

At the time of the sale, the plaintiff, one of Catling's creditors, gave the defendant notice not to pay over the proceeds, alleging that Catling had committed an act of bankruptcy.

The next day, December 28, the plaintiff arrested Catling, and sent him to gaol.

On the 17th of February following, Catling filed his petition under the insolvent debtors' act. But

On the 31st of December and 4th of January, the defendant, upon receiving an indemnity, by Catling's order paid the proceeds of the sale partly to Catling's attorney, and partly to one of Catling's creditors, after deducting the usual amount for the expenses of sale, &c.; whereupon the plaintiff sought to recover the amount of the proceeds in this action.

The learned Judge who tried the cause having non-suited the plaintiff on this state of facts,

A rule nisi was obtained for setting aside the non-suit* on the ground [*379 that the defendant, as appeared by his advertisement, having been privy to the embarrassed circumstances of Catling, the payment of the proceeds of the sale to Catling's attorney was a fraud upon the creditors.

Jones, Serjt., showed cause. Catling had full dominion over his property till the filing of his petition on the 17th of February: the defendant could not disclaim the title of his employer: had he done so, he would have been liable to Catling in an action for the proceeds of the sale. And the defendant being employed merely as an auctioneer, the delivery of the goods to him for the purpose of sale, was not a fraudulent delivery within section 32 of the insolvent act, 7 G. 4, c. 57, which avoids transfers made by the insolvent to a creditor; enacting, that "if any prisoner who shall file his or her petition for his or her discharge under the act, shall before or after his or her imprisonment, being in insolvent circumstances, voluntarily convey, assign, transfer, charge, deliver, or make over any estate, real or personal security for money, bond, bill, note, money, property, goods, or effects whatsoever, to any creditor or creditors, or to any person or persons, in trust for, or to or for the use, benefit, or advantage of any creditor or creditors; every such conveyance, assignment, transfer, charge, delivery, and making over, shall be deemed and is hereby declared to be fraudulent and void as against the provisional or other assignee or assignees of such prisoner appointed by this act: provided always, that no such conveyance, assignment, transfer, charge, delivery, or making over, shall be deemed fraudulent and void, unless made within three months before the commencement of such imprisonment, or with the view or intention by the party so conveying, assigning, transferring, charging, delivering, or making over, of petitioning the said court for his or her discharge from custody under [*380 "his act."

There is no evidence to warrant any imputation that the defendant was acting in collusion with Catling, for the purpose of defeating his creditors.

Bompas, Serjt., in support of the rule. The defendant having notice of White's embarrassment, became, upon the sale of the goods, a trustee to the creditors for the proceeds within the meaning of s. 32, 7 G. 4, c. 57. Either he was such trustee, or agent for Catling; if agent for Catling, he is in the same position as Catling himself, and therefore liable to refund the sum voluntarily paid to Catling's appointee. If the defendant can elude this responsibility, the estates of insolvents may always, by a similar contrivance, be withdrawn from their creditors at large.

TINDAL, C. J. I think this rule ought to be discharged. And though it has been urged that the consequence of our decision will be to waste the property of insolvents, that conclusion cannot apply to cases circumstanced like the present. No one says, that sums improperly paid by an insolvent to one of his creditors may not be recovered by his assignee; but the question here is, whether *this* defendant, who acted in the capacity of an agent, and accounted to his employer, can be called on a second time, upon his employer's afterwards becoming an insolvent debtor. Now the defendant's employer was master of his own property till the month of February, the time of filing his petition in the insolvent debtors' court; till that period it could not be predicated of him that he was an insolvent; nearly two months before, the defendant, as auctioneer, sold some of his effects; accounted to him in December; and, subject *381] to some deductions assented to by his *employer, paid over the proceeds in December and January to persons appointed by him. It is contended, that the defendant ought not to have done this after the notice which he had of his employer's circumstances; but the defendant acted merely as agent, and if he had refused to account to his principal, what answer could he have given to an action for money had and received? As to the 32d section of 7 G. 4, c. 57, it applies only to persons of two descriptions, creditors, and trustees for creditors,—the defendant was neither. It is not pretended he was a creditor, and in order to render him a trustee, he should have been at least apprized of the trust. The nonsuit therefore was right, and this rule must be discharged.

GASLEE, J. I am of opinion there is no ground for setting aside this nonsuit. There is no evidence that the transaction was fraudulent; on the contrary, it appears to have been the intention of Catling at the time, to divide among his creditors the proceeds of his property, and up to the 17th of February he had full dominion over it.

BOSANQUET, J. I am also of opinion that the nonsuit ought not to be set aside, for the property claimed was not vested in the plaintiff at the time of Catling's filing his petition. While the property was yet vested in Catling, he employed the defendant, as his agent, to dispose of it by auction. It was to be sold for the benefit of creditors; but they were no parties to any arrangement to that effect, nor was the defendant their trustee: he therefore was bound to account to his employer. But it is urged that the defendant, though acting as an auctioneer, was apprized of the situation in which Catling stood, and therefore must be deemed to have assisted him in a voluntary preference of the *382] *creditor to whom it is alleged some portion of the money has been paid; the defendant, however, could not know to what extent Catling might have been pressed, or that he would take the benefit of the insolvent debtors' act; neither could he have had any defence if Catling had sued him for money had and received.

ALDERSON, J. I am of the same opinion. The case does not involve the consequences predicted by the counsel for the plaintiff. The question is not so much whether Catling's assignee can recover the proceeds in question, as, whether he can recover them of the defendant. Now the defendant was employed as an auctioneer while Catling had dominion over his goods, and as agent, he was bound to account to the principal who employed him. The pay-

ment to Catling's appointee, was the payment of the principal not of the agent, and the mere intermediate hand is not responsible unless he be caught with the goods.

Rule discharged.(a)

(a) *Alderson, J.*, referred to the following case, argued in the Common Pleas of Lancaster, before himself and Patteson, J., of which the note below has been procured:—

HARDMAN v. WILLCOCK.

The defendant was employed by the plaintiff to sell, as auctioneer, certain goods then in the plaintiff's possession. Before the sale a notice was given to the defendant by the assignees of an insolvent, that the goods were their property as such assignees, and that they had been fraudulently removed by collusion between the plaintiff and the insolvent. The defendant, after that notice, sold the property, and rendered an account of the sale of it to the plaintiff. But in the result, on an indemnity being given to him by the assignees, he refused to pay over to the plaintiff the money arising from the sale; and on an action for money had and received being brought against him by the plaintiff, he set up in defence the right of the assignees.

At the trial last Lancaster Spring assizes, the jury affirmed the right of the assignees, and found that the plaintiff obtained *possession of the goods by a fraud between him and the insolvent; and upon that state of facts, were directed by Patteson, J., [383 to find a verdict for the defendant, with liberty to the plaintiff to move to enter a verdict for the amount of the sale in case the Court should be of opinion that it was not competent for the defendant, in the peculiar situation in which he stood to the plaintiff, to set up the right of the assignees on the present occasion.

Wightman accordingly moved to enter a verdict for the plaintiff, on the ground that an agent must account to his principal, and cannot set up the *jus tertii* in an action by his principal against him. He relied on *Nickolson v. Knowles*, 5 Mad. 47; *Meyler v. Fitzpatrick*, 6 Mad. 360; *Stonard v. Dunkin*, 2 Camp. 344; *Dixon v. Hamond*, 2 B. & Ald. 810; *Roberts v. Ogilby*, 9 Price, 269; *Gosling v. Birnie*, 7 Bingh. 339. A rule nisi having been granted,

F. Pollock and *Tomlinson* showed cause. The argument as to *jus tertii* does not arise where, as in the present case, the jury have found in effect that the plaintiff had no property in the goods of which he claims the produce. The plaintiff has no property in goods which he obtained by fraud. If he is estopped to claim the goods, he is equally estopped to claim the produce of them; for the produce belongs to the rightful owner: *Taylor v. Plumer*, 3 M. & S. 362.

Wightman. As against the plaintiff, the defendant is estopped by his own act to set up the title of the assignees, for he rendered to the plaintiff an account of the sales after he had received notice of the claim of the assignees.

Cur. adv. vult.

ALDERSON, J. We have heard this case argued, and have considered it; and we think the direction of the learned Judge was right, and that the verdict ought to stand. There are many authorities which were cited for the plaintiff, which establish, no doubt, that an agent must account to his principal, and cannot set up the *jus tertii* in an action by his principal against him. The case of *Nickolson v. Knowles*, is a distinct authority showing that an agent to receive for the use of another cannot by notice from a third person be converted into an implied trustee; and that his possession is the possession of his principal. The same principle which depends on the relation of the parties as agent and principal was laid down by the Court of King's Bench in *Dickson v. Hamond*; by the Court of Common Pleas in *Gosling v. Birnie*; and by the Court of Exchequer in *Roberts v. Ogilby*. But we think all these cases are distinguishable from the present, upon the ground that here the jury have found that the plaintiff's possession of the goods arose out of a fraud concerted between him and the insolvent. *It is clear [384 that if the insolvent had put the goods into the hands of the defendant for sale, his assignees would have stepped in and claimed the produce from the defendant, and that the insolvent could not have maintained this action after such claim. And we think that the plaintiff, who takes the goods by a fraud between him and the insolvent, can be in no better situation than the insolvent himself.

On this ground, therefore, we think the verdict in this case may well stand consistently with the cases cited on behalf of the plaintiff, and the defendant has the right to set up the title of the insolvent's assignees on this occasion. We are very glad that this case can be thus decided consistently with the general rules of law, as it is obviously in conformity to the substantial justice of the particular case.

It may be proper to mention, that after the decision in *Gosling v. Birnie*, another case between the same parties was tried at the sittings after Hilary term, 1831, before me, in which the defence of a fraudulent sale by Ross to Gosling was set up, and left by me to the jury. But it failed upon the evidence, so that this point did not then come before the Court.

Rule discharged.

BERRIMAN v. PEACOCK. Nov. 22.

The property in trees is in the landlord; the property in bushes is in the tenant, even where they are cut down by a stranger.

At the last York assizes, before Parke, J., the plaintiff had a verdict, with nominal damages, in an action of trespass, on the count *de bonis asportatis*, the learned Judge reserving to the defendant leave to move to enter a nonsuit upon the following facts.

The defendant being in the occupation of land adjoining a field let by the plaintiff to one Peter Wardell, for a term of years, requested Wardell to lower a fence between the two properties. Some delay occurring, the defendant lopped the fence himself, but carried the cuttings to Wardell, the plaintiff's tenant, who said at the trial, that according to the custom of the country he believed he was entitled to them. The hedge was cut by the defendant in an unskilful manner, but the tenant *said he thought it a good job, and *385] that the fence was the better for it.

Jones, Serjt., obtained a rule nisi to set aside the verdict and enter a nonsuit, upon the authority of the third resolution in *Herlakenden's case*, 4 Co. Rep. 62,—“That if trees, being timber, are blown down by the wind, the lessor shall have them (for they are part of his inheritance), and not the tenant for life or tenant for years, but if they be dotards, without any timber in them, the tenant for life or tenant for years shall have them,”—and *Channon v. Patch*, 5 B. & C. 897, where a lessor, during the term, having cut down some oak pollards growing upon the demised premises, which were unfit for timber, it was held, that as a tenant for life or years would have been entitled to them if they had been blown down, and was entitled to the usufruct of them during the term, the lessor could not, by wrongfully severing them, acquire any right to them, and consequently he or his vendee could not maintain trespass against the tenant for taking them.

Bompas, Serjt., showed cause. In *Channon v. Patch*, the lessor himself had cut down the pollards, which during the lessee's term he had no right to do. To have allowed him, therefore, under such circumstances, to claim a property in them, would be to enable him to take advantage of his own wrong; but that decision is not incompatible with the lessor's having an immediate property in such things when they are severed from the soil by the act of a stranger. For the resolution in *Herlakenden's case* must be considered to apply only to the tenant's botes. To the extent of what may be required for housebote, firebote, and the like, the tenant may have a property in underwoods; but, as to *386] the residue, the property must remain in the lessor. It is not pretended that the cuttings in question were required for botes, and the wrongful act of a stranger could not vest in the tenant what, previously to that act, was clearly the property of the lessor.

Jones, in support of his rule, relied on the authorities cited, and referred to *Com. Dig.*, *Biens*. “Lessee for life, or years, has only a special interest and property in the fruit and shade of timber trees, so long as they are annexed to land, 4 Co. 62, b; Dy. 90, b; 1 Roll. 181. And he has a general property in hedges, bushes, trees, &c., which are not timber, 4 Co. 62, 1 Roll. 181. And, therefore, if the lessee cuts down hedges or trees, not timber, the lessee shall have them. So if dotards, &c., which have no timber in them, are thrown down by the wind, &c., the lessee shall have them, Mo. 812. So, if a man cut down timber-trees, the lessee shall have trespass in respect of the loss of his fruit and shade; though the lessor, or any one by his license or command, cut them. 11 Co. 48, b; Mo. 7; Jon. 376.”

TINDAL, C. J. This case requires the same determination as if it had been an action against the tenant, because what the defendant did was adopted by

the tenant, who carried away the cuttings, saying that it was a good job, and that the fence was the better for it. It is clear that, under such circumstances, no action could lie for the tenant against Peacock; and it would be an over-refinement to say that, because a small portion more of a fence has been cut than the tenant is entitled to cut, the landlord has a right to claim it. Here, indeed, the complaint was rather as to the mode than the amount of the cutting; but the question now is, whether the property in the cuttings belonged to the landlord. Now, according to the old authorities, the general property in [*387] trees is in the landlord, and the general property in bushes is in the tenant; although, if he exceeds his right, as by grubbing up or destroying fences, he may be liable to an action of waste. We should be introducing a distinction never drawn before, if we were to decide that, when a tenant cuts rather more than he ought, the property in bushes so cut passes to the landlord. The rule for entering a nonsuit, therefore, must be made absolute.

GASELEE, J. In *Dowglas v. Kendal*, Cro. Jac. 256, it was laid down that "the lord may not cut down any thorns, nor license any other to cut them down; for the defendant prescribeth to have all the thorns growing upon the place; and that prescription excluded the lord from taking any thorns there; but if he had claimed common of estovers only, then, if the lord had first cut down the thorns, the commoner might not take them; and if he had cut down all the thorns, the commoner might have had an assise." The tenant has the general property in the cuttings of a hedge, whoever cuts it. If, by his permission, a stranger cuts improperly, so as to damage the fence, that may give the landlord a ground of action on the case, but the property in the cuttings is in the tenant.

BOSANQUET, J. I am of the same opinion. I do not think it clear that the cutting in this case is to be considered the act of the tenant; but that is not material, for, whether it were the act of a tenant or of a stranger, the property in the cuttings does not pass to the landlord. *Herlakenden's case* is an express authority on the subject, and Chief Baron Comyns, after referring to *Rolle's Reports*, adds, "and, therefore, if the lessee cuts down hedges, or [*388] trees, not timber, the lessee shall have them."

ALDERSON, J., concurring, the rule was made

Absolute.

SYLVESTER and Another v. WEBSTER and Another. Nov. 22.

An attorney must deliver his bill under 2 G. 2, c. 28, before suing to recover charges for business done at quarter sessions.

ASSUMPSIT for work and labour as attorneys. There was a charge in the plaintiffs' bill for attending from day to day at the Sessions House at Clerkenwell, to see whether an indictment had been found against a party, for whose appearance at the sessions the defendants had become bail; and another charge for attendance at the clerk of the peace's office, after the sessions were over, in order to get the defendants' recognisances discharged, which recognisances were discharged on the payment of a fee to the clerk of the peace.

Save these items, there were none which could be called charges for business done in a court, and the plaintiffs omitted to deliver a bill a month before the commencement of their action. At the trial before Tindal, C. J., a verdict was taken for the plaintiffs, with leave for the defendants to move to enter a nonsuit instead, on the ground that the plaintiffs' bill was open to taxation under 2 G. 2, c. 28, s. 23, and that, therefore, it should have been delivered to the defendants in the ordinary way, a month before the action.

**Taddy*, Serjt., having obtained a rule nisi accordingly, on the authority of *Ex parte Williams*, 4 T. R. 496, and *Clarke v. Donovan*, [*389] 5 T. R. 694.

Wilde and Andrews, Serjts., showed cause. The plaintiffs were not bound to deliver a bill under the statute, unless for a work performed by them in the character of attorney in one of the courts indicated by the statute. But mere attendance at the quarter sessions, to see whether an indictment has been found, is not work done in a court, or done in the character of an attorney. The attendance of any lay person would have answered the purpose as well. Still less can attendance at the office of the clerk of the peace be called work done in a court. And the court of quarter sessions is not one of the courts to which the statute, 2 G. 2, c. 23, was meant to apply. The object of the statute in requiring the delivery of the bill, was in order to having it taxed, and it would be useless to require such delivery in cases where the bill cannot be taxed; but from the latter part of sect. 23, 2 G. 2, c. 23, it may be inferred, that the legislature only contemplated taxation for business done in a superior court; for the bill is to be taxed upon the application to the Lord Chancellor or Master of the Rolls, "or unto any of the courts aforesaid, or unto a judge or baron of any of the said courts respectively," in which the business contained in such bill shall have been transacted. *Clark v. Donovan* was decided on the authority of *Ex parte Williams*, in which there was no argument, though there were conflicting statements as to the practice of taxing bills for business done at quarter sessions. But in *Stephenson v. Taylor*, in a note to *Ex parte Williams*, *390] 4 T. R. 142, *Buller, J., decided at Nisi Prius that the delivery of a bill for such business was not necessary. In *Fenton v. Correa*, 1 Ry. & Mo. 262, in an action on the attorney's bill, it was held that searching at the judgment-office to ascertain whether satisfaction had been entered on the roll in an action between A. and B., and also whether issue had been entered in such action, also whether issue had been docketed in such action, were not taxable items within the 2 G. 2, c. 23, s. 23. And in *Williams v. Odell*, 4 Price, 279, the Court would not order a solicitor's bill of costs for business done wholly in the House of Lords, in the prosecution of an appeal, to be referred for taxation; because their officer had no means whereby he might be enabled to tax such bill. So in *Burton v. Chatterton*, 3 B. & Ald. 486, a charge for preparing an affidavit of the petitioning creditor's debt and bond to the Chancellor, in order to obtain a commission of bankruptcy, was held not to be a taxable item in an attorney's bill, within 2 G. 2, c. 23, s. 23, as being a charge at law or in equity, the affidavit not having been sworn, nor a commission issued. And Abbott, C. J., said, "there does not appear to be any method by which these items could be taxed. They are not within the words of the statute, which speaks only of charges or disbursements at law or in equity." In *Wilson v. Gutteridge*, 3 B. & C. 157, the Court of King's Bench referred the bill to be taxed, by virtue of their general jurisdiction. In *Smith v. Wattleworth*, 4 B. & C. 364, the bill was for procuring the discharge of a person arrested at law. In *Collins v. Nicholson*, 2 Taunt. 321, for obtaining a bankrupt's certificate in Chancery; and in *Sandon v. Bourn*, 4 Campb. 68, for preparing a warrant of attorney. In all these cases there was a court *in which the bill *391] might have been taxed; but the court of quarter sessions does not tax bills; nor the Court of King's Bench, bills incurred at the quarter sessions, unless *Ex parte Williams* be considered an authority.

Taddy. In *Clarke v. Donovan*, Lord Kenyon said, "there was no reason for restraining the general words of the first part of the clause, which requires an attorney to deliver his bill one month before he commences any action for the recovery of the amount." And that case has never been impugned. So in *Smith v. Taylor*, 7 Bingh. 262, Tindal, C. J., said, "seeing that the act is remedial, it is better to draw in a case on the extreme verge of the rule, than to leave it without." The delivery of a bill for all charges of attorneys and solicitors concerning their clients' or masters' suits which they have for them, subscribed with their own hand and names, before such time as they or any of them shall charge their clients with any fees or charges, was first required by

3 Jac. 1, c. 7, which recites, "That through the abuse of sundry attorneys and solicitors, by charging their clients with excessive fees and other unnecessary demands, such as were not, nor ought by them to have been employed or demanded, the subjects grow to be overmuch burthened, and the practice of the just and honest serjeant and councillor at law greatly slandered." And it is consonant to the uniform spirit of the legislature to give the most extensive protection to suitors.

Cur. adv. vult.

TINDAL, C. J. The point reserved in this case was, whether the plaintiffs ought to have delivered their bill for business done, signed by themselves, one month before the commencement of the suit. The plaintiffs *contend [392] that the statute 2 G. 2, c. 23, s. 23, does not apply to the case of business done at the quarter sessions; and even if it does apply, that there is no charge for such business in the present bill.

With respect to the second point, however, it appeared upon the evidence that the plaintiffs made a charge for attending from day to day at the sessions-house at Clerkenwell, to see whether an indictment had been found against the party for whose appearance at the sessions the defendant had become bail; and another charge, for attendance at the clerk of the peace's office after the sessions were over in order to get the recognisances discharged, which were discharged accordingly, on the payment of a fee to the clerk of the peace. And this latter charge appears to us, at all events, to be a charge for business done at the quarter sessions: for the discharge of the recognisance must be taken to be the act of the Court who alone have the authority to give such discharge, though in fact it is handed over to the party by the clerk of the peace after the sessions have terminated. The only question therefore is, whether business done at the quarter sessions is within the meaning of the statute? This was so held in two cases, *Ex parte Williams*, 4 T. R. 496, where the Court, after inquiry made, reversed their former decision; and *Clarke v. Donovan*, 5 T. R. 694, where the Court of King's Bench adhered to the decision last referred to, saying, "there was no reason for restraining the general words of the first part of the clause, which requires an attorney to deliver his bill one month before he commences any action for the recovery of the amount." These decisions which have been constantly acted on as authorities for so long a period, ought not to be overturned, unless the Court can see most clearly that such construction is wrong; and we *cannot arrive at such conclusion. It is an additional [393] argument in support of the construction which they give to the statute 2 G. 2, that by the subsequent statute 22 G. 2, c. 46, s. 12, it is enacted, "that no person whatsoever shall act as an attorney at any general or quarter sessions of the peace for any county, &c., within the kingdom, either with respect to matters of a criminal or civil nature, unless such person shall have been admitted an attorney of one of His Majesty's courts of record at Westminster, and duly enrolled pursuant to the act 2 G. 2." Construing the two statutes, therefore, as made in *pari materiâ*, there seems to be no reason why the action by the very same person to recover fees for business done in the court of quarter sessions should not be considered as subject to the same law as the action "for fees, charges, and disbursements, at law or in equity" are expressly subjected to by the statute 2 G. 2. We therefore think the rule for entering a nonsuit should be made absolute.

Rule absolute.

BELL and HEAD v. NIXON and DAVISON. *Nqv.* 23.

Where two persons fill the office of clerk to the trustees of a turnpike road, both must join in executing a contract on the part of the trustees, under 3 Geo. 4, c. 126, s. 57.

THIS was an action of assumpsit brought by the plaintiffs, as clerks to the trustees appointed by virtue of an act of parliament passed in the 7 G. 4, c.

74, for making and maintaining a turnpike road leading out of the Alston turnpike road at Branch End, in the county of Northumberland, through Calton Allindale town and Allen Heads in Cow's Hill, in the county of Durham, against the defendants, for the tolls arising from certain toll-gates upon that road.

*394] *The declaration was framed upon a contract or agreement made between the trustees, by Head their clerk, and the defendants. The defendant Davison was surety for Nixon. At the trial before James Parke, J., last summer assizes, a verdict was found for the plaintiff, with leave for the defendant Davison to move to set it aside and enter a nonsuit, upon the ground that the agreement should have been signed by both the plaintiffs. By the 3 G. 4, c. 126, s. 57, under which the trustees named in the local act were directed to proceed, it is enacted, "that all contracts signed by the trustees and commissioners letting such tolls, or any two or more of them, or by their clerk or treasurer, shall be good, valid, and effectual," &c. It was contended at the trial, that by the words "their clerk" were meant the persons filling the office of "their clerk," and that inasmuch as both the plaintiffs filled that office, it was necessary they should both have signed the agreement. The declaration originally stated the agreement to have been made by the plaintiffs as clerks, &c. But that variance was amended by the judge at the trial.

Merewether, Serjt., having obtained a rule nisi to enter a nonsuit,

Spankie, Serjt., who showed cause, contended that the trustees having, under s. 74 of 3 G. 4, c. 126, authority to sue in the name of their clerk or clerks, the contract must be deemed equally binding whether executed by a single clerk or many, otherwise the commissioners would not have been empowered to sue by a single clerk. If twenty clerks were required for an extensive line of road, it would be extremely inconvenient that every contract should be signed by all of them. Besides, the signature of one might be taken to be the signature of all, just as the execution of a contract by one of the members *395] of a firm would bind all the others. But in the present case, the lessee having enjoyed the tolls under the contract, would have been equally liable to the commissioners if it had not been signed by any one on their part; so that the signing by either of the clerks was immaterial, especially after verdict.

Merewether. This contract was entered into under a statutory power, and in order to make it binding on a surety, the power should have been strictly pursued. It was, no doubt, competent to the trustees to have appointed only one clerk, but they having in fact appointed two, the two constitute one agent, and must join in any act to bind the trustees. The object probably was, that each should be a check on the other, or at all events, that the trustees should have the benefit of their combined judgment; the two together, therefore, constituted the trustees' clerk, and not one singly. Now, where a power is granted to two, or an office is executed by two jointly, both must concur in an act to render it legal. Thus, in *Auditor Curle's case*, 11 Rep. 5, William Curle and Walter Tooke having been appointed auditor of the Court of Wards, Lord Coke says, "When Walter Tooke died, then William Curle remained one of the persons, &c., and the king might add another to him, and until another is added his voice is suspended, as in the case of 14 H. 4, 35, a, if a writ issue to the sheriffs of London, and one of them dies, the other cannot execute the writ, because his power is suspended until he has a companion chosen him."

In *Salter v. Grosvenor*, 2 Mod. 804, it was held, that if an aggregate corporation consist of two bailiffs and burgesses, &c., the two bailiffs make but *396] one officer, and if a lease be made by one of them, in his political capacity, to the other it is void.

So in *Jones v. Pugh*, 2 Salk. 465, the Court held that a judicial office might be granted to two, but if one dies, it shall not survive, unless said to the survivor. See also *Vin. Abr., Office*, C. *Bac. Abr., Office*.

TINDAL, C. J. However reluctant I may feel to yield to this objection, which is at variance with the justice of the cause, I cannot think that where two persons are appointed to fill the office of clerk, their principals can be bound in a contract by the signature of one only. By the common law there could have been no lease in a case of this kind, except under seal. By s. 57, of 3 G. 4, c. 126, it is enacted, "That all contracts and agreements to be made or entered into for the farming or letting the toll of any turnpike roads, signed by the trustees or commissioners letting such tolls, or any two or more of them, or by their clerk or treasurer, and the lessee or farmer, and his sureties of such tolls respectively, shall be good, valid, and effectual to all intents and purposes, notwithstanding the same may not be by deed, or under seal."

And by s. 74, "That the trustees and commissioners of every turnpike road may sue and be sued in the name or names of any one of such trustees or commissioners, or of their clerk or clerks for the time being; and that no action or suit to be brought or commenced by or against any trustees or commissioners of any turnpike road by virtue of this or any other act or acts of parliament, in the name or names of any one of such trustees or commissioners, or their clerk or clerks, shall abate, or be discontinued by the death or removal of such trustee, commissioner, clerk or clerks, or any of them, *or by the act [397] of such trustee, commissioner, clerk or clerks, or any of them, without the consent of the said trustees or commissioners; but that any one of such trustees or commissioners, or clerk or clerks for the time being to the said trustees or commissioners, shall always be deemed to be the plaintiff or plaintiffs, defendant or defendants (as the case may be), in every such action or suit."

How are we to say, that if trustees have appointed two clerks, perhaps for the benefit of having their united judgment, the two are not to be parties to a contract which is to bind the trustees? It is like the case where two execute the office of sheriff or bailiff. It seems to me, therefore, that as the agreement was entered into by one who was not singly but jointly the clerk of the trustees, they have not pursued the authority vested in them by the act, and that this rule must be made absolute.

The other Judges concurred, and the rule was made absolute.

NEWARK, Vouchee.

A recovery suffered by the son of a peer may pass, though the acknowledgment be signed with his name of courtesy, and not with his true name, provided he be described on the record as "commonly called lord, &c."

THE vouchee in this recovery, who was the son of a peer, was described in the dedimus and acknowledgment as "Charles Henry Pierrepont, commonly called Lord Viscount Newark;" and he had signed the acknowledgment, "Newark."

The Court having, in the case of Tatton demandant, Grey vouchee, 2 Bingh. 313, refused to allow a recovery to pass, on the ground that the acknowledgment had been signed by the son of a peer, with his name of courtesy, and not with his true name,

**Bompas*, Serjt., who moved that the present recovery might pass, [398] distinguished it from that, by the circumstance, that here the record described the vouchee as "commonly called Lord Newark;" an explanation which did not appear upon the documents in Tatton demandant, Grey vouchee.

But the Court, referring to another report of that case, said, it appeared there, not only that the documents described George Harry Grey, Esq., as "commonly called Lord Grey," but that that expression was adverted to in the judgment of the court. If the present case could have been distinguished

from that, which appeared a harsh decision, they would have allowed the recovery to pass.

Bompas argued the propriety of a reconsideration of the point, and dwelt upon the hardship of compelling a lord-by-courtesy to sign his name as a common person. But,

The Court adverted to the general inconvenience occasioned by reversing decisions on matters of practice, and *Bompas*

Took nothing.

Nov. 24. This day *Tindal, C. J.*, said, the Court, upon examining the record in *Tatton* demandant, *Grey* vouchee, found, that none of the documents described *George Harry Grey* as "commonly called Lord Grey." The present case therefore being distinguishable in that respect, they ordered that

The recovery do pass.

*399] **JACKSON*, Demandant; *WARDE* and Wife, Conusees. Nov. 24.

A fine may be levied by a trustee, substituted for a missing trustee, under 6 G. 4, c. 74, s. 5.

UPON the occasion of a conveyance required on the part of the trustee of one *Wilkins*, it was found that the trustee had been dead ever since the year 1797, and that his heir, a female, had married one *Warde*, a strolling player, many years ago, and had never been heard of since.

Upon this, the Chancellor, under the authority of 6 G. 4, c. 74, s. 5, had substituted *Joseph Maberly* to join in the conveyance instead of *Warde* and his wife, and

Taddy, Serjt., now moved, that, under these circumstances, this fine might be levied by *Maberly* instead of *Warde* and his wife, assuming that a fine might be levied, under the authority given by the above statute to the substituted trustee, to convey and assure; as was the practice in the case of infant trustees empowered to convey and assure under 7 Ann, c. 19, 3 Atk. 164, 479, 559.

TINDAL, C. J. We do not profess to investigate the facts, but proceed on the order of the Chancellor.

Fiat.

*400]

**MANESTY v. STEVENS.* Nov. 24.

The bail are discharged if a plaintiff on general process declares as executor.

A RULE nisi had been obtained for entering an *exoneretur* on the bail-piece, on the ground that the process and affidavit to hold to bail were general, and the declaration special; viz., by the plaintiff as executrix.

Jones, Serjt., showed cause. It is clear, from the authorities both in the King's Bench and this Court, that such a variance is no ground for setting aside the proceedings. *Lloyd v. Williams*, 3 Wils. 141, 2 W. Bl. 722; *Weavers' Company v. Forrest*, 2 Str. 1232; *Watson v. Pilling*, 3 B. & B. 4; *Rogers v. Jenkins*, 1 B. & P. 383. The distinction is between the cases where a process is general, and the declaration special, and where the process is special and declaration general; for which latter variance the proceedings will be set aside; *Douglas v. Irlam*, 8 T. R. 416; *Canning v. Davis*, 4 Burr. 2417. It was once, indeed, held, that although the proceedings would not be set aside in case the process was general, and declaration special, yet the bail would be discharged. But in *Ashworth v. Ryal*, 1 B. & Adol. 19, it has been expressly decided that such a variance does not operate in discharge of the bail.

Wilde, Serjt., in support of the rule. The decisions on the subject of setting

aside proceedings for irregularity do not apply to motions in discharge of bail. And the case of *Ashworth v. Ryal* is met by the case of *Hally v. Tipping*, 3 Wils. 61; in this court, where it was held *that the plaintiff should lose his bail, where he declared differently from his writ. And the practice established by that case, which has never been overruled, was recognised in *Turing v. Jones*, 5 T. R. 402, and *Douglas v. Irlam*, as being the practice of the Court of King's Bench. That agrees with the principle acted on upon other occasions. Thus if a plaintiff arrest a defendant upon a bill of exchange, he may declare on the common money counts, but the bail are entitled to be discharged for the variance. The rules, therefore, as to setting aside proceedings, and as to the discharge of bail, are parallel, and not inconsistent with each other. In *Marzetti v. De Jouffroy*, Dowl. Pr. Cases, 41, Lord Tenterden says: "With regard to the objection that the affidavit shows a cause of action in the representative character, and the process does not describe the plaintiff in that character, I think the case falls within the established rule, that the addition of the representative character is not necessary in the process. If, when the plaintiff declares, he should set out a cause of action different from that which appears in the affidavit of debt, the defendant, or his bail, can apply to the Court for relief."

It is probable that, in *Ashworth v. Ryal*, the distinction between the two rules was not accurately kept in view. *Cour. adv. vult.*

TINDAL, C. J. In this case a rule has been obtained to enter an *exoneretur* on the bail-piece, on the ground of a variance between the declaration and the process, the plaintiff having declared in the character of executrix, and having arrested the defendant in her general capacity.

There is some conflict in the cases; but the Court are *of opinion that the bail are entitled to an *exoneretur*, where the declaration is on a cause of action distinct from that disclosed by the process, as here, where the process is general and the declaration is particular, in the plaintiff's character of executrix. The variance is not such as the defendant could avail himself of, but we think the bail are entitled to do so. Rule absolute.

VANSANDAU and TINDALE v. BROWNE. Nov. 24.

VANSANDAU and BROWN v. BROWNE.

An attorney is not compelled to proceed to the end of a suit in order to be entitled to his costs, but may, upon reasonable cause and reasonable notice, abandon the conduct of the suit, and in such case may recover his costs for the period during which he was employed.

ASSUMPSIT for work and labour by plaintiffs as attorneys. The defendant pleaded in each action the general issue. At the trial before Gaselee, J., London sittings after last Hilary term, a verdict by consent was found in the first action for plaintiffs, with 64*l.* 1*s.* 2*d.* damages; and in the second for 73*l.* 2*s.* 4*d.*, subject to the opinion of the Court on the following case:

The first-named plaintiffs, at the time the debt for which the first action was brought was contracted, were attorneys in copartnership together, and were retained and employed by the defendant to defend an action brought against him by Carr, Dodgson & Co. That action was commenced in April, 1826; and in Michaelmas term of that year final judgment was obtained thereon by Carr, Dodgson & Co. against the defendant. The amount of the first-named plaintiffs' bill for defending that action, and for a motion made for a new trial, was 87*l.* 10*s.* 10*d.* On the 9th of November, 1826, the first-named plaintiffs were advised by counsel *to apply for relief to a court of equity, in order to prevent execution from being issued on the judgment. Afterwards, [403]

and by the consent and direction of the defendant, a bill was filed in Chancery against Carr, Dodgson & Co., for the purpose of obtaining relief from the judgment, and the first-named plaintiffs continued to conduct such suit until Easter term, 1828, at which time the same plaintiffs dissolved their copartnership; and at the time of the dissolution the amount of their bill in respect of the proceedings in Chancery was 176*l.* 10*s.* 4*d.* over and above the before-mentioned sum of 87*l.* 10*s.* 10*d.*, the particulars of which the same plaintiffs delivered in due time before these actions were brought. The Chancery suit still remains undetermined; but on the 15th of May, 1830, an order or decree was made by the Master of the Rolls, whereby he directed a case to be submitted for the opinion of this Court, and that case has not yet been argued. About the month of April, 1828, the defendant paid the first-named plaintiffs, on account of their bill, 200*l.*

The second-named plaintiffs, Vansandau and Brown, entered into partnership as attorneys in February, 1829, and from that period to the present conducted the Chancery suit on behalf of the defendant, and with his knowledge and consent.

There were letters from the defendant of June, 1827, October, 1827, and January, 1828, soliciting indulgence in respect of the plaintiffs' demands; and one of March, 1828, promising payment of the balance claimed in the first action, in a few days. In June, 1828, Vansandau apprised the defendant that Tindale had quitted the firm, and demanding payment of the balance still due, said he had no motive for exertion in the Chancery suit, *Browne v. Carr*, till it was paid. In May, 1830, Vansandau, complaining that the old balance was still unpaid, wrote to say he would make no further cash payments in the

*Chancery suit. In August and September, 1830, Vansandau threatened to arrest defendant for the balance still unpaid, and called on him to pay the costs already incurred in the Chancery suit, if he did not choose to proceed with it. The money not having been paid, Vansandau apprised the plaintiff in October, 1830, that he had commenced actions against him, and that in the second action against him, which he had instituted in the name of Vansandau and Brown, he would seek to recover the full amount of business done after the determination of the partnership of Vansandau and Tindale, both as regarded what was due to himself individually as also that which was due to the partnership of Vansandau and Brown. If the defendant did not assent to that, he, Vansandau, would bring a third action against him in the name of himself individually.

The plaintiffs' bills were delivered to the defendant a month before the action. In the first action they were signed by Vansandau and Tindale; in the second by Vansandau and Brown. None of the charges were subsequent to April, 1830, and the present actions were commenced in October following.

Taddy, Serjt., for the plaintiffs. The principal objection to be advanced on the part of the defendant against the plaintiffs' claim, is that this action is premature, and that an attorney cannot sue for his costs till the proceedings which he has been retained to conduct have received their judicial determination. But such a principle would operate as a great discouragement to the attainment of justice by the assistance of professional men; and it has been expressly laid down, that an attorney may refuse to proceed if he is not furnished with money to carry on a suit. In *Rowson v. Earle*, 1 Mo. & Mal. 538, *where it was held that an attorney who had given notice that he would not go on with a cause in the Court of Chancery without being supplied with money, had a right to desist from it, and might recover for the work done up to that time, Lord Tenterden said, "It is not to be expected that any attorney will carry on a cause of an indefinite length unless he is furnished with funds so to do." The case reported in 1 Sid. 31, seems opposed to this, but the facts are not stated, and the case is of doubtful authority.

Jones, Serjt., for the defendant. Under the circumstances stated in the case,

it is not competent for the plaintiffs to maintain an action for their bill of costs, until the suit in which the costs arose was determined: the obligation being founded on the retainer, which continues until the end of the cause, or a countermand: it is against the policy of the law to permit a party to recover in a contract *pro ratâ*; and an attorney always has a lien on the proceeds of the suit: Com. Dig., *Atty.* (B) 910, *Mulloy v. Backer*, 5 East, 316; *Drapers' Company v. Davis*, 2 Atk. 295; *Tabram v. Horn*, M. & R. 228. The plaintiffs, therefore, ought not to have sued so soon, or have split their demand into two actions. The contract entered into to conduct the defendant's suit was an entire contract, and the defendant's right to have it treated as such, cannot be altered by any change of partnership, which is an act of the plaintiff's unconnected with the original contract. If the attorney be allowed to sue for his costs at any time before the business he is engaged in is concluded, no line can be drawn, and the client may be harassed by multiplied actions for the costs of a single law-suit. In *Mordecai v. Solomon, Sayer*, 172, where it appeared that the *plaintiff's brother had frequently employed an attorney, and had [*406 always paid him well; that he had undertaken to pay the attorney in the cause, but had not brought some money applied for by the attorney; that judgment of *non pros* was signed for not making up the issue; and that the plaintiff was in prison for not paying the costs of that judgment;—the Court, upon a rule to show cause why the plaintiff's attorney should not pay the costs of the judgment of *non pros*, and the costs of that application, ordered costs to be paid by the attorney in the cause. And, *per Curiam*, "when an attorney has commenced a suit upon the credit of a client, he ought to proceed in it, although the client do not bring him money every time he applies for it."

In *Cresswell v. Byron*, 14 Ves. 271, Lord Eldon says, "The client may discharge his solicitor; but I do not know that a solicitor, whatever may be his reasons for declining to proceed, can claim a lien, if he does not carry the business to a hearing. If that could take place, there might be numerous claims of lien. The Court of Common Pleas, when I was there, held that an attorney, having quitted his client before trial, could not bring an action for his bill."

In *Rowson v. Earle* there had been a decree, and the attorney had given up his papers and lien before making his demand.

Here, too, the signature of the bill in the second action was insufficient. The charges incurred during the period in which Vansandau carried on the business alone, ought to have formed a separate bill authenticated by his separate signature.

TINDAL, C. J. I think the plaintiffs are entitled to recover the taxed costs, for which they have sued the *defendant in these two actions, with the [*407 exception of the charges which accrued in the interval between the dissolution of the first and the formation of the second partnership, which cannot be recovered in the name of either of the two firms unless the defendant should consent, in order to save himself from the expense of a third action, to be brought for a small sum in the name of Vansandau alone.

The objection, however, which has been raised to the plaintiffs' recovery is, that an attorney cannot sue for his bill till the business which he has been retained in is terminated. It would be long before I should be induced to assent to such a proposition. Suppose the employer to become insolvent while the attorney is engaged in a long and difficult suit, it would be hard if he could not recede,—resile,—from such an engagement. I agree that he cannot wantonly, so as to throw unexpected difficulties in the way of his client, take the course which has been taken by the plaintiffs here. But have they wantonly, and without sufficient notice, refused to proceed with the defendant's cause? So far from it, the defendant has, from the month of June, 1828, to the present time, been repeatedly applied to for payment, and apprised of the plaintiffs' resolution.

It is said, however, that there are authorities in support of the proposition for which the defendant contends. That in *Siderfin* is, no doubt, strong; but we must see whether it proceeds on just principles, and whether it will apply to the facts of the present case. Now, in the report in *Siderfin*, no facts are stated to explain the decision of the Court. It may be, probably was the fact, that the attorney on the very day of the assizes deserted the conduct of the cause, giving his client neither time nor opportunity to obtain other professional assistance: if so, the decision of the Court was proper.

*408] *The next case is that of *Mordecai v. Solomon*. There it appeared that the plaintiff's brother had frequently employed an attorney, and had always paid him well; that he had undertaken to pay the attorney in the cause, but had not brought some money applied for by the attorney; that judgment of *non pros* was signed for not making up the issue; and that the plaintiff was in prison for not paying the costs of that judgment: the Court, upon a rule to show cause why the plaintiff's attorney should not pay the costs of the judgment of *non pros*, and the costs of that application, ordered the costs to be paid by the attorney in the cause; observing, that when an attorney had commenced a suit upon the credit of a client, he ought to proceed in it, although the client did not bring him money every time he applied for it.

I accede also to that proposition. It is not to be supposed that an attorney may suddenly give up his employment, because a client does not upon every occasion yield to his demand for money: but the report states no facts, without which the decision cannot be esteemed of great value: *ex facto oritur jus*: and for aught that appears, the conduct of the attorney might have been such as I have supposed in the preceding case.

The next authority is the passage in 14 Ves., where Lord Eldon is made to say, "The client may discharge his solicitor: but I do not know that a solicitor, whatever may be his reasons for declining to proceed, can claim a lien, if he does not carry the business through to a hearing. If that could take place, there might be numerous claims of lien." What was passing in his Lordship's mind must have been with reference to the attorney's right to retain his lien after he has ceased to conduct the cause;—and I am far from saying that where *409] he refuses to go on he can insist upon retaining *the papers; at once declining to proceed himself, and precluding his client from proceeding without him:—his Lordship then continues, "The Court of Common Pleas, when I was there, held that an attorney, having quitted his client before trial, could not bring an action for his bill." Here again we have not the facts on which the Court proceeded, but there is enough to warrant the inference that the attorney must have deserted his client suddenly, and have left him unprepared to act for himself.

Then we come to the case of *Rowson v. Earle*, in which Lord Tenterden held, that an attorney who had given notice that he would not go on with a cause in the Court of Chancery without being supplied with money, had a right to desist from it, and might reeover for the work done up to that time. And there is no authority for the proposition on which the defendant relies.

When we observe that the plaintiffs commenced no action till October, 1830, and that all the business charged for ended in the April preceding, we cannot say that the plaintiffs were not justified in refusing to proceed farther.

It is for the advantage of the defendant that the charges for business done by Vansandau while he was without a partner should be included in the second bill. Those charges, however, must be struck out unless the defendant consents that they should remain. As to the rest, our judgment must be for the plaintiffs.

GASELEE, J. I am of the same opinion. Since the days of *Siderfin* there has been a great increase in the expense of conducting a cause, and it would be hard to compel an attorney to go on where he is not furnished with the necessary funds.

*BOSANQUET, J. I cannot agree in the position contended for on the part of the defendant, to the extent to which his counsel pushes it. [*410 It is true that an attorney cannot suddenly, and without notice, abandon a client to his prejudice and inconvenience; but, if he gives reasonable notice, he is at liberty to discontinue the conduct of a cause, and is not bound, at all events, and at great expense, to proceed to the end of a suit and all the proceedings arising out of it. As to the case in *Siderfin*, when we are ignorant of the facts on which that decision was grounded, and find that Lord Tenterden expressed a contrary opinion in *Rowson v. Earle*, we may fairly exercise our judgment on the point; and it seems to me that the position in *Siderfin* is too extensively laid down.

ALDERSON, J. I am of the same opinion. All the cases cited on the part of the defendant are consistent with the supposition that the refusal of the attorney to proceed was such as to render all the business done unprofitable to the client; if so, and the throwing up the retainer were without notice, sudden and unreasonable, I agree in the opinion expressed. In the present case, where the most ample notice has been given, we may decide consistently with that opinion, that the plaintiffs are entitled to recover their costs.

Judgment for the plaintiffs.

*WALL v. LYON. Nov. 26.

[*411]

Under the rule of *Michaelmas*, 1654, s. 17, a party has a right to amend, after plea in abatement, on payment of costs; but the Court, or a Judge, have a discretion to allow him to amend without costs.

By an order of Parke, J., the plaintiff had been allowed to amend his declaration, after plea in abatement, without payment of costs.

Ludlow, Serjt., moved to amend this order, by substituting the word *upon*, for the word *without*. He relied on the rule of *Michaelmas*, 1654, s. 17, that, before the declaration actually entered, the plaintiff may amend his declaration, paying costs or giving an imparlance, at the plaintiff's election, by the order of a Judge of the Court or prothonotary: but after it is entered, if the amendment be but a small matter that doth not deface the roll, yet that before issue or demurrer entered, it will be amendable by rule of Court upon costs, and liberty to plead with a new or further imparlance.

TINDAL, C. J. The rule is not so worded as to be obligatory on the Court in the negative. It is a general rule, in acting on which the Judge may exercise a discretion, and there is no ground for the present application.

GASELEE, J. The rule gives the party a right to amend on payment of costs; but it does not preclude the Court from *allowing* him to amend without costs.

BOSANQUET and ALDERSON, Js., concurring, Ludlow Took nothing.

*DIGBY v. ALEXANDER. Nov. 26.

[*412]

Judgment of respondeat ouster having been given on a plea of peerage, and a verdict having afterwards been obtained for the plaintiff, the Court refused to set aside, upon an affidavit of peerage, a writ of ca. sa. issued against the defendant.

JUDGMENT of respondeat ouster having been given upon a plea of peerage in this case (see *ante*, vol. viii., 416), the cause went to trial, and a verdict was given for the plaintiff. Whereupon a ca. sa. having been issued against the defendant in June last,

Taddy, Serjt., obtained a rule nisi to set it aside, on an affidavit that the defendant was a Scotch peer, the same in substance as that on which the Court had formerly set aside the *capias ad respondendum* against the defendant. (See *ante*, vol. viii., 5.)

Stephen, Serjt., showed cause. The required relief can only be granted, and that by supersedeas, where the party is named as a peer on the record, or has sat in parliament. Lord Banbury's case, 2 Ld. Raymd. 1247, Com. Dig., *Dignity*, F. 3. Countess of Rutland's case, 5 Rep. 26 b. In the matter of the Countess of Huntingdon, 1 Ventr. 298.

Where he is not so named, and has not sat in parliament, but is a peer, his only remedy in a court of law is by plea in abatement: Vin. Abr. *Abatement*, F. b. Lord Lonsdale v. Littledale, 2 H. Bl. 267, 299. Trustees of Taunton Market v. Kimberly, 2 W. Bl. 1120. The defendant here having pleaded his peerage in abatement, and his plea having been held insufficient, to discharge him now would be in effect to reverse the decision on that plea.

Here the Court called on

*413] *Taddy*, to distinguish this case from Lord Banbury's. Lord Banbury, he contended, claimed as an English peer, the defendant as a Scotch peer; and as the Scotch peers do not sit in parliament, like the English, by virtue of a writ of summons, the decisions as to English peers cannot apply. And the position in Lord Banbury's case, that the Court cannot try peerage on motion, is too general. That the court will entertain the question on motion, appears from *Trinder v. Shirley*, Dougl. 45, and from the first decision in this court in the present case (*ante*, vol. viii., 55). It was there held, that the fact that a defendant has voted for the sixteen peers of Scotland, is sufficient to authorize this Court to discharge him from a *capias ad respondendum*: and after that, it would be inconsistent to refuse to discharge him from a *capias ad satisfaciendum*; for, as a general rule, a *ca. sa.* lies not, except where a *ca. ad resp.* lies. Bac. Abr. (*Execution*). 3 Rep. 12. And the Court has jurisdiction, although the defendant's title do not appear on record; as may be collected from Lord Savile's case, Cro. Car. 205, and from the form of the writ in the Register, 287 b. Fitz. N. B. 247 c. Then, the defendant is not concluded by his plea in abatement. For the Court, in giving judgment, *quod respondeat ouster*, have not decided that he is not a peer, but that the plea did not allege the peerage with sufficient precision. And many things may be pleaded in bar after a plea in abatement; as outlawry; 2 Lutw. 1604; such matters as a party may plead indifferently in bar or in abatement; as alien enemy; property in a stranger, in replevin. Therefore, though the defendant has not correctly availed himself of his plea of misnomer, he may avail himself of his peerage in another form and for another purpose. Vin. Abr. *Abatement*, F. b, only shows there *414] can be no plea in abatement after imparlance; Lord Lonsdale v. *Littledale, that a party cannot object matter in abatement after pleading in chief; The Trustees of Taunton Market v. Kimberly, that misnomer cannot be objected in arrest of judgment, but only by way of plea in abatement.

TINDAL, C. J. The question before the Court may be decided on a short point, without going into the early and abstruse authorities. Where a party has privilege of parliament, his remedy, or arrest, is by plea in abatement, or by application for a supersedeas. The defendant in this cause pleaded in abatement; in such a way, however, as not to assert definitively that he was a peer, but merely to allege evidence on which he might go to a jury as to that fact. The Court held that plea insufficient, and awarded judgment of *respondeat ouster*; the cause went on to trial, and a verdict passed for the plaintiff. Now after a judgment in this cause, in which the defendant has been ordered to answer over as a common person, he is estopped to apply to the summary jurisdiction of the Court, on the ground that he is entitled to privilege as a peer. If our judgment be unsatisfactory, he may have it reconsidered on a writ of error; but the present rule must be discharged.

GASELEE, J. The Court have indulged the defendant by setting aside the *capias ad respondendum*; though, if they had been aware of the case of *Smith v. Villars*, 7 Mod. 38, it is probable they would have confined the rule to discharging the defendant upon his filing common bail; but it does not follow, because they indulged him then, that they are to continue the indulgence after the defendant's plea in abatement has been overruled, and the cause has gone on as against a common person.

*In *Smith v. Villars*, the defendant pretending to be Earl of Buckingham, and being arrested by the name of J. Villars, arm., upon [*415 motion concerning bail to be put in by him, the Court said, that he might without prejudice put in bail by the name by which he was arrested; because being a civil action, he need not join in the recognisance, as the custom is in criminal causes; and that in the case of the Earl of Banbury, who was indicted by the name of George Knowles, Esq., because, by the course of the Court, he ought to join in the recognisance, and if he had entered into one by the name of George Knowles, it would be an estoppel upon him, therefore the Court indulged him to bring others who gave bail for him in the name of George Knowles, Esq., for their act could not conclude him.

BOSANQUET, J. This Court in this cause cannot recognise the defendant as a peer; he might have so pleaded in abatement as to raise an issue on that point; but he failed to do so, and the Court decided that his plea was bad: he then pleaded the general issue, and must be considered to have gone to trial as a common person. It has been urged, that after the indulgence granted on the writ of *capias ad respondendum*, it would be inconsistent to refuse the same indulgence on the writ of *ca. sa.* But after the party has had the opportunity of putting his claim of peerage on record, and the Court has decided on record that he has failed in his attempt, they cannot now try the same question on affidavit.

The writ cited from the register appears to have been a form of *supersedeas*, and the issuing of that writ is not incompatible with our refusal to interfere in a summary way after judgment on a plea in abatement.

ALDERSON, J., concurred in discharging the rule. Rule discharged.

*MELLISH v. RAWDON. Nov. 26.

[*416]

Plaintiff purchased in the market a bill drawn by defendant on G., at Rio Janeiro, and payable at sixty days' sight; the exchange falling after the purchase, plaintiff kept the bill nearly five months, and then sold it again.

The drawee having failed before presentment, plaintiff after paying his endorsee the amount of the bill sued the defendant, the drawer:

Held, that the jury were correctly directed to consider, whether, looking at the situation and interests of both drawer and holder, there had been unreasonable delay on the part of the plaintiff in forwarding the bill for acceptance or putting it in circulation; and the jury having found for the plaintiff, the Court refused to disturb the verdict.

THIS was an action brought by the holder against the drawer of a bill of exchange, addressed to Guimarroens at Rio de Janeiro, and payable at sixty days after sight: the rate of exchange, at which the bill was to be paid, being fixed by endorsement on the bill, at 22*d.* per milrea.

This bill had, by the defendant's order, been offered for sale in the money market, and was purchased by the plaintiff on the 10th of September, 1830, at which time the rate of exchange was at the amount endorsed on the bill.

The plaintiff kept the bill in his own hands till the first of February, 1831, when it was again sold by him in the market and put into circulation.

Guimarroens having failed before the bill reached Rio, the plaintiff was obliged to pay a subsequent endorsee the amount, and now sought to recover it of the defendant, the drawer.

Immediately after the bill came into the plaintiff's hands the rate of exchange began to fall, and by the 1st of February, 1831, had fallen from 22d. to 17½d.

It was proved at the trial that foreign bills were constantly bought and sold in the market for the purpose of speculation, and that this course of business was so general, that the defendant could not but know that it existed.

There was no evidence of any such unvarying course having been observed *417] with respect to foreign bills *payable at a given time after sight, as that the holder should send them forward for acceptance within any certain time; as by the first or second packet which sailed after they came into his hands; on the contrary, there was conflicting evidence of the judgment and opinion of merchants on that point; some stating that such was their understanding of the course and practice, others stating that they understood foreign bills were usually kept, without being forwarded for acceptance, as long as it suited the convenience or interest of the holder.

But it appeared, that where drawers of foreign bills payable at any time after sight are desirous of limiting the time of their responsibility, there are various modes which they are accustomed to pursue to attain that object: either, they are in the habit of sending forward one part to a correspondent to procure acceptance, and bringing another part of the bill to the market, upon which is noted the time at which the first part was forwarded; or, they make it a matter of express stipulation with the purchaser, that the bill sold shall be sent forward within a limited time.

It was proved at the trial by all the witnesses, that if the bill was once put in circulation, it might be sent to any part of the world, and kept a reasonable time by each successive holder before it passed on to the next.

TINDAL, C. J., before whom the cause was tried at the last London sittings, told the jury that they were to determine on the evidence before them, whether there had been an unreasonable delay on the part of the plaintiff, the holder of the bill, in sending it forward for acceptance, or putting it into circulation: and that, in order to arrive at a proper determination of that question, they were to take into their consideration the situation and interests, not of the drawer only, or of the holder only, but the situation and interests of both; and to say, whether, under all the circumstances, the delay in this *418] *case, which amounted to four months and twenty-two days, was unreasonable or not.

The jury having found for the plaintiff,

Taddy, Serjt., moved to set aside the verdict on the ground of an alleged misdirection; contending that the proper question for the jury should have been, Whether due diligence had been used by the holder in sending forward the bill for acceptance, or putting it in circulation, with reference to the interests of the drawer.

By the law merchant it was the duty of the holder either to put the bill into immediate circulation, or, if he kept it in his own hands, to send it forward for acceptance by the first packet which sailed to Rio after he received the bill, or at the latest by the second. If the first holder has a right to detain the bill for five months, so has the second and every subsequent holder, and the drawer's responsibility may so be protracted interminably. The holder, therefore, of such a bill ought to proceed with the same diligence as the Courts have required at the hands of the holder of a banker's check, or of a note payable on demand, who by laches in presentment loses his claim against the maker: and in *Muilman v. D'Eguino*, 2 H. Bl. 565, Buller, J., says, "If instead of putting the bill into circulation, the holder were to lock it up for any length of time, I should say he was guilty of laches."

A rule nisi having been granted,

Wilde, Serjt., showed cause. The direction to the jury was correct. It would greatly clog the circulation of foreign bills, and be prejudicial to commercial
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intercourse, if the holder of such bills were not permitted to consult his own interests as well as those of the drawer, and were refused a reasonable latitude as to retaining or *forwarding the bill. According to the principle for [*419 which the defendant contends, a merchant who has payments to make abroad must purchase his bills for that purpose at the precise time he is about to make the payment. But at that time it may happen that the market may be insufficiently supplied with the bills he requires, or the rate of exchange may be ruinously against him. It is essential therefore to his interests, and to the free circulation of such bills, that he should be enabled to buy them when induced to do so by a favourable state of the market or of the exchanges, and to retain them a reasonable time for his own profit or convenience. In the present instance the rate of exchange having fallen immediately after the purchase, the plaintiff was justified in retaining the bill with a view to indemnify himself by any subsequent rise. The language of Buller, J., applies to a wanton or careless detainer of the bill, and not to a detainer essential to the interests of the holder. [ALDERSON, J., *Fry v. Hill*, 7 Taunt. 397, explains the expressions to be found in *Muilman v. D'Eguino*.] And there is no danger that a right of retainer for such an object will in general be prejudicial to the interests of the drawer, for after any long detainer the holder will suffer more by loss of the interest of his money than he can possibly gain by any rise in the exchange. At all events, it is in the power of the drawer to secure himself, by sending out one part of the bill to be accepted, or by stipulating for its transmission within a given time.

The law of France (Code de Commerce, liv. i. tit. 8, s. 11) requires that a bill drawn from the Continent or Isles of Europe, and payable within the European possessions of France, shall be presented within six months from the date, or the holder shall have no remedy against the *drawer or [*420 endorser; but in the law of England there is no such rule with respect to what are termed foreign bills. The drawer must calculate on the continued solvency of the drawee; for without any detainer by a holder, the bill may, in passing from hand to hand, be months in circulation before presentment for acceptance.

Taddy, and *Andrews*, Serjt., with him, in support of the rule, contended, that the holder ought not to be permitted to consult his own interests to the injury of the drawer; that no instance could be shown in which a party had detained a bill nearly five months before presenting or putting it in a course of circulation; and that nothing but *vis major*, such as embargo, blockade, or imprisonment, could justify such a proceeding. Buller, J., said in *Muilman v. D'Eguino*, "due diligence is the only thing to be looked at, whether the bill be a foreign or an inland one; and whether it be payable at sight, at so many days after, or in any other manner."

The Court said they would take time to consider, not on account of any difficulty, but of the great importance of the case. *Cour. adv. vult.*

TINDAL, C. J. The rule obtained by the defendant in this case, calling on the plaintiff to show cause why there should not be a new trial, proceeds upon the ground that there has been a misdirection, in point of law, to the jury on the trial of the cause, in consequence of which misdirection the jury have returned their verdict improperly for the plaintiff.

The rule of law laid down to the jury appears to have been substantially this,—that they were to determine on the evidence before them, whether there had been an unreasonable delay on the part of the plaintiff, the holder *of [*421 the bill, in sending it forward for acceptance, or in putting it into circulation; and in order to arrive at the proper determination of that question, the jury were told that they were to take into their consideration the situation and interests, not of the drawer only, or of the holder only, but the situation and interests of both; and to say whether, under all the circumstances, the delay, in this case, which amounted to four months and twenty-two days, was unreasonable or not. This must be taken to be the *substance* of the direction; for although

remarks were made incidentally on the different parts of the evidence as they occurred in summing it up, this was the basis of the charge : it was pointedly laid down at the beginning, and was again pointedly recurred to at the end of it ; and there can be no doubt but that the jury, being a special jury of merchants, understood this to be the rule and guide of their judgment upon the question before them, and acted upon it in finding their verdict.

On the part of the defendant it is contended that this direction was wrong, and that the proper question for the jury should have been, whether due diligence had been used by the holder in sending forward the bill for acceptance, or putting it in circulation, with reference to the interests of the drawer ; and it was urged, in the course of the argument, that by the law merchant it was the duty of the holder, either to put the bill into immediate circulation, or, if he kept it in his own hands, to send it forward for acceptance by the first packet which sailed to Rio after he received the bill ; or, at the latest, by the second. And the point now to be determined by us, is, whether the question submitted to the jury at the trial was the proper direction or not.

There was no evidence in the cause of any such general unvarying course having been observed with respect to foreign bills payable at a given time after sight, as, that the holder who kept them in his own hands, sent them *422] forward for acceptance within any certain time, as, for instance, by the first or second packet which sailed after they came to his hands. Had there been proof of any such general usage, it would have put an end to all doubt ; the parties would be taken to have dealt with each other on the footing of such usage ; the reasonable time for forwarding the bill would have been then marked with the same precision as the reasonable time for giving notice of the dishonour of an inland bill ; and the only point for the consideration of the jury would then have been, whether the bill had been sent forward within such limited time or not. But there was no such evidence of usage ; on the contrary, there was conflicting evidence of the judgment and opinion of merchants on that point ; some stating that such was their understanding of the course and practice, others on the contrary stating that they understood foreign bills were usually kept without being forwarded for acceptance, as long as it suited the interests or convenience of the holder. Again, there is no definite time prescribed by the law of England, within which such presentment for acceptance must take place. In some countries, as in France, the times within which a foreign bill payable at sight, or at any certain time after, must be presented for acceptance to the drawee, are fixed by positive law, according to the place where, and the place on which the bill is drawn. Thus, for instance, where it is drawn from the continent of Europe, or the isles of Europe, and payable within the European possessions of France, such presentment for acceptance must be made within six months from the date ; in default of which, the holder can have no remedy against the drawer or endorsers. (Code de Commerce, liv. 1, tit. 8, s. 11.) But there is no such law in England ; and in the absence of any such positive regulation, or of any general usage, or course of trade, no other rule, as it *423] appears to us, can be laid down as the limit within which the bill must be forwarded to its destination, than that it must take place within a reasonable time under all the circumstances of the case, and that there must be no unreasonable or improper delay.

Whether there has been in any particular case reasonable diligence used, or whether unreasonable delay has occurred, is a mixed question of law and fact, to be decided by the jury acting under the direction of the Judge, upon the particular circumstances of each case. The judgment of the Court of Common Pleas, in the case of *Muilman v. D'Eguino*, 2 H. Bl. 565, seems to us to lead directly to this conclusion, and to no other. And although one expression used by Mr. Justice Buller, in giving his judgment, is much relied on by the defendant, namely, that "if instead of putting the bill into circulation, the holder

were to lock it up for any length of time, I should say he was guilty of laches," such expression, when properly considered, only leaves the rule above laid down as uncertain and undefined in its application as it was before. "To lock the bill up for any length of time," does not, and cannot, mean, that keeping it in his hands for any time, however short, would make him guilty of laches. It never can be required of him, instantly on the receipt of it, under all disadvantages, either to put it into circulation, or to send it forward to the drawee for acceptance. To hold the purchaser bound by such an obligation, would greatly impede, if not altogether destroy the market for buying and selling foreign bills, to the great injury, no less than to the inconvenience of the drawer himself. For if he has no opportunity to realize his bill by sale at home, he can only obtain the amount, by sending it out to a correspondent at the place upon which it is drawn, incurring thereby delay, expense, and risk: and if the buyer is not to be allowed a reasonable discretion as to the *time of parting with the bill, how can the drawer expect to find a ready sale? The [*424 meaning, therefore, of the expression above referred to, is, and indeed the very form of the expression denotes it, that he must not lock the bill up for an indefinite time; that there must be some limit to its being kept from circulation; and what limit can there be, except that the time during which it is locked up must be reasonable? But what is or is not reasonable for that purpose, a jury must, with the assistance of the Judge, under all the circumstances of the particular case, determine.

In the present case, on the 10th of September, 1830, the bill was sold in the market, by the defendant's order, and purchased by the plaintiff. It was kept by the plaintiff in his own hands until the 1st of February, 1831, when it was again sold by him in the market, and put into circulation. But the rate of exchange in the market fell immediately after the purchase of the bill by the plaintiff, and during the whole of the interval down to the very time of the sale of the bill by him, continued lower than it was at the time the plaintiff purchased the bill. The point, therefore, which arises in this case is, as before observed, whether, in determining the question of reasonable time, the jury are to look exclusively to the interests of the drawer, or may take into account those of the holder also. And we are of opinion there is no rule of law, and no custom was proved at the trial, which should prevent the jury from looking, for that purpose, to the interests of both. The interest of the drawer is, that the bill should be presented as early as possible after he has sold it; for the longer the delay the greater the risk he runs of the insolvency of the drawee. The interest of the holder is, that he may be allowed to keep the bill until he can make a profit on it, or, at all events, save himself from loss. So long as the exchange remains steady, or, at all *events, if it rises after he has taken the bill, his interest does not materially clash with that of the drawer; [*425 and on such a case the jury would probably think, with reference to the interest of both, that the reasonable time for sending forward the bill was satisfied by the allowance of a shorter and less extended period of time than if the interest of the holder and the drawer were in conflict and competition with each other. But if, as happened in the present case, the exchange falls immediately after the sale of the bill, the jury might then think a more extended period might fairly and reasonably be allowed the holder, in order to enable him *bonâ fide* to endeavour to make a fair profit, or, at all events, to endeavour to secure himself from actual loss. And, considering the nature of the transaction of the sale of the bill by the holder; the form of the security itself; and the expedients to which the drawer might have recourse to limit the time of the bill's circulation; we think a jury well warranted in coming to such a conclusion. At the time the bill was sold upon the market by the drawer, the rate of the exchange for the milrea was 22*d.*, which rate was upon the sale definitively fixed as that at which the bill was to be paid when due. Now, although the drawer may not have any direct interest himself in selling his bill at the time

the milrea is at the highest value in *English* money, yet it is obviously for the benefit of his customer or correspondent, the drawee, that he should do so; inasmuch as the value so fixed on the milrea at the time of the sale, is the value at which payment is to be made at *Rio* at the time the bill becomes due. The higher, therefore, the value of the milrea, the smaller will be the number which it will require from the drawee's funds to make up the sterling sum expressed in the bill.

It was further proved at the trial, that foreign bills were constantly bought and sold at the market for the *purpose of speculation: that this course
*426] of business was so general, that the defendant could not but know that it existed; and the jury might probably infer, and if they did so, we think they were warranted by the evidence in so doing, that the defendant must have known that the particular bill in question had been purchased by the plaintiff for that purpose. As, therefore, the drawer chose his own time for bringing the bill into the market, the jury might think it not unreasonable that the purchaser should have the privilege of keeping it until the state of the market was such as to enable him to part with it without any great loss. And if such was their opinion, we are not able to say that it was unreasonable or contrary to law.

But, further, it appeared upon the evidence at the trial, that where drawers of foreign bills, payable at any time after sight, are desirous of limiting the time of their responsibility, there are different modes which they are accustomed to pursue to attain that object: either they are in the habit of sending forward one part to a correspondent to procure acceptance, and bringing another part of the bill to the market, upon which is noted the time at which the first part was forwarded; or they make it a matter of express stipulation with the purchaser, that the bill sold shall be sent forward within a limited time. The jury in this case may have thought, that as the drawer had recourse to neither of these expedients, he tacitly permitted the purchaser to keep the bill until his own interest induced him to bring it again to the market; and that he had not abused this permission, or kept the bill an unreasonable time, when he resold it at the first opportunity which presented itself, if not of gaining a profit, at least of avoiding a loss. It is true, that by having recourse to either of the modes above referred to, the negotiability of the bill is clogged whilst in the
*427] hands of the drawer; but if the drawer may limit *the time his bill has to run, but does not, for the sake of his own advantage, the jury may have thought that the advantage he thereby obtained, was in the nature of a premium paid to him for running the risk of his drawee's insolvency, by the extended period that might elapse before the bill was presented.

Again, the holder of the bill has at all times a direct interest in not keeping the bill out of circulation a longer time than is necessary; for he loses the interest of his money, and runs the risk of the insolvency of the parties to the bill. This check, therefore, which must always operate against keeping back the bill capriciously or wantonly, the jury may have considered as having had its due effect in the present case, and as justifying them in making a more liberal allowance of time to the holder of the bill before he is to be compelled to put it in circulation.

Still further, it was proved by all the witnesses on the trial, and indeed admitted on the argument of this rule, that if the bill was once put in circulation it might be sent to any part of the world, and kept a reasonable time by each successive holder before it was passed on to the next; so that, in effect, the time which would elapse before it was forwarded for acceptance, if put in circulation, might equal, if not exceed any period for which the bill can be supposed, under ordinary circumstances, to be kept back by the first purchaser. But whether the bill is looked up by the first purchaser, waiting for the turn of this market in his favour, or whether it is circulating through a distant part of Europe for an equal space of time, really seems to make little, if any, difference

with respect to the drawer's risk. When the bill is circulating, the immediate motive for forwarding it to its destination will be a rise in the exchange: and the same motive will equally operate and produce the same effect if the bill still remains in the *hands of the original purchaser. Perhaps the case presented itself to the jury in this point of view, whilst weighing the [428] question, whether the bill had been kept back an unreasonable time, and they may have thought there was no objection to the allowing a liberal measure of time to the original holder before he put the bill in circulation, when such would be confessedly claimed and allowed to successive holders of the same bill.

Upon the whole we see no objection to the rule of law laid down at the trial for the government of the jury in the consideration of the question before them, and we think the jury have come to a proper conclusion on the evidence. We therefore think the rule for a new trial must be discharged. Rule discharged.

GROVE v. ALDRIDGE. Nov. 26.

After seizure, and before sale under a *fi. fa.*, while the defendant's goods were yet in the possession of the sheriff, the officers of the customs seized them under a warrant to levy a penalty incurred by the defendant for an offence against the revenue laws. Held, that the sheriff was justified in returning *nulla bona* to the writ of *fi. fa.*

THIS was the case of an action against the sheriff of Sussex for a false return, in which there was a verdict for the plaintiff, with 10*l.* damages, with liberty for the defendant to move to enter a verdict for himself.

The facts proved at the trial were, that on the 22d of June the sheriff entered under a *fi. fa.*, issued by the plaintiff, upon a judgment signed by him, on the 18th of the same month, against the defendant in that suit. Afterwards, and whilst the sheriff was in possession of the goods under such writ, and before any sale, the officers of the customs entered to levy for a penalty recovered against the same defendant, for an offence *against the laws relating to [429] the customs. The information upon which this penalty had been recovered, was laid before a magistrate against the party on the 5th of June; the defendant had appeared thereto on the 23d, on which same day he was convicted by the magistrate, and the officers entered under the warrant issued on such conviction. The sheriff permitted the goods in question to be taken for the penalty, and returned *nulla bona* to the writ of *fi. fa.*; and whether such return was justifiable was the question.

Taddy, Serjt., in Trinity term, 1829, obtained a rule nisi to set aside this verdict, against which rule

Wilde and *Spankie*, Serjts., showed cause, when it appearing that the point to be determined was the same as in *Giles v. Grover*, ante, p. 128, the Court postponed judgment till that case should have been decided. (a) The House of Lords having disposed of *Giles v. Grover*, judgment, in the present case, was now delivered by

TINDAL, C. J. At the time this case was argued the case of *Giles v. Grover* was undecided in the House of Lords, and the judgment of this Court was deferred until the decision of that case. The House of Lords has, however, since decided the rule of law to be, that where the sheriff seizes under a *fi. fa.*, and after such seizure, but before the sale under such writ, a writ of extent is sued out and delivered to the sheriff, the crown is entitled to the priority, and the sheriff must sell under the extent, and satisfy the crown's debt, before he sells under the *fi. fa.* (b)

(a) The arguments, in substance the same as those in *Giles v. Grover*, have been so fully entered into in the judgment of that case, that it would be improper to repeat them here.

(b) See *Giles v. Grover*, 9 Bingh. 128.

*430] *That case is a decisive authority in favour of the defendant, unless a distinction can be made between a warrant to levy a penalty given to the crown by a statute, and an execution under an extent. But we can see no sound distinction between a warrant issued to recover a debt to the crown and an extent. That the penalty in this case, after the conviction before a magistrate, constitutes a debt to the crown, is evident from the statute under which it was recovered, which enables the informer to recover the same "either by information or by suit;" and after a judgment in a suit for the penalty, it would unquestionably constitute a debt to the crown. If, then, it be a debt, whether the crown seeks to levy it by an extent, or by a warrant against the goods of the defendant, can make no difference. Indeed, in this case, the information was laid, and, therefore, as it appears to us, the king's suit begun (if it had been necessary to decide that question), before the subject obtained his judgment. We therefore think the case above referred to governs the present, and, consequently, that the *postea* must be delivered to the defendant.

Judgment for the defendant.

*431]

*WOODHOUSE v. JENKINS.

Tenant for life, and his eldest son, the remainder-man in tail, leased to E. S. for ninety-nine years, and gave E. S., who was acquainted with their title, a bond conditioned for the due observance of their covenant for quiet enjoyment. E. S. underlet to W. for sixty years, and covenanted with W. against eviction by any one claiming under E. S., or by his acts, means, consent, neglect, default, privity, or procurement. Tenant for life and his eldest son being dead without issue, W. was evicted by the next remainder-man in tail. Held, that E. S. was not liable on his covenant to W., the eviction being by title paramount, which E. S. had no means of defeating.

THE following case, by the direction of the Vice-Chancellor, was submitted for the opinion of this Court:—

Under the limitations of the will of Henry Southouse, formerly of Manuden, in the county of Essex, dated the 3d of November, 1743, the freehold part of and in the Sun Tavern, situate in the Strand, in the parish of St. Martin's-in-the-Fields, in the county of Middlesex, was, in and before the year 1790, vested, as to one undivided third part thereof, in Edward Southouse, of Manuden, since deceased, for an estate in tail male in possession; and as to one other undivided third part thereof, in Henry Southouse of Southampton, since deceased, for his life, with remainder to Edmund Edward Southouse, since deceased, the eldest son of the said Henry Southouse, for an estate in tail male; and as to the remaining one other undivided third part in Edward Southouse of Starcross, since deceased, for his life, with remainder to Charles Southouse, the eldest son of the said last-named Edward Southouse, for an estate in tail male, with other remainders over.

In or about the month of September, 1790, the said Edward Southouse, of Manuden, agreed with the said Henry Southouse of Southampton, and Edmund Edward Southouse, his son, and with the said Edward Southouse of Starcross, and Charles Southouse, his son, respectively, for two several leases to be granted to the said Edward Southouse of Manuden, of the said two several last-mentioned *432] undivided third parts of the premises for *two several terms of ninety-nine years each, at certain annual rents; and two indentures of lease were executed in conformity with such agreement on the 29th of September, 1790; one of them, between the said Henry Southouse of Southampton, and the said Edmund Edward Southouse (described as the eldest son and heir of the said Henry Southouse), of the one part, and the said Edward Southouse of Manuden, of the other part; the other, between Edward Southouse of Starcross, and Charles Southouse (therein described as his son and heir), of the one part, and Edward Southouse, of Manuden, of the other part. In these leases the lessee covenanted in the usual way to pay rent, and the lessors, for them-

selves severally and respectively, and for their several and respective heirs, executors, administrators, and assigns, and for each and every of them, covenanted, promised, and agreed, to and with the lessee, the said Edward Southouse of Manuden, his executors, administrators, and assigns, that he, the said Edward Southouse of Manuden, his executors, administrators, and assigns, paying the said rent, and observing and performing, fulfilling and keeping all and every the covenants, clauses, provisos, conditions, and agreements which on his part were or ought to be paid, observed, fulfilled, and kept, should and might peaceably and quietly have, hold, use, occupy, possess, and enjoy the said messuage or tenement, and other the said thereby demised premises, with the appurtenances, for and during the said term of ninety-nine years thereby granted, without any let, suit, trouble, denial, eviction, hindrance, or interruption, of or by them the lessors, or either of them, their or either of their heirs or assigns, or of or by any other person or persons whomsoever lawfully claiming or to claim by, from, or under him, them, or any of them, or by or through his, their, or any of their acts, means, consent, or procurement.

*Before and at the time of the agreement for the said leases of 1790, the said Edward Southouse of Manuden was aware of and acquainted ^[*433] with the state of the title of the lessors respectively to the said premises thereby demised. And in the year 1791 the said Henry Southouse of Southampton and the said Edmund Edward Southouse, his son, agreed with the said Edward Southouse of Manuden to give, and made and executed and delivered to him, a bond in the penal sum of 200*l.*, the condition of which recited that in and by a certain indenture of lease, made in September, 1790, between the said Henry Southouse and Edmund Edward Southouse, the obligors, of the one part, and the said Edward Southouse of Manuden of the other part, the said Henry Southouse and Edmund Edward Southouse did, for the considerations therein mentioned, demise, lease, set, and to farm let unto the said Edward Southouse, his executors, administrators, and assigns, all that one undivided third part or share of and in the freehold part of the said tavern, and then in the occupation of the above-named Edward Southouse of Manuden, for and during, and unto the full end and term of ninety-nine years; that the said Henry Southouse, the obligor, was entitled to the said third part of the said premises for the term of his natural life only, and the said Edmund Edward Southouse was entitled thereto as tenant in tail, after the decease of the said Henry Southouse; that they being desirous to save the expense of a recovery, and that the said recited lease might be fully performed for and during the term aforesaid by such person or persons as should take the inheritance of the same premises in remainder, and that the said lease might continue and be in force for the term aforesaid, had agreed to enter into the bond or obligation aforesaid; and the condition was, that, if the said Henry Southouse, and Edmund Edward ^[*434] Southouse, or either of them, their or either of their heirs, executors, or administrators, should fulfil, perform, and keep, or cause to be done, fulfilled, performed, and kept, the several conditions, clauses, and agreements, contained in the said recited indenture of lease which was therein agreed to be done, fulfilled, performed, and kept by and on the parts and behalf of the said Henry Southouse and Edmund Edward Southouse, their heirs and assigns, then the above-written obligation should be void and of non-effect, otherwise to remain in full force and virtue. In the year 1792 a similar bond was given to Edward Southouse, of Manuden, by the said Edward Southouse, of Starcross, and the said Charles Southouse his son.

In Hilary term, 1795, the said Edward Southouse, of Manuden, suffered a common recovery of the said undivided third part of which he himself was so seized in tail, and thereby acquired an estate in the same in fee-simple.

By an indenture made the 2d of March, 1795, between the said Edward Southouse, of Manuden, of the one part, and Joseph Allen and Charles Harman of the other part, it was recited that the said Edward Southouse, of Manuden, being entitled to one undivided third part of the freehold part of the

said premises called the Sun Tavern, in his own right, and to one other undivided third part thereof by virtue of a lease for ninety-nine years to him granted by Henry Southouse, and Edmund Edward his son and heir, and to the remaining undivided third part thereof, by virtue of a lease for ninety-nine years to him granted by Edward Southouse and Charles Southouse his eldest son, had agreed to grant to the said Joseph Allen and Charles Harman, their executors, administrators, and assigns, a lease of the freehold part of the said premises called the Sun Tavern, for the term of sixty years, at and under

*435] the yearly rent, covenants, provisos, and agreements thereafter contained; and it was witnessed, that in consideration of the yearly rent and covenants thereafter reserved and contained, and which on the part and behalf of the said Joseph Allen and Charles Harman, their executors and administrators, were and ought to be paid, done and performed, he, the said Edward Southouse of Manuden demised unto the said Joseph Allen and Charles Harman, their executors, administrators, and assigns, the freehold part of the said tavern, to hold the same unto the said Joseph Allen and Charles Harman, their executors, administrators, and assigns, from Christmas day then last past, for the term of sixty years, yielding and paying therefor yearly during the said term unto the said Edward Southouse of Manuden, his executors, administrators, and assigns, the clear yearly rent of 61*l.* payable as therein mentioned. And the said Edward Southouse of Manuden for himself, his executors, administrators, and assigns, did thereby covenant, promise, and agree to and with the said Joseph Allen and Charles Harman, their executors, administrators, and assigns, that he and they well and truly paying the said yearly rent of 61*l.* at the days thereinbefore limited for the payment thereof, and observing, performing, fulfilling, and keeping all and every the covenants and agreements in the said indenture contained on the part and behalf of the said Joseph Allen and Charles Harman, their executors, administrators, and assigns, to be performed and kept according to the true intent and meaning of the said indenture, should, and lawfully might, peaceably and quietly have, hold, use, occupy, possess, and enjoy the said messuages or tenements and premises thereby demised, with their and every of their appurtenances, for and during all the said term of sixty years thereby granted, without any lawful let, suit, trouble, *436] eviction, ejection, molestation, or interruption, of or by the said Edward Southouse of Manuden, his heirs, executors, administrators, and assigns, or of or by any other person or persons whomsoever, lawfully claiming, or to claim by, from, or under him, them, or any of them, or by his, their, or any of their acts, means, consent, neglect, default, privity, or procurement.

By certain mesne assignments, the premises demised by the said lease of the 2d of March, 1795, were assigned and became vested in the plaintiff Henry Cooper Woodhouse, as assignee of the said lease, and he entered into and continued in possession of the said premises till he was evicted as hereinafter mentioned.

Before the year 1790, the said Charles Southouse and Edmund Edward Southouse had attained the age of twenty-one. Edward Southouse, of Starcross, Henry Southouse, of Southampton, Charles Southouse, and Edmund Edward Southouse, respectively died before the year 1829; Charles Southouse and Edmund Edward Southouse respectively had no issue male; and upon their death, and before the year 1829, the said two undivided third parts of the said freehold premises, wherein the said Charles and Edmund Edward were respectively interested as aforesaid, became vested in the Rev. Edward Southouse, as entitled to the same respectively under the limitations in the said will of the said Henry Southouse formerly of Manuden, in remainder expectant upon the determination of the estates of the said Charles and Edmund Edward therein respectively; and in the year 1829, the said Rev. Edward Southouse, lawfully claiming under such title, entered upon the said two undivided third parts of the said freehold premises, and evicted the said plaintiff Henry Cooper Woodhouse therefrom.

The said Edward Southouse, of Manuden, died several years ago. The defendant, Anthony Jenkins, was the executor of Edward Southouse, of Manuden, and his legal representative, both as to his real and personal estate.

*The question for the opinion of the Court was, whether the plaintiff was entitled, in respect of the said eviction, to maintain an action of [*437 covenant upon the said indenture of lease, dated the 2d of March, 1795?

This case was argued in Trinity term last, by

Stephen, Serjt., for the plaintiff. The defendant is liable on Edward Southouse of Manuden's covenant for quiet enjoyment. For the Rev. Edward Southouse has recovered the premises against the plaintiff through the neglect and default of Edward Southouse of Manuden, in not procuring the original lessors and their sons to suffer a common recovery. In *Butler v. Swinerton*, Cro. Jac. 657, Palm. 339, the covenant was against disturbance by the lessor, or any other person, "by or through his means, title, or procurement." The lessor, when he purchased the premises, had procured the conveyance of the estate to be made to himself and his wife, and the heirs of himself: after his death his wife evicted the lessee: and the lessee was held entitled to recover under the covenant, because the lessor might have taken the original conveyance to himself alone. So in *Lady Cavan v. Pulteney*, 2 Ves. jun. 544, upon a covenant very similar to the present, the lease having been avoided by a remainder-man, the Chancellor thought the lessor responsible, because it had always been in his power, by an easy act, to make himself owner of the property. In *Howes v. Brushfield*, 3 East, 490, where the seller covenanted to the purchaser of an estate that he should enjoy and receive the rents, &c., without any action or interruption from the seller or those claiming from him, his executors, &c., or by, through, or with his or their acts, means, default, &c.; it was held that a breach was well assigned in respect of certain *quitrents in arrear [*438 before and at the time of the conveyance, though not stated to have accrued while the seller was tenant of the premises.

Adams, Serjt., *contrâ*. Edward Southouse of Manuden had no means of compelling the original lessors and their sons to suffer a recovery. *Thomas v. Powell*, 2 Cox, 394; *Hallett v. Middleton*, 1 Russ. 243. The plaintiff, therefore, has not been evicted by the default or procurement of Edward Southouse of Manuden, but by title paramount, after having taken the lease with a full knowledge of the lessor's title. It would have been useless for the lessor to limit the covenant to his own act or default, if he were also to be responsible against title paramount.

In *Butler v. Swinerton*, it was by the procurement of the lessor that his wife obtained the power to evict the lessee; and in *Howes v. Brushfield* it was by the clear default of the lessor that the lessee was compelled to pay quitrents, contrary to the covenant of the lessor. *Lady Cavan v. Pulteney* was compromised, without any decision; but as it was always in the lessor's power to have secured the lessee, his omission to do so was a manifest default. In *Evans v. Vaughan*, 4 B. & C. 261, the default was of a similar description. Here it was not in the power of Edward Southouse of Manuden to compel the original lessors to suffer a recovery.

Stephen, in reply, referred to *Fildes v. Hooker*, 2 Merivale, 424, where, on a bill by vendor, for specific performance of an agreement to take a lease for twenty-one years at rack-rent, the Master having reported in favour of the title shown by the abstract, and an exception being taken to the report, the question was, whether, where the *agreement was silent, the vendor of a lease- [*439 hold interest was bound to produce the title of the lessor: and the exception was allowed. And it was holden that, whether the interest contracted for were freehold or leasehold, for a long term of years or a short lease at rack-rent, the party who comes for a specific performance should be prepared to show that he was able to give what he sought to compel the other to take.

Our. adv. vult.

TINDAL, C. J. Although it might have been sufficient to certify our opinion to the Vice-Chancellor, from whose Court this case was sent, "that the plaintiff is *not* entitled, in respect of the eviction set forth in the case, to maintain an action of covenant upon the indenture of lease, dated the 2d of March, 1795," yet as this general opinion in the negative, would leave the grounds upon which our judgment is formed, in complete uncertainty, we think it better to state those grounds shortly on the present occasion.

The covenant for quiet enjoyment, contained in the lease of 1795, is a covenant against any eviction "by Edward Southouse of Manuden, the lessor, his heirs, executors, administrators, or assigns, or any persons whomsoever lawfully claiming, or to claim, by, from, or under him, them, or any of them, or by his, their, or any of their acts, means, consent, neglect, default, privity, or procurement." It appears, from the facts stated to us, that Edward Southouse of Manuden, the lessor, claimed to be entitled to one-third part of the premises, under a lease for ninety-nine years made to him by a tenant for life, and his eldest son the remainder-man in tail; and to another third part under another lease made to him by lessors having precisely the same interest in such other third part. And it appears further that the tenants for life having died, and *440] the remainder-men in tail, who *had joined in such leases, having also died without issue, the Rev. Edward Southouse, the ultimate remainder-man, who was no party to the leases for ninety-nine years, has entered by his title paramount, and avoided such leases, and evicted the parties in possession under the lease of Edward Southouse of Manuden, of 1795. The question, therefore, is, whether an eviction by the ultimate remainder-man under these circumstances can be considered a breach of the covenant above referred to.

Now it is obvious in the first place, that such eviction is not an eviction by Edward Southouse of Manuden himself, his heirs or assigns, or *any one claiming by, from, or under* him or them: it is an eviction by a person claiming by title paramount to Edward Southouse of Manuden. If, therefore, such eviction can be brought within the terms of the covenant, it must fall within that part of it which provides against any person claiming "by the acts, means, consent, neglect, default, privity, or procurement of Edward Southouse of Manuden, or any one claiming under him."

In the next place, it does not appear to be an eviction arising from the *acts, means, or procurement* of the lessor. In the case of *Butler v. Lady Swinerton* (Cro. Jac. 657, and more fully reported in *Palmer's Rep.* 339, and 2 *Roll. Rep.* 286), Sir John Swinerton, the lessor, covenanted for quiet enjoyment by the lessee against the disturbance of himself, or of any other person "by or through his means, title, or procurement." Sir J. Swinerton, when he purchased, had *procured* the conveyance of the estate to be made to himself and his wife, and to the heirs of himself; and after his death, his wife evicted the lessee. It was held by the Court, that the wife was a person within the covenant, who claimed *441] by the *means* of the husband; for if he had not *procured* the fine to be *made to himself and his wife, she would not have had any estate. In the present case, no *act* is done by the lessor, no *consent* is given to the eviction, there is no *privity*, no *procurement*; and, consequently, the only words of the covenant, if any, upon which a breach could be assigned, would be the remaining words "neglect or default."

Now it must be admitted, that the eviction would have been prevented, if Edward Southouse of Manuden, at the time he took the leases for ninety-nine years, had required the lessors to join in common recoveries to cut off the entails, and if the lessors had complied with such requisition. The question is, therefore, whether the not procuring such common recoveries to be suffered was a "neglect or default" in Edward Southouse of Manuden, within the meaning of the covenant. And we are of opinion that no breach of covenant could be assigned on those words, unless it could be averred in the declaration, that Edward Southouse of Manuden, at the time the leases were made to him, had the

power or means of procuring such common recoveries to be suffered by his lessors, the tenants for life in tail, and that he neglected or omitted so to do. With such an allegation made and proved, we think an action of covenant might possibly be maintainable, but not without it. For if Edward Southouse of Manuden had no means of compelling common recoveries to be suffered by the lessors, if upon his requisition they refused, it can hardly be said that he was guilty of any neglect or default in not procuring that step to be taken which he was unable to compel. It may, indeed, show a want of discretion in Edward Southouse of Manuden, that he took leases under such a defeasible title; but a *neglect* and a *default* seem to imply something more than the mere want of discretion with respect to his own interests; something like the breach of a [*442] *duty or legal obligation existing at the time; those words, in their proper sense, implying the not doing some act to secure his title which he ought to have done, and which he had the power to do; and the not preventing or avoiding some danger to the title, which he might have prevented or avoided. And this seems to agree with the view which Lord Rosslyn takes of a covenant very similar in its terms to the present: in the case of *Lady Cavan v. Pulteney*, 2 Ves. jun. 559, the Chancellor, in stating his opinion that General Pulteney was liable upon the covenant for quiet enjoyment contained in the leases he had granted, which had been avoided by the remainder-man, says, "to all appearance he was the owner,—in substance he was the owner, *for it was always in his power, by an easy act, to make himself so.*" And, again, "the title might have been made perfectly absolute in him by a trifling expense on his part." Now, in the present case, it does not appear that Edw. Southouse of Manuden ever had the power of procuring his lessors to suffer common recoveries; it does not appear that he neglected any means which he possessed, of thereby making his title indefeasible: on the contrary, it is rather to be inferred, from the recital in the bonds of indemnity, that the tenants in tail, if they had not actually refused, had been unwilling to suffer recoveries, as the bonds were expressly given by them to avoid the expense of such proceedings. We think, therefore, as the statement of facts at present stands upon this case, that no breach could be assigned upon the covenant in question, and that we shall certify to the Vice-Chancellor accordingly.

*GENERAL RULES

[*443]

AGREED UPON BY THE JUDGES IN PURSUANCE OF THE STATUTE 2 W. 4, c. 39.

IT IS ORDERED, That every writ of summons, *capias*, and detainer shall contain the names of all the defendants [if more than one] in the action, and shall not contain the names of any defendant or defendants in more actions than one.

IT IS FURTHER ORDERED, That the following fees shall be taken :

£ s. d.

For signing all writs for compelling an appearance, whether of summons, <i>distringas</i> , <i>capias</i> , or detainer, and whether the same shall be the first writ, or an <i>alias</i> or <i>pluries</i> writ: and whether the same shall issue into the same county as the preceding writ, or into a different county, - - - - -	0 2 6
For sealing the same, - - - - -	0 0 7
For entering an appearance for every defendant, - - - - -	0 1 0
Unless an appearance shall be entered for more than one defendant by the same attorney, and in that case for every additional defendant, - - - - -	0 0 4

IT IS FURTHER ORDERED, That the person serving a writ of summons shall,

*444] within three days at least after *such service, endorse on such writ the day of the week and month of such service, otherwise the plaintiff shall not be at liberty to enter an appearance for the defendant according to the statute; and every affidavit, upon which such an appearance shall be entered, shall mention the day on which such endorsement was made.

IT IS FURTHER ORDERED, That the sheriff or other officer or person to whom any writ of *capias* shall be directed, or who shall have the execution and return thereof, shall, within six days at the least after the execution thereof, whether by service or arrest, endorse on such writ the true day of the execution thereof; and, in default thereof, shall be liable in a summary way to make such compensation for any damage which may result from his neglect, as the Court or a Judge shall direct.

IT IS FURTHER ORDERED, That the second rule of Hilary term, 1832, shall be applicable to all writs of summons, *distringas*, *capias*, and detainer, issued under the authority of the said act, and to the copy of every such writ.

IT IS FURTHER ORDERED, That any *alias* or *pluries* writ of summons may, if the plaintiff shall think it desirable, be issued into another county, and any *alias* or *pluries* writ of *capias* may be directed to the sheriff of any other county, the plaintiff in such case upon the *alias* or *pluries* writ of summons describing the defendant as late of the place of which he was described in the first writ of summons, and upon the *alias* or *pluries* writ of *capias* referring to the preceding writ or writs as directed to the sheriff to whom they were in fact directed.

*IT IS FURTHER ORDERED, That the *alias* or *pluries* writ of summons *445] into another county shall be in the following form:—

William the Fourth, &c.

To C. D., of in the county of late of in the county of [original county]. We command you as before [or, often] we have commanded you, &c. [as in the writ of summons, No. 1, in the schedule of the said act].

And that the *alias* and *pluries* writ of *capias* shall be in the following form:—

William the Fourth, &c.

To the sheriff of . We command you, as heretofore we have commanded the sheriff of that you omit not, &c. [as in the writ of *capias*, No. 4, in the schedule of the said act].

IT IS FURTHER ORDERED, That in every writ of *distringas*, issued under the authority of the said act, a *non omittas* clause may be introduced by the plaintiff, without the payment of any additional fee on that account.

IT IS FURTHER ORDERED, That when the attorney actually suing out any writ shall sue out the same as agent for an attorney in the country, the name and place of abode of such attorney in the country shall also be endorsed upon the said writ.

IT IS FURTHER ORDERED, That if the plaintiff or his attorney shall omit to insert in or endorse on any writ or copy thereof any of the matters required by the said act, *to be by him inserted therein or endorsed thereon, such writ *446] or copy thereof shall not, on that account, be held void, but may be set aside as irregular, upon application to be made to the Court out of which the same shall issue, or to any Judge.

IT IS FURTHER ORDERED, That upon all writs of *capias*, where the defendant shall not be in actual custody, the plaintiff at the expiration of eight days after the execution of the writ, inclusive of the day of such execution, shall be at liberty to declare *de bene esse*, in case special bail shall not have been perfected; and if there be several defendants, and one or more of them shall have been served only and not arrested, and the defendant or defendants so served shall not have entered a common appearance, the plaintiff shall be at liberty to enter a common appearance for him or them, and declare against him or them in

chief and *de bene esse* against the defendant or defendants who shall have been arrested and shall not have perfected special bail.

IT IS FURTHER ORDERED, That in case the time for pleading to any declaration, or for answering any pleading shall not have expired before the 10th day of August in any year, the party called upon to plead, reply, &c., shall have the same number of days for that purpose, after the 24th day of October, as if the declaration or preceding pleading had been delivered or filed on the 24th day of October; but in such cases it shall not be necessary to have a second rule to plead, reply, &c.

IT IS FURTHER ORDERED, That in case a Judge shall have made an order in vacation for the return of any writ issued by authority of the said act, or any writ of *capias ad satisfaciendum*, *feri facias*, or *elegit*, on any day in vacation, and such order shall have been duly served, *but obedience shall not [447 have been paid thereto, and the same shall have been made a rule of Court in the term then next following, it shall not be necessary to serve such rule of Court or make any fresh demand of performance thereon, but an attachment shall issue forthwith for disobedience of such order, whether the thing required by such order shall or shall not have been done in the meantime.

IT IS FURTHER ORDERED, That if any attorney shall, as required by the said act, declare that any writ of summons or writ of *capias* upon which his name is endorsed, was not issued by him or with his authority or privity, all proceedings upon the same shall be stayed until further order.

IT IS FURTHER ORDERED, That every declaration shall in future be entitled, in the proper Court, and of the day of the month and year on which it is filed or delivered, and shall commence as follows:—

Declaration after summons.

Venue. A. B., by E. F. his attorney, [or in his own proper person,] complains of C. D., who has been summoned to answer the said A. B., &c.

Declaration after arrest, where the party is not in custody.

Venue. A. B., by E. F. his attorney, [or in his own proper person,] complains of C. D., who has been arrested at the suit of the said A. B., &c.

Declaration where the party is in custody.

Venue. A. B., by E. F. his attorney, [or in his own proper person,] complains of C. D., being *detained at the suit of the said A. B., in the custody of the sheriff, [or of the Marshal of the Marshalsea of the Court [448 of King's Bench, or of the Warden of the Fleet.]

Declaration after the arrest of one or more defendant or defendants, and where one or more other defendant or defendants shall have been served only and not arrested.

Venue. A. B., by E. F. his attorney, [or in his own proper person,] complains of C. D., who has been arrested at the suit of the said A. B. [or being detained at the suit of the said A. B. as before] and of G. H., who has been served with a writ of *capias* to answer the said A. B., &c.

And that the entry of pledges to prosecute at the conclusion of the declaration shall in future be discontinued.

TENTERDEN,
N. C. TINDAL,
LYNDHURST,
J. BAYLEY,
J. A. PARK,
J. LITLEDALE,
S. GASELEE,
J. VAUGHAN,

J. PARKE,
W. BOLLAND,
J. B. BOSANQUET,
W. E. TAUNTON,
E. H. ALDERSON,
J. PATTESON,
J. GURNEY.

IT IS ORDERED, That the writ of *capias* and *distringas* which shall hereafter be issued out of the superior Courts of law at Westminster, into the counties palatine of Lancaster or Durham, shall be directed to the Chancellor of the county palatine of Lancaster, or his deputy there, or to the Bishop of Durham, or his Chancellor there, and shall be in the following form :

*449]

** Writ of Distringas.*

William the Fourth, &c.

To the Chancellor of our county palatine of Lancaster, or his deputy there; or

To the Reverend Father in God, by Divine Providence Lord Bishop of Durham, or to his Chancellor there, greeting: We command you, that by our writ, under the seal of our said county palatine, to be duly made and directed to the sheriff of our said county palatine, you command the said sheriff [or, if in Durham, that by our writ, under the seal of your Bishopric, to be duly made and directed to the sheriff of the county of Durham, you cause the said sheriff to be commanded] that he omit not by reason of any liberty in his bailiwick, but that he enter the same and distrain upon the goods and chattels of C. D., for the sum of forty shillings, in order to compel his appearance in our Court of _____ to answer A. B. in a plea of trespass on the case, [or debt, or as the case may be,] and how he shall execute that our writ, that he make known to us in our said Court, on the _____ day of _____ now next ensuing.

Witness _____ at Westminster, the _____ day of _____ in the _____ year of our reign.

Notice to be subscribed to the foregoing writ.

In the Court of _____

Between { A. B. - - - - - Plaintiff,
 and
 C. D. - - - - - Defendant.

Mr. C. D.

TAKE NOTICE, That I have this day distrained upon your goods and chattels in the sum of forty shillings *in consequence of your not having appeared *450] in the said Court, to answer to the said A. B., according to the exigency of a writ of summons, bearing teste on the _____ day of _____, and that in default of your appearance to the present writ within eight days inclusive after the return hereof, the said A. B. will cause an appearance to be entered for you, and proceed thereon to judgment and execution, or [if the defendant be subject to outlawry] will cause proceedings to be taken to outlaw you.

Writ of Capias.

William the Fourth, &c.

To the Chancellor of our county palatine of Lancaster, or his deputy there; or

To the Reverend Father in God, by Divine Providence Lord Bishop of Durham, or to his Chancellor there, greeting: We command you, that by our writ, under the seal of our said county palatine, to be duly made and directed to the sheriff of our said county palatine, you command the said sheriff [or, if in Durham, that by our writ, under the seal of your Bishopric, to be duly made and directed to the sheriff of the county of Durham, you cause the said sheriff to be commanded] that he omit not by reason of any liberty in his bailiwick, but that he enter the same, and take C. D., of _____ if he shall be found in his bailiwick, and him safely keep until he shall have given him bail or make deposit with him according to law in an action on premises

[or of debt, &c.] at the suit of A. B., or until the said C. D. shall by other lawful means be discharged from his custody, and *that he further com- [*451] mand him, that on execution thereof, he do deliver a copy thereof to the said C. D., and that the said writ do require the said C. D. to take notice, that within eight days after execution thereof on him, inclusive of the day of such execution, he should cause special bail to be put in for him in our Court of to the said action; and that in default of his so doing, such proceedings may be had and taken as are mentioned in the warning thereunder written or endorsed thereon. And that he further command the said sheriff, that immediately after the execution thereof, he do return that writ to our said Court, together with the manner in which he shall have executed the same, and the day of the execution thereof; or that if the same shall remain unexecuted, then that he do so return the same at the expiration of four calendar months, from the date thereof, or sooner if he shall be thereto required, by order of the said Court or by any Judge thereof.

Witness

at Westminster the

day of

Memorandum to be subscribed to the writ.

N. B. This writ is to be executed within four calendar months from the date thereof, including the day of such date, and not afterwards.

A warning to the defendant.

1. If a defendant being in custody shall be detained on this writ, or if a defendant being arrested thereon shall go to prison for want of bail, the plaintiff may declare against such defendant before the end of *the term next [*452] after such detainer or arrest, and proceed thereon to judgment and execution.

2. If a defendant being arrested on this writ shall have made a deposit of money, according to the statute 7 & 8 G. 4, c. 71, and shall omit to enter a common appearance to the action, the plaintiff will be at liberty to enter a common appearance for the defendant and proceed thereon to judgment and execution.

3. If a defendant having given bail on the arrest, shall omit to put in special bail as required, the plaintiff may proceed against the sheriff or on the bail-bond.

4. If a defendant having been served only with this writ and not arrested thereon, shall not enter a common appearance within eight days after such service, the plaintiff may enter a common appearance for such defendant, and proceed thereon to judgment and execution.

Endorsements to be made on the writ of Capias.

Bail for £ by affidavit,
or

Bail for £ by order of [naming the Judge making the order],
dated the day of

This writ was issued by E. F., of , attorney for the plaintiff
[or plaintiff] within named,
or

This writ was issued in person by the plaintiff within named [mention the city, town, or parish, and also *the name of the hamlet, street, and [*453] number of the house of the plaintiff's residence, if any such there be].

N. C. TINDAL,

J. PARKE,

LYNDHURST,

W. BOLLAND,

J. BAYLEY,

J. B. BOBANQUET,

J. A. PARK,

W. E. TAUNTON,

J. LITTLEDALE,

E. H. ALDERSON,

S. GASELEE,

J. PATTESON,

J. VAUGHAN,

J. GURNEY.

MEMORANDA.

THE Right Honourable Charles, Lord Tenterden, Lord Chief Justice of the Court of King's Bench, died the early part of this term; and was succeeded by Sir Thomas Denman, Knight, his Majesty's Attorney-General, who was called to the degree of the coif, and gave rings with the motto, "*Lex omnibus una.*" On the 8th of November Sir Thomas was sworn into office, and took his seat on the Bench on the following day.

Sir William Horne, Solicitor-General to his Majesty, succeeded to the office of Attorney-General; and John Campbell, of Lincoln's Inn, Esquire, one of his Majesty's counsel, was appointed Solicitor-General to his Majesty, and afterwards received the honour of knighthood.

On the first day of this term, John Beames, Robert Mounsey Rolfe, and Clement Tudway Swanston, of Lincoln's Inn, Esquires, and Henry Hall Joy, *454] of the Inner *Temple, Esquire, having been, during the preceding vacation, appointed his Majesty's counsel, were called within the bar, and took their seats accordingly: and

Mr. Serjt. Spankie was appointed one of his Majesty's serjeants, and took his seat within the bar accordingly.

END OF MICHAELMAS TERM.

CASES

ARGUED AND DETERMINED

IN THE

COURT OF COMMON PLEAS,

AND

OTHER COURTS,

IN

Hilary Term,

IN THE THIRD YEAR OF THE REIGN OF WILLIAM IV.

Ex Parte YATES. Jan. 11.

As an attorney may be struck off the roll of this Court upon reading a rule for striking him off the roll of E. B., so he may be readmitted here upon reading a rule of E. B. for his readmission in that Court.

In the year 1823 Yates was struck off the roll of attorneys of the Court of King's Bench, upon affidavits disclosing his conviction for a misdemeanour; and shortly afterwards he was struck off the roll in this Court upon reading the rule for striking him off the roll of the Court of King's Bench.

In the course of the last term he was readmitted an attorney of the Court of King's Bench, his innocence of the misdemeanour having been established to the satisfaction of the Judges; and now

Ludlow, Serjt., moved that upon reading the rule for his readmission in the Court of King's Bench, he *should be readmitted in this Court without [*456 payment of arrears of duty or fine.

PARK, J.(a) Inasmuch as he was struck off the roll of this Court upon reading the former rule of the Court of King's Bench, I think we should now act on the present rule for his readmission. Rule absolute.

(a) Tindal, C. J., was absent during the first four days of this term, on account of the decease of a near relation.

FAIRCLOTH v. GURNEY, Clerk. Jan. 12.

The Court declined to hear a rule for setting aside an annuity, upon its appearing that the rule had not been obtained on behalf of the grantor, but on behalf of a party who had purchased the annuity from an assignee, and who raised objections to avoid completing his purchase.

Stephen, Serjt., had obtained a rule nisi to set aside, upon a great variety of objections, an annuity granted by the defendant.

Wilde, Serjt., who now opposed the rule, said it appeared from the affidavits filed in support of the rule, that the annuity was secured on ecclesiastical property and certain policies of insurance in which the grantor had a reversionary interest; that the grantor having become insolvent, his assignee had made an arrangement with the grantees of the annuity to sell the annuity and the reversionary interest in the policies; that the whole had been sold by auction, after the annuity had been paid for several years without objection; and that the purchaser, becoming unwilling to complete his purchase, had resorted to a conveyancer to start objections. The conveyancer suggested no less than six, upon which he said the opinion of the Court must be obtained before the purchaser could safely proceed; whereupon this *application was made, *457] Gurney contributing an affidavit that though he had not before been aware that there were legal objections on which he could set aside his grant, he had always esteemed himself grievously used by the grantee.

Wilde contended, therefore, that the application was a mere experiment to obtain the opinion of the Court upon a matter not in litigation, and that the Court would not entertain the motion unless it were made *bonâ fide* on the part of the grantor. That could not be the case here, for though he had contributed an affidavit of facts connected with the grant, he did not state that the application was made on his behalf. [ALDERSON, J. It can scarcely be so, for it is his interest to uphold, not to defeat the sale of the annuity.]

The Court here called on Stephen to show that the application was made *bonâ fide* on behalf of Gurney, and upon his failing to do so, declined to hear him further.

SHARP v. GREY. Jan. 11.

A coach proprietor is bound to convey his passengers in road-worthy vehicles, and if an accident happen from a defect in construction, the proprietor is liable, although the defect be out of sight and not discoverable upon ordinary examination.

ASSUMPSIT against a coach proprietor and common carrier, for failing in his undertaking to convey the plaintiff safely from Chertsey to London.

The axletree of the defendant's coach broke on the journey, whereby the plaintiff was thrown off, his limbs fractured, and considerable loss and expense incurred in his cure.

It appeared that the axletree was an iron bar, which, excepting the arms projecting into the wheels, was *enclosed in a frame of wood consisting of *458] four pieces bound together by clamps of iron. The clamps were fastened with screws.

Before the journey the defendant's servants had examined this part of the vehicle in the usual way, when no defect was obvious to the sight; but upon investigation after the accident, a defect was discovered in that portion of the iron bar which, being embedded in the wood work, could only be examined by unscrewing the iron clamps, and taking off the wooden frame.

A mail contractor proved that it is not usual, previous to journeys, to examine the iron of the axletree by opening its wooden frame, and that such a practice

ascertaining what was the precise direction to the jury in this cause, but the learned Judge reports, himself, that he did not say that the delay, to be justifiable, must be a delay for the purpose of the voyage, except that the vessel, which was a yacht, should arrive safely at its place of destination. That certainly *produced an impression on the jury, because they found for the plaintiff, "considering that the vessel was a yacht." It is impossible to [*463 sustain that verdict, for the jury should have been told that if that was the ground on which they determined, the verdict ought to have been for the defendant. We think, therefore, that there should be a new trial; the costs to abide the event.

GASELEE, J., concurred.

BOSANQUET, J. I am of opinion there has been a miscarriage in this cause, and that the verdict is inconsistent with the law laid down in *Palmer v. Marshall*. The only question is, whether this miscarriage is to be ascribed to an omission in the direction given to the jury by the learned Judge who presided at the trial. He reports that he did not expressly say the delay ought to have been a delay for the purposes of the voyage (no purposes of the voyage appearing), except that the vessel, which was a pleasure yacht, should arrive safe at its place of destination. But this Court has decided, that the circumstance of the vessel being a pleasure yacht is not a sufficient reason for the delay; and the mention of the term pleasure yacht seems to have misled the jury, for they found their verdict "considering that the vessel was a yacht." I think, therefore, there should be a new trial, but that, under the doubt as to the precise effect of the direction to the jury, the costs should abide the event.

ALDERSON, J. I am of the same opinion as before, that this delay, to be justifiable, should have been a delay for the purpose of the voyage, as waiting for a wind, provisions, or the like. But, as the delay was *not* for the purpose of the voyage, I think the rule for a new trial should be made Absolute.

*FRASER v. CASE. Jan. 16.

[*464]

A *distringas* under 2 W. 4, c. 39, must be issued expressly for one of two purposes, either to compel appearance or with a view to outlawry; not in the alternative.

THE defendant being applied to in July last for payment of a debt due to the plaintiff, promised to settle it on the following Saturday.

The plaintiff's clerk called on that day at the defendant's house, when he was informed by the defendant's wife that the defendant was gone to Africa; and upon calling again on the 14th of November to serve him with a writ of summons, was informed he was still abroad.

Wilde, moved for a writ of *distringas* under 2 W. 4, c. 39, s. 3, in furtherance of the plaintiff's proceedings.

Per Curiam. Under that statute a *distringas* may be obtained, either to compel an appearance, or with a view to outlawry. If the party is *not* abroad, the Court will not issue a *distringas* with a view to outlawry. If there is reason for thinking he *is* abroad, they will not issue one to compel an appearance. You must make out one case or the other; or at least, under the present circumstances, elect for which purpose the *distringas* shall issue.

Wilde elected a *distringas* to compel appearance.

*LANCUM v. LOVELL. Jan. 21.

[*465]

In an action for a toll claimed on a public road, persons who have refused to pay the toll are, from necessity, competent to give evidence, notwithstanding their interest in the result of the cause.

ASSUMPSIT for toll traverse. Plea, general issue.

At the trial the defendant called several witnesses to prove that they had used the way in question, a public road passing the borough of Northampton, without payment of any toll: in some cases when no demand had been made, in other cases where tolls had been demanded and refused. It was objected by the plaintiff, that these witnesses were incompetent, inasmuch as the verdict in the present case might be given in evidence against them, if an action should be brought against them for the toll; and the case of *Lord Falmouth v. George*, 5 Bingh. 286, was relied upon in support of that objection. On the authority of that case *Tindal, C. J.*, before whom the cause was tried, allowed the objection, but gave the defendant leave to move.

A verdict having been found for the plaintiff, a rule nisi was obtained for a new trial on several grounds, and among them, on the ground that these witnesses ought not to have been excluded.

After hearing *Wilde*, Serjt., against the rule, and *Jones*, Serjt., in support of it, the Court requested that the question of evidence might be argued before all the Judges; accordingly, the day before this term commenced, fourteen of the Judges being assembled in the Exchequer Chamber,

Chilton, on this point only, again showed cause against the rule for a new trial.

The witnesses in question were properly excluded, *because the verdict in this cause would have been evidence against them, so that they had an immediate interest in the result of the cause. That has always been deemed an insuperable ground of exclusion. *Gilb. Evid.* 107, *Bull. N. P.* 284, *Walton v. Shelley*, 1 T. R. 296; *Rex v. Bray*, *Cas. Temp. Hard.* 360; *Duke of Somerset v. France*, 1 Str. 661; *Hockly v. Lamb*, 1 Ld. Raymd. 731; *Harvey v. Collison*, 1 Selw. N. P. 439; *Anscomb v. Shore*, 1 Taunt. 261; *Earl of Clanricard v. Denton*, 1 Gwill. 360; *Bent v. Baker*, 3 T. R. 27; *Smith v. Prager*, 7 T. R. 62; *Rhodes v. Ainsworth*, 1 B. & Ald. 87; *Wyndham v. Chetwynd*, 1 Burr. 414. To say nothing of *Lord Falmouth v. George*, which may be considered as under reconsideration on this occasion, the present case cannot be distinguished from *The Company of Carpenters, &c., in Shrewsbury v. Hayward*, Dougl. 373, where it was held that a person who had acted in breach of an alleged custom was not a competent witness to disprove the existence of the custom.

It may be urged on the other side that such evidence ought not to be excluded in the case of public rights, which affect all the king's subjects; but that argument is met by the case just cited, in which the custom set up by the plaintiffs affected all the king's subjects. The only exception to the rule of exclusion in cases of interest, is that pointed out by *Buller, J.*, *Bull. N. P.* 289, namely, that a party who has an interest will be admitted where no other evidence can reasonably be expected: *Gilb. Evid.* 114, *Evans v. Williams*, 7 T. R. 481, n.; *Lock v. Hayton*, *Fortesc.* 246; *Goodtitle v. Welford*, Dougl. 140. Here other evidence might be adduced. The servants of those whose *carriages passed the gate might have been called, or the witnesses might have paid under protest: *Rex v. Carpenter*, 2 Show. 47; *City of London v. Water Bailiff*, 1 Ventr. 351.

Sir *James Scarlett* in support of the rule. Witnesses are not excluded because the verdict in the cause may be evidence for or against them, but because they have an interest in the result of the cause: the admissibility of the verdict for or against the witness is often a test of the existence of the interest; but it is the interest which disqualifies him, and not the circumstance that the verdict may be given in evidence for or against him. Now, to the rule of incompetency from interest, and to the admissibility of a verdict in evidence, *Read v. Jackson*, 1 East, 355, there are several admitted exceptions. One of them is the case of a claim which affects all the king's subjects; as a claim to toll on a public road. The interested witness, there, is a witness of

necessity, because none can be found who are at once not interested, and have any correct knowledge about the matter in dispute. In the present case the servants of those whose carriages passed without impediment might not know that their employers paid a composition for passing: the employers alone could state the fact correctly. Claims against the public may be divided into two classes: 1. Those which affect a portion of the public, as the inhabitants of a manor, parish, or township, or persons of a particular vocation. 2. Those which affect all the king's subjects. In the first class the testimony of interested witnesses is excluded by common law, because it is possible to procure other, and less exceptionable testimony; but in claims which fall under the second class, witnesses are admitted notwithstanding their interest, from the impossibility of *procuring other testimony. This distinction reconciles all the cases; for *The Company of Carpenters, in Shrewsbury v. Hay-* [*468 ward, and *Lord Falmouth v. George*, may be ranged within the first class. To receive the evidence of those only who paid the toll would be to receive evidence only on one side. *Cur. adv. vult.*

The judgment of the Court was now delivered in C. B. by

PARK, J. This was an action of assumpsit for toll for passing through the borough of Northampton, tried before the Lord Chief Justice of this Court, when a verdict was found for the plaintiff. A motion was made by leave reserved at the trial, to set aside this verdict upon several grounds, upon which it is not now necessary to give an opinion. But there is one, upon which I am now to proceed to deliver the unanimous judgment of this court: it is also an opinion in which all the Judges of England concur. At the trial of this cause several witnesses were proposed to be called on the part of the defendant, to prove that they had used the way in question without payment of any toll, in some cases where no demand had been made, and in other cases where the toll had been demanded, and refused to be paid. This evidence was objected to as incompetent, by the counsel for the plaintiff, inasmuch as the present verdict, it was contended, might be given in evidence against them, if an action should be brought against them for the toll. In support of this objection, the case of *Lord Falmouth v. George*, 5 Bingh. 286, was relied upon, and much pressed upon the Chief Justice: and I believe I may say in his presence, that although his leaning was against the objection made to the incompetency of the *witness, yet, upon the authority of that case, his lordship allowed it, [*469 giving the defendant leave to move the court. The question then is, are these witnesses admissible or not?

This case, and the question arising upon this point, are of great importance, and of frequent occurrence, and therefore the court were desirous of having the point set at rest upon the highest judicial authority. Accordingly, we requested the other judges of the other courts of Westminster Hall to permit this single point to be heard before them; and the day before this term it was accordingly argued by one counsel on each side, before fourteen judges, and they agree unanimously; and the Lord Chief Justice of this Court, being unavoidably absent at the argument, authorizes me to say that he fully concurs.

Whether it would be possible to support the case of *Lord Falmouth v. George*, by supposing it savoured more of a private than of a public right, I do not think it worth while to discuss. Because, in *this* case of *Lawrence v. Lovell*, there can be no doubt that this was a matter in which every subject of the king has an interest; and if any one man, because he has passed that way unmolested or resisting, and therefore having an interest, is rejected, every individual in the kingdom is equally exceptionable. The court, and the other judges therefore wish this case to be placed upon this broad ground, that this is a public right, in which all mankind are interested; and if such an objection to witnesses were allowed to prevail, a man would have only to set up a toll or any other claim as against all the world, and no man who had used the way, could be called to controvert or contradict the claim, although he had uniformly resisted the

yielding to such a demand. It is of course, therefore, as it seems to us, that such witnesses, of necessity, must be *admissible. It was said at the *470] bar the other day, that the servants of the masters, whose carriages passed, might be called. But that would not be sufficient, for it would then be alleged, even if the servants swore that they passed without paying, that it by no means followed that the masters did not compound for the tolls, a practice not uncommon, and of which the servants might not be cognisant. The only persons who could give satisfactory proof, are those who could absolutely prove that they being the owners of carts or other carriages, continually passed; and that no demand had ever been made upon them; or, if made, had been uniformly resisted by them. It appears, therefore, that this case falls expressly within Mr. Justice Buller's second exception to the general rule, that no person interested can be a witness; namely, that a party, who has an interest, will be admitted, where *no other evidence can reasonably be expected*: Bull. N. P. 289. Now how can any other evidence be reasonably expected to rebut a claim made against *every* individual subject of the realm, but that of *some* of the subjects of the king?

The Court has been much pressed with the case of *The Company of Carpenters, &c., in Shrewsbury v. Hayward*, Doug. 373, where it was held, that a person who had acted in breach of an alleged custom was not a competent witness to disprove the existence of the custom, namely, that *he had worked, being a resident in Shrewsbury, without molestation as a carpenter there, although he was not free of the company, nor an apprentice nor journeyman*. On that case it is to be observed, that it was not a case affecting *all* the king's subjects, but only a particular class of tradesmen, in a particular town: in the next place it was decided expressly on the ground that *they* were not witnesses of necessity, *471] for Mr. Justice Buller *says "the objection to the witness produced for the defendant is certainly decisive: for it is not true that he could have had no other sort of witnesses. The employers might have been witnesses."

The result of the whole is, therefore, that we are of opinion, that the right claimed is a *public* right, in which all the king's subjects are interested: and that consequently the right on the one hand, and the resistance on the other, can only be substantiated or resisted by the subjects of the king, who are all equally interested; and, therefore, the rule for the new trial must be made absolute.

Rule absolute.

(IN THE EXCHEQUER CHAMBER.)

BALME and Others, Assignees of BANKHART and BENSON, Bankrupts,
v. HUTTON, JEWISON, INGHAM, WOOD, and Others.

A sheriff who has seized goods under a *fi. fa.*, and has sold and delivered them after a secret act of bankruptcy committed by the defendant, but before a commission issues against him, is liable in trover to the assignees under the commission.

UPON error from the Court of Exchequer, the judgment of this Court was now delivered as follows:—(a)

PATTESON, J. This was an action of trover by the assignees of a bankrupt firm in which the jury found a special verdict as follows:—

C. Bankhart and W. Benson, the bankrupts, for several years before and up *472] to the time of the issuing the commission *hereinafter mentioned, carried on the business of worsted spinners, in partnership, at Bowling,

(a) This case was argued in Trinity vacation.

The arguments are so fully stated in the judgment, that it would be improper to repeat them here.

within the honour of Pontefract, in the county of York. On the 27th of October, 1825, Bankhart and Benson were indebted to the defendants, H. W. Wood, J. W. Wood, and M. W. Wood, in a sum of money exceeding 3500*l.* for wool sold and delivered, and upon that day, at the request of the said Messrs. Wood, executed a warrant of attorney for securing that sum, and such further advances as in the whole should amount to a sum not exceeding 5000*l.*, which warrant of attorney was filed within twenty-one days from the date thereof, pursuant to the statute 6 G. 4, c. 16; and judgment by *nil dicit* was entered up thereon on the 14th of November following. On the 31st of December, 1825, the said C. Bankhart and William Benson, being traders, and indebted to the petitioning creditor in a debt sufficient to support the aforementioned commission, committed an act of bankruptcy. On the 25th of January, 1826, the defendant Ingham (Jewison then being chief bailiff of the honour of Pontefract, within which honour he has the execution of all writs, and appoints his own deputies, from whom he takes bonds with sufficient sureties to indemnify him from the acts of such deputies), by virtue of a warrant directed to Jewison and his deputy (defendant Ingham), by defendant Hutton, the then sheriff of the county of York, founded on a writ of fieri facias issued at the suit of the said defendants, H. W. Wood, J. W. Wood, and M. W. Wood, against the said bankrupts, under the judgment aforesaid returnable on Monday next after eight days of the Purification, and endorsed to levy 152*l.* 12*s.* 10*d.*, besides, &c., seized in execution certain machinery and utensils of the said bankrupts, in a mill occupied by them at Bowling aforesaid. On the same day a valuation of the said machinery and utensils, together with the said bankrupt's tenant-right in the said *mill, was made by the defendant Ingham, amounting altogether to the sum of 1485*l.*, and the said [473] machinery and utensils, and tenant-right, were, on that day, purchased at such valuation from the said Ingham, acting on behalf of the chief bailiff, by one Barker, a clerk or bookkeeper of the said Messrs. Wood, but no money was paid by Barker or Wood to Ingham, except the sheriff's poundage and other costs of the levy. Immediately upon the sale, Barker took possession of the mill, machinery, and utensils, on behalf of Messrs. Wood, and retained possession until the 17th of February following, when the machinery and utensils were sold by public auction for the sum of 964*l.* 14*s.* 6*d.*, the tenant-right in the mill remaining unsold, but being of little or no value, and the proceeds of such sale were paid over by Barker to Messrs. Wood. On the day of the sale to Barker, Messrs. Wood agreed to indemnify the defendant Ingham from any action for making the levy, and a bond of indemnity was afterwards executed. On the 21st of February, 1826, a commission of bankrupt issued against Bankhart and Benson, under which they were declared bankrupts, on the 24th of the same month. Neither the sheriff nor the chief bailiff, nor Ingham knew or had any notice of any act of bankruptcy by Bankhart and Benson before the return of the writ of fieri facias.

The Court of Exchequer has given a very elaborate judgment, and has decided that the verdict should be entered for the defendant Jewison, and against the defendant Ingham. Upon which judgment a writ of error has been brought. The decision against the defendant Ingham proceeds on the ground that he, being the bailiff who executed the writ of fieri facias, took an indemnity from the execution creditor, and is therefore identified with him. But the Court held that the defendant Jewison, the chief bailiff, whose officer Ingham *was, is not affected by this circumstance. I confess it appears [474] to me, as at present advised, that if Ingham be identified with the execution creditor in consequence of what he has done in the course of executing the writ, Jewison is so likewise. Jewison would be liable for all acts done by Ingham as officer, even for any extortion committed by Ingham, although contrary to his express orders. Jewison can have the benefit of the indemnity taken by Ingham, and is, in my apprehension, exactly in the same condition as

Ingham. However, as the other point in this case is the most important one, I will proceed to examine it, having stated only this much upon the point of indemnity, lest I should be supposed to agree entirely with the Court of Exchequer upon it.

The principal question, then, is this, Is a sheriff liable to an action of trover at the suit of the assignees of a bankrupt, where, upon a *fieri facias* against a trader who has committed a secret act of bankruptcy, of which the sheriff is wholly ignorant, he seizes and sells? I am of opinion that he is liable. It has been so considered for a great length of time, and though I admit that the case of *Cooper v. Chitty*, reported in 1 Burrow, 20, and much more intelligibly, as I think, in Lord Kenyon's notes, 395, does not, necessarily, decide the point, because, in that case, the sheriff sold the goods after a commission of bankrupt had issued; yet the general understanding of the profession has long treated that case and the subsequent practice as decisive of this question. Accordingly, in the case of *Lazarus v. Waithman*, 5 B. Moore, 813, the Court of Common Pleas expressly so held; and in that case the old authorities, and particularly *Baily v. Bunning*, 1 Lev. 173, were cited by counsel. Afterwards in *Price v. Helyar*, 4 Bingh. 597; 1 Mo. & P. 541, the Court of Common Pleas again decided in the same manner on the same ground, and according to the report in Moore and Payne the counsel for the defendants cited *Baily v. Bunning*. The Court of Exchequer had also held the same doctrine some time before in the case of *Potter v. Starkie*, 4 M. & S. 260, and also in *Lazarus v. Waitman*. I do not think it necessary to enter into a full examination of the reasoning of Lord Mansfield in *Cooper v. Chitty*. I agree in much, though not in all, that is said on that subject, in the judgment of the Court of Exchequer in this case, but I dissent from the conclusion which is drawn in that judgment. Looking at the subsequent authorities, and at the uniform practice in modern times, I cannot consider this question as *res integra*, and should not think myself justified in overruling the decisions of so many learned Judges, even if I felt that in the absence of such decisions my view of the law would probably be different. But I by no means say that it would be different. The first authority, namely, *Baily v. Bunning*, is cited as having determined this point the other way. Now if I am not bound by the several modern decisions on the subject, I certainly am not bound by the authority of *Baily v. Bunning*, badly and imperfectly reported as it is in Levinz, Siderfin, and in Comberbach; and impossible as I find it to satisfy my mind on what ground the Court in that case really did proceed. The special verdict in that case, which was an action of trover against the judgment creditor and the bailiff of a liberty having the return of writs, is plainly imperfect, for it finds only a demand and refusal, but not a conversion, whereas it is common learning that demand and refusal are evidence only of a conversion, and that the jury must themselves draw the conclusion. Again, the verdict puts the question on the taking, and according to the Reports it should seem that the Court proceeded on the ground that the taking was not unlawful, which is frequently not the real point in trover, for the taking may be lawful, and yet there may be a subsequent unlawful conversion. The verdict is general, not guilty, as regards the execution creditor, and rightly so, for it is not found that he interposed in the seizure; and it is expressly found that the goods still remained in the bailiff's hands, not sold nor delivered over to the execution creditor; and yet *Baily v. Bunning* has been mentioned by Levinz as an authority to show that the officer shall not be charged, when perhaps the party shall;—so inaccurate are the Reports of that day respecting this case, and so conclusive to my mind that no reliance can be placed on *Baily v. Bunning* as establishing any point at all. *Letchmere v. Thorowgood*, 3 Mod. 326, and other places, has been cited; but, if possible, it is worse reported than *Baily v. Bunning*; the only point was there, that a man shall not be made trespasser by relation; a point confirmed in *Smith v. Milles*, 1 T. R. 475. The decision in

the action of trover afterwards brought in *Letchmere v. Toplady*, is plainly bad law. *Cole v. Davies*, 2 T. R. 729, is but a *Nisi Prius* decision.

Take this case, then, upon legal principles, independent of all authority. The bankrupt acts say that the commissioners shall deal with all the personal property of the bankrupt of which no execution is served and executed at the time he becomes bankrupt. How deal with it? By assigning it to the assignees. In order to effectuate this intention of the legislature, it was absolutely necessary to hold that the property was in the assignees by relation from the time of the act of bankruptcy, otherwise there would have been no mode of recovering the personal property which had *been disposed of between [477] the act of bankruptcy and the assignment. This relation is created by the statutes of bankrupt in effect, as much as if it had been expressly enacted, and manifestly binds all persons except the king, who is not named in these statutes. Now the action of trover, which is the form of the present action, is founded on property, and as the assignees have the property by relation, it follows that they can maintain this action against any person who has converted the goods in the interval between the acts of bankruptcy and the action, subject always to the limitation of two months introduced by statute 49 G. 3, c. 121, s. 2. All the cases from the time of the bankrupt acts of Elizabeth and James I. show this; and indeed it is on this principle only that the Court of Exchequer in the present case have given judgment against the execution creditor and the bailiff Ingham. The action of trespass is very different, it is founded not on property but on possession; and where there is no actual possession, but right of property, is said to draw to it possession, that is only where the plaintiff has a right of possession at the time of the trespass; here he had no such right, except by relation, and the cases establish that a man shall not be made a trespasser by relation. There is reason in such a rule, for in trespass the damages are unlimited: in trover they are limited to the value of the property.

It being, therefore, clear that the plaintiffs had by relation such a property as would maintain trover against all persons but the king, the question in this case, as it seems to me, is reduced to this, whether the character of the sheriff affords a defence to the action. The bankrupt acts contain no clause protecting the sheriff; they speak of all persons being bound who claim under the bankrupt; but it is contended that the sheriff does not claim under the bankrupt: yet it is admitted that the execution creditor who puts the sheriff *in motion, does claim under the bankrupt, and that the vendee from [478] the sheriff also claims under him; but it is said that the sheriff does not. I cannot assent to this doctrine at all.

It is said to be hard on the sheriff: but if the law be clear, any hardship arising from it is immaterial; and it is not found practically hard, for the offices of under sheriff and of bound bailiff are coveted, notwithstanding the hardship which has prevailed many years. It is said that the sheriff is invincibly ignorant of the facts: so is the execution creditor; yet he is not excused if he join in the execution; ignorance therefore alone will not do. Again, the sheriff is often as invincibly ignorant in cases of bills of sale, whether they be fraudulent or not, yet he is obliged to run the risk: nay more, where he knows of an act of bankruptcy he is still obliged to seize under a *fieri facias*, and formerly was obliged to sell, for *non constat* that any commission will issue; which is quite as hard as being obliged to act in ignorance. Whatever hardship he may have been under formerly, he is under very little since 49 G. 3, c. 121: he can always inquire whether any act of bankruptcy has been committed; and if he has reason to suspect that there has, he can apply to the Court for protection for two months, after which he is safe.

But it is said that the law in other cases makes a distinction between a sheriff and a party. As, for instance, that a sheriff may justify under a writ of execution, but the party must show not only a writ but a subsisting judgment. No

doubt that is so; and why? Because the party in the cause who is liable only in case he has been personally active in the seizure, or has taken the goods or their produce from the sheriff, yet having put the sheriff in motion, that is, having sued out the writ, if he become liable at all, must show a *cause
 *479] for suing out the writ; and it is obvious that the writ itself would show no cause; whereas the sheriff does nothing till after the writ is put into his hands, and acts professedly in obedience to the writ. The difference in the requisites of a justification between the sheriff and the party arises not from the character of the sheriff, but from the stage of the proceedings at which they respectively interfere. The writ commands the sheriff to take goods of A.; he takes goods which had been the property of A. and are still in his possession, though in point of law they have ceased to be his property, if certain contingent events happen; but no other person at that time has the right of possession; the sheriff, therefore, is not liable to be sued in trespass by the person who, by the happening of subsequent events, turns out to have had in law the property of the goods at the time of the seizure; neither is the execution-creditor liable in trespass; but both the sheriff and the creditor, if he takes the proceeds, are liable in trover to render the value of the goods to the person whose property they turn out to be. I see neither hardship nor injustice in this, nor anything contrary to the usual course and maxims of the law. If, then, this were *res integra*, I should think the sheriff liable, and much more do I so think when I find the modern authorities so deciding, even if I concede and were satisfied, which I am not, that the more ancient ones are the other way. I am therefore of opinion that the judgment of the Court of Exchequer in this case, as regards the defendant Jewison, ought to be reversed.

TAUNTON, J. Two questions have been raised on behalf of the defendants in error in this case; the one, that the property in the goods and chattels seized remained in the bankrupts Bankhart and Benson until the assignment by the
 *480] commissioners under the commission of bankrupt; that at the time of the seizure, therefore, they were their goods and chattels; that in making the seizure, Jewison, the chief bailiff of the honour, and Ingham, his deputy, were acting in strict obedience to the writ of fieri facias, which commanded them of the goods and chattels of Bankhart and Benson to make the money to be levied; and therefore that Jewison (for of Ingham there was no question in consequence of his having taken an indemnity from the judgment-creditor) is not liable to this action. The other question was, whether, admitting the doctrine of relation to be applicable to the judgment-creditors, it could be so with respect to Jewison, who was a public officer, and supposed to be entitled to peculiar protection, and not capable of being considered as a wrong-doer when acting in obedience to his writ and in ignorance of any act of bankruptcy committed. If either of these questions be answered in favour of the defendants in error, the judgment ought to be affirmed; but, upon a full consideration of the subject, I am of opinion that both points are against them, and that the judgment of the Court below ought to be reversed.

In giving my reasons for the conclusion at which I have arrived, I do not mean to go into the cases at any length; they are so fully discussed in the very learned and elaborate judgment of the Court of Exchequer, and in the arguments at the bar, and the subject itself, speaking generally, is so familiar to the mind of every lawyer, that this is wholly unnecessary.

Upon the first point, I admit that the property in the goods, according to the case of *Cary v. Crisp*, 1 Salk. 108, is not transferred out of the bankrupt before assignment by the commissioners; but though this be so, it is most
 *481] clear, and has been settled by a long series of decisions, that when an assignment is made under a good commission of bankruptcy, it relates back to the act of bankruptcy committed, and avoids all mesne acts. The law on this subject is thus stated by Lord Hardwicke in the case of *Billon v. Hyde*, 1 Ves. 328: "By the act of bankruptcy all the real and personal estate vested

in the assignees, and the property vested in them from the time of the act committed, and that may go back to a great length of time, and it overcharges all those acts, without regard to the fairness or fraud in them, so that a sale of goods by the bankrupt after the act committed is a sale of their property, and for which they may maintain trover. So it is as to the payment of money; and this was the intent of the act of parliament, the statute of Jac. 1 being that this shall not extend to the prejudice of any debtor of the bankrupt who paid his debt after the act committed, without knowing of it. This relation the assignment has, does not only overcharge acts done in pais, and contracts entered into by such person's having committed an act of bankruptcy, but also acts on record, and legal acts done by him, such as judgments. So that if execution is taken out after the act committed, upon a judgment before, that execution is undone and set aside. It is said that this rule, founded on this act of parliament, is contrary to the general reason of the law, which says that fictions of law and legal relations shall not enure to the wrong of any one: which is a general rule, invented to support the right and equity of the case. But the reason of taking this case out of that rule is plainly this, and the law did intend it on this general rule, that it is better to suffer a particular mischief than an inconvenience; and the legislature foresaw there would be a particular mischief, which they cured by that proviso; but did not extend *it farther, because the inconvenience, on the other hand, of suffering bankrupts to dispose of their effects by contracts or judgments would put it in their power to defeat their just creditors of their debts, so as it would be difficult commonly to find out whether there was a mixture of fraud, the legislature thought it better to lay down that general rule." Lord Mansfield, in *Cooper and another v. Chitty*, 1 Burr. 31, expresses himself in these words: "This relation, the statutes concerning bankrupts introduced to avoid frauds. They vest in the assignees all the property that the bankrupt had at the time of what I may call the crime committed (for the old statutes consider him as a criminal), they make the sale by the commissioners good against all persons who claim by, from, or under the bankrupt after the act of bankruptcy, and against all executions not served and executed before the act of bankruptcy." It must be particularly recollected that this relation takes effect, not from the common law, but by statute; and the necessary result is, that though at the time of the execution executed goods seized under an execution may ostensibly have been the goods of the bankrupt, and in truth would have been, and have continued to be so, notwithstanding a prior act of bankruptcy committed, if no commission was sued out thereon; yet if a good commission be taken out, and an assignment executed, whoever possesses himself thereof at any interval of time between the act of bankruptcy and the assignment is considered as possessing himself of the property of the assignees. He, therefore, whether judgment-creditor, or sheriff, or bailiff, or any other person, who in such a case takes the goods apparently of A., the bankrupt, has, in legal effect, taken possession of the goods of B., the person who afterwards becomes assignee, and is liable to an *action at the suit of B., the subsequent assignee, for so doing, [†483 unless he be protected by some peculiar privilege.

This brings me to the second question, whether a sheriff has such a privilege; so that under the same circumstances, ignorance of any act of bankruptcy committed being one, the judgment-creditor will be liable and the sheriff will not. It is said that he has, because he is the king's officer, and that he is acting only in obedience to the writ which he is obliged to execute.

Now, if there be an exception to the general rule in the instance of a sheriff, it is an implied one, for there is none to be found in the statute. The words of the 6th G. 4, c. 16, s. 12, which are the same as those in the 13 Eliz. c. 7, s. 2, are general, that the commissioners shall have full power and authority to take order and direction of all the bankrupt's lands, which he shall have in his own right before he became bankrupt, and of all his money, goods, chattels,

&c., and to make sale thereof, or otherwise order the same for satisfaction and payment of the creditors.

I confess I can see no necessity for making this exception in favour of the sheriff. He is the immediate officer of the king and all his courts, to execute the writs of the common law, and for doing this he is entitled, on the one hand, to certain allowances and fees, and subject, on the other, to many perils and liabilities; and to these perils and liabilities, though they may in particular instances, work great injustice, he is exposed for the public good. If we were to confine the liabilities of sheriffs to cases of personal misconduct or default in them or their officers, we should overturn the settled administration of law upon the subject, and throw everything into confusion. Nothing can be more severe than the responsibility of sheriffs in the case of bail. If he *484] refuses sufficient bail *he may have an action brought against him by the defendant, and if he takes it, and the defendant in the suit does not appear according to the exigency of the writ, which he can only do by putting in and justifying bail above, he may be attached by the plaintiff. So, he is identified with the bailiffs, and liable for all their acts, though beyond the scope of their authority, or contrary to their duty, as voluntary escapes, extortion, and the like. In the one instance, without the means of knowledge, he is bound to judge of the sufficiency of persons tendering themselves as bail, and in the other he is driven to protect himself by a bond from sureties for the good conduct of his officers, and to rely upon such security, which may turn out to be worthless, for indemnity. So, in executing process, whether against the person or against goods, he acts at his peril, and is responsible if he makes any mistakes, however innocently, with respect to the identity or the property. This has been carried so far, that in a case where he had seized goods under a fieri facias against A., in a house where A. and the plaintiff lived together as man and wife, and the plaintiff afterwards discovered that when she intermarried with A. he had another wife living, it was held that the plaintiff might recover the value of the goods against the sheriff, they having been her property before the marriage; it not appearing that the plaintiff knew, at the time of the execution, that A. had another wife living. *Glasspoole v. Young and Others*, 9 B. & C. 696. All this apparent injustice has its origin in, and can be excused only by, the apprehensions of the numberless frauds, oppressions, and inconveniences that would otherwise ensue.

But in favour of the sheriff upon this occasion, the case of *Bailey v. Bunning*, 1 Lev. 173; *Siderfin*, 272, has been cited. I admit this case as reported in *485] *Levinz*, to be *primâ facie* an authority *for the sheriff, though in *Siderfin* the reporter subjoins a query with this remark, "For it was affirmed that the practice is that the bailiff shall be found guilty if the party was then a bankrupt." But it may be observed that this appears to have been the first case decided upon this point of relation after the statutes 13 Eliz., 1 Jac. 1, and 21 Jac. 1, and was decided at the time when the bankrupt law was not moulded, partly by decisions of courts of justice, and partly by subsequent statutes, into that more perfect system which it afterwards attained. It is still more material to observe, that, on referring to the original record, it appears that the special verdict does not expressly find any conversion by the defendant Bonyng. The action was trover against the judgment-creditor Mawley and the officer Bonyng. The former was found not guilty, and with respect to the latter the jury found that, by virtue of the warrant and writ he caused to be made, the goods, chattels, and moneys in the count mentioned, and which goods, chattels, and moneys still remain in the hands of the said Thomas Bonyng, neither sold nor delivered to the said William Mawley. They afterwards further said that Richard Bayliss (the plaintiff) demanded of the said Thomas Bonyng the moneys, goods, and chattels in the count mentioned, and that Thomas Bonyng refused, upon his request, to deliver them to Bayliss. But whether, upon all the matters found, the moneys, goods, and chattels aforesaid were all taken by Bonyng by virtue of the writ of execution,

the jurors are ignorant, and pray the advice and consideration of the Court; and if it shall seem to the Court they were not rightly taken, then Thomas Bonyng is guilty of the premises laid to his charge, but if rightly taken, then not guilty. A demand and refusal, therefore, are found, but no sale and express conversion, and the question referred to the Court is merely as to the taking. This, I think, *considerably impugns the authority of the case, inasmuch as the conversion, which is the gist of the action, is not found; [486 and from the contradictory accounts of the several reports of this case, it is difficult to ascertain the ground of the decision. The case of *Turner v. Felgate*, 1 Lev. 95, was also cited as illustrating, by the reporter's note, and not by the decision itself, the difference between charging the officer and charging the party. It was there held, though Twisden was not satisfied, that the party who levied upon a judgment that was afterwards vacated, was a trespasser by relation. This was the only point decided; and the reporter subjoins a note of observation that the action was brought against the party and not against the sheriff, who had the king's writ for his guarantee, and refers to *Bailey and Bunning's case*. This case, therefore, and that also of *Philips v. Thompson*, 3 Lev. 193, in which the ground of the decision in *Bailey v. Bunning* is simply stated, are not additional authorities, because this very point was not adjudged in either. Of *Letchmere v. Thorogood*, 3 Mod. 236; 1 Show. 12; Comb. 123, it is sufficient to say that the form of action there was trespass, and not trover, and the only point decided was, that a man shall not be made a trespasser by relation: and it is a very different thing to make a sheriff answerable in trover, where the value of the property only is the usual measure of damages, and in trespass, where circumstances of aggravation may swell their amount. It by no means follows, of necessity, that the Court would have holden that trover would not lie, because they held that trespass did not, though it is probable that, at that day, founding themselves upon *Bailey v. Bunning*, they might have so held; and it is not immaterial to observe, that the distinction in this respect between trespass and trover is *particularly pointed out by Lord Mansfield in the case of *Cooper v. Chitty*, and is the particular ground of [487 decision in the case of *Smith and Another, Assignees v. Mills*, 1 T. R. 475. As to the case of *Cole v. Davies and Others*, 1 Ld. Raymd. 724, Lord Mansfield, in *Cooper v. Chitty*, 1 Burr. 36, says, "These notes were taken when Lord Raymond was young, as short hints for his own use, but they are too incorrect and inaccurate to be relied on as authorities." And the resolution relied on in the present case is considered by him not to have been warranted by the case then in judgment, but to have been a mere obiter reference to the determination in *Bailey v. Bunning*. In *Aldridge v. Ireland* (cited in 1 Taunt. 278), it was not necessary to decide this question, although it arose, the sheriff having been indemnified; and the same observation, that there was no decision on this point, may be applied to *Coppendale v. Bridgen and Another*, 2 Burr. 814; although, if one were inclined critically to examine the language used by part of the Court, Mr. Justice Foster, if the sheriff there had returned *nulla bona* on the day of the return of the writ, that would not have been a false return, though the act of bankruptcy on that day was incomplete, because the relation is made to be to the time of the first arrest by the express words of the statute. But I by no means rely upon this, inasmuch as the other Judges had doubts about the point.

The case, then, of *Bailey v. Bunning*, such as it is in *Levins*, is, in effect, the only one solitary decision purporting expressly to be in favour of the officer. I agree that, according to the report of the case of *Cooper v. Chitty*, in *Burrow*, that case is no authority for the present. Lord Mansfield there is reported to have made two points; the first, whether or not there was sufficient *pro- [488 perty in the plaintiffs, as assignees, to enable them to maintain the action, and, secondly, whether the defendants had been guilty of a wrongful conversion; and the decision turned upon this, that the sale having been after

the commission and assignment, which were both notorious transactions, the conversion was wrongful. It is true, that in Blackstone's report of the case, 1 Blac. 69, Lord Mansfield is reported to have said, "But had the sale been immediately after the seizure, still the sheriff would have been liable." Of these reports, that of Burrow is probably the more correct, as it is certainly the most elaborate, and perhaps received the correction of Lord Mansfield himself. But notwithstanding *Cooper v. Chitty* be no direct authority against the sheriff, in a case where the seizure and sale are both before the commission, or notice of it, yet it appears to me to be pretty clear that, soon after that case, an opinion grew up in the profession that the sheriff was equally answerable in both cases, upon the ground that, from the act of bankruptcy, the property, by relation, vests in the assignees; and that any sale or disposition of it afterwards, without their privity, must be a wrongful conversion by whomsoever made. The observations which fell from the Court in *Hitchin and Others v. Campbell*, 3 Wils. 304; 2 W. Black. 827, determined in Trinity term, 12 G. 3, only sixteen years after the decision of *Cooper v. Chitty*, afford strong proof of this; and in *Lazarus and Waithman*, 5 B. Moore, 313, which was trover against the sheriff, where the seizure and sale were both before the issuing of the commission, Burrough, J., who spoke from very long experience, said the point was settled long before he knew Westminster Hall. I consider this case and *Potter v. Starkie*, Sel. N. P. 1431, cited in 4 M. & S. 260; and *Wyatt v. *489] Blades*, 3 Campb. 396, which last two cases were *Nisi Prius* decisions, and *Lee v. Lopes*, 15 East, 239; and *Price v. Helyar*, 4 Bingh. 597; *Carlisle v. Garland*, 7 Bingh. 298, which was on special verdict, and *Dillon v. Langley*, 2 B. & Ald. 131, as constituting one continued series of decisions establishing the liability of the sheriff. These will be found to embrace a very considerable period of time, and to have been established, in succession, by all the common law courts in Westminster Hall, and the common practice, I believe, has been in uniform concurrence therewith. I cannot think that, against this accumulation of authority, the single case of *Bailey v. Bunning*, as reported in 1 Levinz, ought to prevail; and that, however strong particular notions may be as to what the law ought to be, we must be governed by what it has been during the whole time of living memory.

I am of opinion, therefore, that the judgment of the Court below as to Jewison should be reversed.

BOSANQUET, J. The question in this case depends upon the effect which is to be given to a statutory provision, by which the property of a bankrupt which he had at the time of his bankruptcy is subjected to the operation of a commission against him.

The terms of the 6 G. 4, by which the bankrupt law is now regulated, do not materially differ from those of the statutes which preceded it; and being *in pari materia* with these, must receive a similar construction, there being no reason to suppose that any alteration regarding the point under consideration was intended to be made by the legislature. It is not to be disputed, with respect to persons in general, that after an assignment by the commissioners, *490] all property of the *bankrupt is liable to be treated and dealt with, not merely as actually being, but as having been from the time of the act of bankruptcy the property of the assignees; and that persons who possess themselves of such property, or dispose of such property to others, are liable to be sued for a tortious conversion in actions of trover. This liability to answer in an action of tort to the assignees does not depend upon any actual or presumed knowledge on the part of the defendant of the existence of an act of bankruptcy. The act of bankruptcy subjects the property of a trader to the right of his assignees in the event of a commission, and when the assignment has been executed, the title of the assignees is completed by relation from the date of the act of bankruptcy. The effect of this relation may sometimes produce hardship to individuals who may have purchased or disposed of property

with perfect honesty and good faith. But the necessity of adopting a retrospective measure for the prevention of fraud has been thought sufficiently to counterbalance the evil of such occasional hardship. Even those persons who purchase goods sold by the sheriff under an execution against a trader, are liable to be sued in trover for the value of the goods by assignees claiming under a commission subsequently issued, if an act of bankruptcy appears to have been committed by the trader before the sale. A limit, however, has been set to this retrospective effect of the bankrupt law, by provisions introduced into the latter statutes, by which parties who act *bonâ fide* and without notice of an act of bankruptcy, are protected unless a commission shall have issued within a certain time.

Such being the general effect of the bankrupt law, the point now to be considered is, whether any exception to it is to be allowed in favour of the sheriff, who sells under the process of the law. No words *importing any express exception are to be found in any of the statutes; the exception, [491] therefore, if established, must be established by implication. The mere absence of notice is not a sufficient ground upon which an exception in favour of the sheriff can be founded. For in cases where a change of property has taken place without fraud, the sheriff, if he seize and sell the goods of the purchaser under an execution against the seller, will be liable in an action, though he may neither know nor have reason to suspect the change. In the case of bankruptcy, the act of bankruptcy, whether notorious or secret, is a fact which, coupled with the existence of a debt to a certain amount, renders the property of a trader liable to the operation of a commission. The right of a trader to his own property is a defeasible right: till the commission issues the property remains in the trader; but he holds it from the time of the act of bankruptcy, liable to be defeated by the proceedings under a commission, and subject to the rights which in the event of a commission the assignees may acquire to it. In the mean time this possibility of a right accruing to assignees under a commission affords no legal answer to a sheriff for not executing the writ directed to him: but if the sheriff has reason to apprehend a commission, he may ask for an indemnity, and in case a satisfactory one be not given, he may apply to the Court for time to return the writ, till it can be ascertained whether a commission is intended to be issued. Some risk, indeed, will be incurred by the sheriff, and if he is necessarily to be protected from all risk, an exception in his favour must be implied by law. But it is to be recollected that the office of sheriff is in its nature an office of risk. It is not for us to consider whether the policy of the law which has made it so, is or is not founded on wise principles. But so the law has made it; and so it must be treated *in courts of justice. The sheriff is bound by statute to permit a defendant who is arrested to go at large upon bail; yet if bail, apparently or [492] even actually responsible at the time, become insolvent before the return of the writ, the sheriff must render the defendant or pay the debt. This is a hardship upon the sheriff imposed by the operation of the statute Hen. 6. No difficulty, however, is found in obtaining persons willing to incur this responsibility; the office being an office of profit as well as of risk. If, therefore, the liability of the sheriff in the present case were now to be considered for the first time, I think that his title to an exemption from the general operation of the bankrupt law would be very far from clear. To me, however, it appears that the question ought not at the present day to be considered as open to discussion. The interpretation of the statute law, as well as of the common law, is to be sought for in the doctrines promulgated and acted upon in courts of justice. It may be admitted, indeed, that the express provisions of a statute cannot be overturned by the authority of a court; but upon the propriety of admitting an implied exception in the absence of express words, the authority of the courts has the same weight as upon questions of common law: their decisions give the rule by which the profession is guided in advising parties upon their re-

spective rights; and to question their correctness, after they have been recognised and acted upon for a long series of years, is not only to introduce uncertainty upon the point under immediate consideration, but to encourage resistance to established rules by holding out to ingenious persons a prospect of overturning them upon subtle and refined distinctions. If the judgment in *Cooper v. Chitty* be considered with reference to the facts of that case only, it will not amount to an authority upon the point now under discussion, since it appears *493] that the sale by the sheriff took place not only after the date of the commission, but after the assignment. But the authority of considered judgments is not to be confined to the point actually adjudged. The reasoning of Lord Mansfield in delivering the judgment of the Court, appears to take a wider range than the particular facts of the case required. He begins by saying that the bare defining the action of trover, and the grounds upon which the plaintiff is entitled to recover in it, will go a great way towards the understanding, and, consequently, towards the solution of the question in that particular case. In form, he says, it is a fiction,—in substance, a remedy to recover the value of personal chattels converted by another to his own use; that it lies in many cases where the defendant has got the possession lawfully; that two things are necessary to be proved,—property in the plaintiff, and a wrongful conversion by the defendant. After laying it down that dispositions by process of law are upon the same footing with dispositions by the party, and that to be vested they must be completed before the act of bankruptcy, he says, “Therefore, as to the first point, it is most clear that the property was in the plaintiff as and from the 4th of December, when the act of bankruptcy was committed; secondly, the only question then is, whether the defendant was guilty of a wrongful conversion. That the conversion itself was wrongful is manifest. The sheriff had no authority to sell the goods of the plaintiff, but of John’s only.” Here the right to the property disposed of is made the test of the wrongful conversion. His lordship then proceeds to consider whether the defendant was excusable, though the act of conversion was wrongful. As to which, he says, “Though the statutes rescind contracts and executions not complete before the act of bankruptcy, they do not make men *trespassers* or *criminal* by relation. But the injury complained of (that is, in the action of *494] *trover*), is the wrongful conversion. The sheriff acts at his peril, and is answerable for all mistakes. None of the cases authorize the sheriff to sell the goods of a third person.” Here the distinction between trespass and trover appears to be distinctly taken. The injury complained of in trespass is the unlawful force; in trover the wrongful conversion of property. The mere act of force is *excused* if committed before an assignment in fact; but if a conversion takes place, the person to whom the law ascribes the property is entitled to a compensation for his loss from the person, whoever he may be, that has converted his property.

It had been determined in the case of *Bailey v. Bunning* (16 Car. 2, reported in 1 Lev. 178; 1 Sid. 272; 2 Keb. 32), that a sheriff who had taken goods in execution after an act of bankruptcy, was not liable to the assignees in an action of trover.

The dates of, and the special finding of the jury, as they all appear upon the special verdict, have been already stated.

It is very material to observe, that in this case there was no sale; nothing was done with respect to the goods, beyond the first taking possession under the writ, by the officer in whose hands they still remained when the action was brought; and the sole question referred to the Court by the jury was, whether this *taking* was lawful. Unless this taking amounted to a conversion, the defendant was entitled to a verdict; for the demand and refusal stated in the special verdict, though evidence of a conversion, could not be taken to amount to an actual conversion: a point which had been settled long before the case in question, having been laid down as clear in 10 Rep. 56, 57, the case of *The*

Chancellor of Oxford. According to the report in Levinz, Wyndham said, that notwithstanding the suing of the *writ, the goods are subject to the disposal of the commissioners: but he, Twysden and Kelynge, all agreed [*495] that the issue was found for the defendant; for the *taking* by him was lawful by virtue of the writ. Siderfin says the Court delivered this opinion, that the goods were liable from the *time of the teste* of the *fi. fa.*; and this shall be said to be *emanatio brevis*, although it was in fact at another time. And as to the other point, they were clearly of opinion that the bailiff was not liable in trover, for that the sheriff (*as the case is found*) took the goods lawfully. According to Keble, Kelynge, C. J., said the special conclusion being on the *taking*, the officer is not *punishable*. The case of *Bayley v. Bunning*, therefore, is not an authority for the sheriff, where there has been an actual sale; and so Lord Mansfield appears clearly to have thought. And with respect even to the original taking, the case of *Bayley v. Bunning* is distinguishable from executions of a later date. For though the writ of *fi. fa.* had been delivered to the sheriff after an act of bankruptcy, it was tested before. And having been issued in a case which occurred before the statute 29 Car. 2, c. 3, it did there bind the goods from the teste. Upon which point much reliance was placed. Accordingly, Lord Mansfield observes, in the case of *Bayley v. Bunning*, the goods were clearly bound by the teste; and then adds, "The question referred by the special verdict was upon the *taking*, viz., whether the party was guilty in the taking; and the Court *excuse* the bailiff for his innocent executing of the writ." The act of taking seems to have been treated as an act of excusable trespass, either on account of the teste, or the character of the officer; and independently of the taking, there was no conversion. It is remarkable that Siderfin, after stating the argument for the bailiff, that he ought not to be found guilty, because he had only performed his duty, and had not converted the goods to his own *use, adds, "*Quære*, for it was affirmed that the practice is, that [*496] the bailiff shall be found guilty if the party was then a bankrupt."

It is said in Lord Raymond's Rep. 724, to have been ruled by Lord Holt, C. J., at N. P. 10 Will. 3, if, after a bankruptcy, the sheriff, upon a writ of *fi. fa.* against A., seizes the goods and *sells them*, and a commission of bankruptcy is granted, and the goods assigned by the commissioners, the assignee of the commission may maintain trover against the vendee of the goods, but no action will lie against the sheriff because he obeyed the writ. The latter part of this proposition is the very point now contended for, to which it appears from his remarks on Lord Raymond's notes, that Lord Mansfield did not assent. He says the notes were taken when Lord Raymond was young, as short notes for his own use; and are too incorrect and inaccurate to be relied on as authorities: that it might not be at all material to attend to the distinction between trespass and trover; that the passage in question was a loose note of what was said *obiter*, and manifestly refers to the case of *Bayley v. Bunning*; but is no authority in the present case. It must be admitted, however, that Lord Mansfield, in several parts of his judgment, notices and avails himself of the sale in *Cooper v. Chitty* being subsequent to the commission and assignment. Thus, in commenting upon *Cole v. Davies*, he says: "Besides the case there put is of a sale by the sheriff *before the commission, and the conversion* might be as excusable as the taking, because he obeyed the writ; whereas here the goods were not sold till after *both commission and assignment*." Again, "The taking (in *Cooper v. Chitty*) was innocent, and in that sense lawful, but as a ground to support a conversion by a sale after a commission publicly taken out, and an actual assignment made, it was not lawful." And at *the conclusion, [*497] "The gist of this action is the wrongful conversion by the sale and false return long after the commission and assignment." A question might, therefore, fairly be raised, whether the proposition ascribed to Lord Holt was intended to be denied by Lord Mansfield, or only to be distinguished from the case in judgment. It is scarcely possible that such a point should be long suffered to

remain in doubt, since it must have been of frequent occurrence; and if the general reasoning of Lord Mansfield, and his particular observation respecting Lord Raymond's note, have, from the year 1756, been treated in practice and in judgment as contradictory to the point therein stated, the point ought to be considered as overruled. Two passages apparently inconsistent with each other have been cited on the authority of Sir W. Blackstone. In his report of *Cooper v. Chitty*, he states Lord Mansfield to have said, "But had the sale been immediately after the seizure, still the sheriff would have been liable." And in his report of *Timbrel v. Mills*, that "the whole Court declared that it was allowed in that case (*Cooper v. Chitty*), that if the sheriff levies the money and pays it to the plaintiff before any commission issued, and without notice of the act of bankruptcy, he will, at all events, be safe." It is not likely that both these passages should have been uttered by Lord Mansfield upon the same occasion. And as no notice is taken of either of them, either in the report of Sir James Burrow or in that of Lord Kenyon, little reliance can be placed upon them.

No question appears to have been raised respecting the effect of the judgment in *Cooper v. Chitty* till the year 1807, in the case of *Potter v. Starkie*. But in the mean time we find the principle supposed to be established, stated in practical books, and assumed in courts of justice. In the editions of Cook's *Bankrupt Laws*, published many years before the case of *Potter v. Starkie*, it is said, "The sheriff who executes a *fi. fa.* upon the bankrupt's goods, after an act of bankruptcy committed, and before the issuing of a commission, is not a trespasser, but the assignees may maintain trover against him. In Gwillim's edition of Bacon's *Abridgment*, published in 1798, tit. *Bankrupt*, it is said, "It seemeth to have been formerly very much doubted whether the assignees could maintain any action against an officer who had the goods of a bankrupt in execution after an act of bankruptcy, and before the issuing a commission; but it is now settled that the assignees may, in such case, bring trover against him, though the relation shall not operate to make him a trespasser."

The distinction with respect to the liability of the sheriff in trover, though exempt from an action of trespass, had been expressly recognised in 1786 in *Smith v. Milles*, 1 T. R. 475, as established by *Cooper v. Chitty*. In *Hitchin v. Campbell*, 2 Black. 829,—Trinity term 12 G. 3, only sixteen years after *Cooper v. Chitty*,—which was an action of indebitatus assumpsit against an execution creditor for the amount of debt levied after the act of bankruptcy but before the commission, Lord C. J. De Grey, in delivering the opinion of the Judges (of whom Sir W. Blackstone, who reports the case, was one), says, "That the legal effect of an act of bankruptcy committed by a trader, is to put it in the power of the commissioners, by relation, to divest the property of the bankrupt from that time, in case a commission is afterwards issued. This relation takes place in every instance but those excepted by the statute 1 Jac. 1, 21 Jac. 1, and 19 G. 2. Executions are not among those excepted cases, but are expressly declared void by the statute 21 Jac. 1. Yet, notwithstanding this transfer of the property by relation, the sheriff is certainly no trespasser by taking the goods in execution after the act of bankruptcy and before the commission issued. So ruled in *Lechmere v. Thorowgood*, 1 Comb. 123, and 1 Show. 12; and in *Cooper v. Chitty*, Burr. 20. But by selling the sheriff converts the goods, and then trover is maintainable against the sheriff or his vendee, or the plaintiff in the original action." A former action had been brought in trover against the sheriff and the defendant, in which there was a verdict and judgment for the defendant. As to which action the Chief Justice observed, "As there was clearly a conversion before the action of trover, the only question could be on the property; thereby intimating, that if the goods belonged to the bankrupt, there could be no defence. And according to the report of the same case in *Wilson*, 3 Wils. 308, the Court say, "That the action brought in trover against the sheriff of Surrey and the defendant, to

recover the value taken in execution, well lay." In the year 1792, Grose, J., in the case of *Farr v. Newman*, 4 T. R. 633, after adverting to the difficulty on the part of the sheriff of distinguishing between the goods of an executor and the goods of a testator, says, "If this would be a sufficient answer in the mouth of the sheriff, what are we to say to cases of a much severer line of justice; cases where a sheriff is considered as a tort feaser by relation; cases of bankruptcy?" In the case of *Menham v. Edmonson*, 1 B. & P. 367, the act of bankruptcy took place in December 1796, the execution on the 30th of March 1797, and the commission issued in the June following. The execution creditor having accompanied the sheriff's officer at the time of the execution, he was sued by the assignee in trover; and it being objected that the action should have been brought against the sheriff, in whose hands the money remained, it was not contended that the action might not have been maintained against him. *Eyre, C. J., after stating that he had some doubt at first whether the action should not have been brought for the money, as the execu- [*500] tion had been regularly made under the authority of the law, and the goods regularly sold, observed, "There is a fact, however, in this case, which decides the point, viz., that the defendant was in company with the sheriff's officer at the time of the execution. By the case cited, *Rush v. Baker*, 2 Str. 996, it appears that trover may be maintained against the party himself if he give bond to the sheriff, because that is equal to intermeddling; actual intermeddling therefore must be equal to giving a bond." Here, the liability of the sheriff himself seems to have been assumed, and the participation of the defendant in his act, is stated as the ground of his liability. In the year 1807, the point now in question was distinctly made before Mr. Baron Wood in *Potter v. Starkie*, and that Judge, whose practical experience as well as learning are well known, held the sheriff liable; in which he was confirmed by the court of exchequer. Eight years after this, the case of *Wyatt v. Blades*, 3 Campb. 396, occurred before Lord Ellenborough, in which the act of bankruptcy having taken place on the 8th. of December, the goods were seized and carried to a broker on the 8th of February, and the commission issued on the 12th of the same month; and Lord Ellenborough held in trover against the sheriff, that the removal was a sufficient conversion to support the action, though the goods were never sold, but remained at the broker's, in consequence of a notice not to sell; and though no demand of the goods had been made, no objection was made to the liability of the sheriff to answer for the conversion. In eight years more, in the year 1821, the point was again raised in *Lazarus v. Waithman*, 5 B. M. 313, in the time of Lord *Chief Justice Dallas, when the Court of Common Pleas, after an [*501] argument in which *Bayley v. Bunning* and the old cases were cited, decided against the sheriff. Mr. Justice Burrough saying that the point was settled long before he knew Westminster Hall. Again, in 1828, in *Price v. Helyar*, 4 Bingh. 597, in the time of Lord Chief Justice Best, the same Court came to a similar determination. And the judgment of that Court, in *Carlisle v. Garland*, 7 Bingh. 298, in 1831, in the time of the present Lord Chief Justice, was conformable to the former decisions. Finally, in the same year, 1831, the Court of King's Bench, in *Dillon v. Langley*, 2 B. and Adol. 131, also decided in the same manner against the sheriff. Upon that occasion the noble and learned Lord, whose loss we so recently had to deplore (Lord Tenterden), expressed the opinion of the Court in the terms which I desire to adopt, and with which I shall now conclude, "He (the sheriff) must obey the writ, but he is also required to know whose goods he takes. I think, in this case we ought to say that we consider ourselves bound by the many decisions which have taken place establishing the liability of the sheriff." I am therefore of opinion, that the judgment of the Court of Exchequer for the defendant Jewison ought to be reversed.

GASELEE, J. Upon the best consideration I have been able to give to this

case, I am of opinion that the judgment of the Court of Exchequer ought to be affirmed; and although I am sorry to have the misfortune of differing from those of my learned brethren who have preceded me, and also of those who are to succeed me upon this occasion, it is a matter of great consolation to me, that I am supported by the unanimous opinion of the Court of Exchequer. The reasons upon which that judgment is founded are so fully, and to me, so *502] *satisfactorily stated by the Lord Chief Baron in the reports of the case in 2 Crompton and Jarvis, page 20, and in 1 Tyrwhitt, 17, that I should consider myself guilty of an unnecessary waste of time, were I to repeat them from the reports; and I should run a considerable risk of weakening their impression, were I to attempt to state them in any other terms.

There is certainly great weight in the argument, that the decisions in *Cooper v. Chitty*, and many subsequent cases, are contradictory to that of the Court of Exchequer; and if they had corresponded with the older cases, so that there had been a constant course of decision in the same way, I should have very much hesitated before I should have ventured to break in upon them; and it is to that consideration that I attribute my having concurred in the judgment given by the Court of Common Pleas in the case of *Price v. Helyar*, having always considered that if the case were a new one, the sheriff was undoubtedly entitled to protection. Independent, however, of the circumstance, that in the case of *Cooper v. Chitty*, and many of the subsequent ones, the acts of the sheriff, after he had notice of the bankruptcy, were sufficient to support the decision of those cases, it appears to me that the earlier cases are authorities in favour of the sheriff, and, therefore, that in affirming the judgment of the Court of Exchequer on this occasion, we should not be overturning the constant course of the authorities upon the subject, but restoring the law as it was laid down and acted upon in the reign of Charles II., and from thence downwards to the time of the decision in *Cooper v. Chitty*.

Upon considering the several reports of the case of *Bayley v. Bunning*, it is not quite clear that the allegation in the judgment of the Court of Exchequer,—that in deciding the case of *Bayley v. Bunning* the Court by disallowing the objection that the goods were to be considered as bound by the teste of the writ *503] of execution, *which was before the act of bankruptcy, allowed the other objection, viz., that the taking was lawful in respect of the character of the person by whom it was made,—is quite accurate; for, although the latter was clearly one of the grounds of the decision, it is not so clear that it was the only one. The report in *Levinz* concludes thus: “And afterwards, Easter 18th, judgment was given for the defendant; he being an officer obliged to execute the writ, who could not be aware of any acts of bankruptcy, or known that any of them would be acted upon.” And the report in *Siderfin* states the Court as to the other point, viz., the character of the sheriff, were clear that the bailiff is not guilty of trover; for that the sheriff took the goods lawfully.

During the argument of this case in the Court of Error, a doubt was thrown out whether the case of *Bayley v. Bunning* was an action of trover; and it was suggested, that it might be an action of trespass, and so reconcile all the cases. The original roll has, therefore, been inspected, and it thereby clearly appears that the form of action was trover.

LITTLEDALE, J. It is admitted on all hands that,—as far as relates to the judgment-creditor if he interferes in the sale or receives the produce after the sale, and also the vendee of the sheriff or other officer,—the goods of the bankrupt are, upon the assignment to the assignees, vested in them by relation to the act of bankruptcy, so as to avoid all mesne acts and dispositions; and that, both upon the words of the various acts of parliament and the uniform construction that has been put upon those acts, and the policy of the bankrupt laws. And therefore I do not think it necessary to advert to any authorities as to the ground or effect of relations either at common law or by any acts of parliament.

The words of the act of parliament relating to *bankrupts are general, and make no exceptions as to the persons to be bound, only indeed that [*504 as the King is not named in them, they do not affect the crown till there is an actual assignment of the property.

But it is contended on the behalf of the defendant, that he is to be exempted from liability for seizing and selling if he has no notice of an act of bankruptcy. And he contends this upon two grounds: first, that the older statutes of 33 & 34 Hen. 8, c. 4, 13 Eliz. c. 7, 1 Jac. 1, c. 15, 19 Jac. 1, c. 19, and 5 G. 2, c. 30, do not extend to the sheriff at all, and that the last statute of 6 G. 4, does not increase the liability of the sheriff.

The statute of Hen. 8 says, the sale by the commissioners shall be good and effectual against the bankrupts, their heirs and executors, as though the sale had been made by the bankrupt at his own free will and liberty.

13 Eliz. c. 7, s. 2, says the sale by the commissioners shall be good and effectual (after an enumeration of various descriptions of persons) "against all other persons claiming by, from, or under the bankrupt by any act had, made, or done after he shall become bankrupt."

The other acts of the 1 Jac. 1, 19 Jac. 1, and 5 G. 2, as to the sale or assignment by the commissioners, all refer to the stat. of Eliz., and no fresh powers are given to the commissioners, except that the twenty-sixth section of the 5 G. 2, directs the commissioners to assign to assignees for the general benefit of creditors who prove their debt.

But I think that the words of the statute of Elizabeth are sufficient to bind the sheriff; for though he does not claim, as to any beneficial interest, from the bankrupt, yet he claims to sell, for the purpose of paying over the proceeds to the creditors of the bankrupt, and the person to whom he sells certainly claims under the bankrupt; and it would be somewhat extraordinary if *the [*505 sheriff, who sells under such circumstances, was to be excepted out of the operation of the statute.

I may observe that I am not aware that this point has ever been raised before, which, if there had been any ground for it, would surely have been done, considering the great variety of cases in which this subject has been agitated for the last 70 years.

The statute of 6 G. 4, c. 16, is differently expressed from the former acts: in the twelfth section it says the commissioners are to assign in manner after directed; and then the manner is directed in the sixty-third section, which contains no such words as are contended to be a limitation of the persons bound.

But I do not consider whether this enlarges the power of the commissioners or not, because I think the former acts extend to sheriffs and other similar public officers.

But it is said the law will make an implied exception in favour of the sheriff or other person having the execution of process, because he is bound to obey the king's writ, and it would be very hard to make him liable to an action when he acts according to the best of his judgment, and has no means of ascertaining whether the debtor has, or has not, committed an act of bankruptcy.

With regard to his being a public officer, and that he is bound to obey the king's writ, there is no doubt but he is, and in the execution of that duty he ought to be protected.

But the question is, does he act in obedience to the king's writ? That commands him to take the goods of A.; but how can they be said to be the goods of A. when A. himself has lost his power of conferring any property, and when the judgment-creditor has no right to have them as the goods of A., and when the person to whom the sheriff will sell has no such right?

And the result, therefore, is, that instead of seizing *the goods of A. [*506 he seizes the goods which, by relation, have become the goods of the assignees.

But it may be said they are the goods of A.; that he has acquired them; that

he is in possession ; treats them as his own, and no other person has yet acquired a right to them.

But by the act of bankruptcy there is a sort of stamp or mark fixed upon them, which, though invisible at first, afterwards is brought into light by the commission, and attaches upon them so as to destroy all property in the bankrupt, which destruction of property, though not apparent at the time of the levy, afterwards, when the commission and assignment take place, operates in the same way as if the whole had been known at first.

He takes upon himself to sell goods which the judgment-creditor has no right to have sold, and which the person who buys from the sheriff has no right to buy.

How can this be acting in obedience to the king's writ?

As to the hardship upon the sheriff, the general policy of the bankrupt laws makes many things apparently hard.

It is very hard that if a man who owes a trader money pays it to him *bond fide* in the regular course of business, without any suspicion of an act of bankruptcy ; or if a bankrupt owes money which he pays to a creditor in the ordinary course of business, he having no suspicion that an act of bankruptcy has been committed ; or if a trader sells his estate after having committed a secret act of bankruptcy ; that all these transactions should be rendered invalid by the general operations of the bankrupt laws : yet it is so ; and it is only by several particular acts of parliament, applicable to these various cases, that the various hardships which I have enumerated are corrected or modified.

It is a hardship on a sheriff if he seizes goods of which the debtor is in possession and apparent ownership, and it should turn out that the possession and *507] apparent ownership was not fraudulent, that the sheriff *should be liable ; and yet the circumstances may be such as that the sheriff has no means of ascertaining the ownership.

I think the hardship of a case ought not to form a principle on which the law should act. Society is so formed that many persons fill relations which appear to induce great hardships. If these hardships be of sufficient importance for the legislature to interfere they will do so.

If cases of hardship be brought before the Court they will frequently interfere so as to relieve the sheriff, if the law will permit it. And a late act of parliament, often called the Interpleader Act, in some degree acts as a relief to the sheriff : but that has nothing to do with the general liability of the sheriff.

But then the defendant says, that by the constructions which have been put upon the statutes by the general administration of the bankrupt law, public officers who have to execute process are protected in cases like the present ; and that, though for a number of years back there are cases, and the practice while these cases have been in force has been against sheriffs, yet these recent cases and practice are not according to law, and that the earlier cases are contrary, and that they being the first that occurred after the bankrupt law was introduced, are to be regarded as the real existing law, not to be overturned by late decisions ; and more particularly the defendant says that the whole of these modern cases and modern practice have been founded on a misapprehension of the case of *Cooper v. Chitty*, 1 Burr. 20, 1 Black. 65, 1 Keny. 395, and that in all the later cases the former decisions have not been sufficiently brought before the Court.

The earliest case urged on the behalf of the defendant is *Bailey v. Bunning*, *508] 1 Lev. 173, 1 Sid. 271, and the Judges there say *that the sheriff's taking was lawful by virtue of the writ.

But in *Siderfin* the reporter makes a query ; for it is affirmed that the practice is, that the sheriff shall be found guilty if the party was then a bankrupt.

The special verdict has been examined in *Bailey v. Bunning*, and it appears that the sheriff had caused to be made the debt of the goods, chattels, and moneys of the bankrupt, but that they remained in his hands, and he had not sold or delivered them to the judgment-creditor, and then it states a demand

and refusal, and concludes with saying that they are ignorant whether the *taking* was lawful.

This special verdict is quite imperfect: there is no conversion found, and the question by the jury is, whether the *taking* was lawful, and, therefore, in such an imperfect case, the very slight way in which it is mentioned in the two reports makes the decision amount to very little; especially as one reporter states the practice to be contrary; and that may account for the language of the Judges that the taking was lawful; which may have been meant to apply to the original taking only, and not to say whether, if the goods had been sold, the sheriff would be liable.

This case, however, as far as it goes, is confirmed by what the Court says in *Phillips v. Thompson*, 3 Lev. 191.

Turner v. Felgate was mentioned in *Bailey v. Bunning*, it is reported in 1 Lev. 65, 2 Sid. 125, and it has been considered as applicable to the present case.

That was an action of trespass against the creditor who had obtained judgment, and levied under a *fieri facias*, and the judgment was afterwards set aside by rule of Court. And it was there said that the sheriff was not liable, because he acted in obedience to the king's writ, and that there is a difference [*509 between the party and the sheriff in that respect.

There is not the least doubt about that. The sheriff is protected by the writ, and he need only plead that, by way of justification to an action of trespass. But the party must plead the judgment. The sheriff is bound to obey the writ; but the party must show that he had authority to sue out the writ, and that authority is the judgment. If the party was not bound to show the judgment it would be in the power of any man, who had obtained no judgment, to sue out any sort of writ of execution for any amount that he thought proper.

But that does not apply to the present case; here the writ directs the sheriff to take goods of A., and if he does take goods of A. it is immaterial to him whether there was any judgment against A. or not.

But the complaint is, that he does not obey the king's writ, and that being directed to take the goods of A., he takes goods which, though in the possession of A., yet by operation of the bankrupt law ultimately turn out, in point of law, not to be the goods of A.

The case of *Lechmere v. Thorowgood*, 3 Mod. 326, 1 Show. 12, Comb. 123, is also cited in favour of the defendant. That was an action of trespass against the sheriff. One of the points in dispute was, whether the crown under an extent, or the party under a *fieri facias* was entitled to the goods.

But the Court said the sheriffs were not liable in this action; and there is no doubt but that according to the modern cases he is not liable in trespass; for in *Smith v. Milles*, 1 T. R. 475, it was held that an action of trespass will not lie against the sheriff who seizes goods after an act of bankruptcy, and before the issuing of a commission, even though he afterwards sells them. But, at the same time, I must observe, that in the report of the case, *Lechmere v. Thorowgood*, in 3 Mod., there is nothing said about the liability of the [*510 sheriff. Afterwards an action of trover was brought against *Toplady*, the party, and *Thorowgood*, and another, for taking the goods, and it is reported in 1 Shower, 146, and 2 Ventris, 169; and they pleaded the judgment in the former action, and it was held to be a bar.

But that was decided only on the technical ground of law, that after a judgment for the defendants in trespass, the plaintiffs could not recover in an action of trover for a conversion of the same goods: but there is not a syllable said in the latter case as to the liability of the sheriff; and I think no argument can be applied from any reasoning upon technicalities and the form of action, as to whether the sheriff is liable for seizing and selling goods under circumstances like the present.

Coles v. Davies, 1 Ld. Raym. 724, is also cited for the defendant. Lord

Chief Justice Holt there held that the sheriff was not liable to an action of trover under circumstances like the present. That case, as far as it goes, is in point for the defendant, but it is only a *nisi prius* decision.

As to the other cases of *Bailey v. Bunning*, and *Lechmere v. Thorowgood*, considering the imperfect manner in which they are reported, and considering also the special verdict in *Bailey v. Bunning*, I think they only amount to a declaration of the opinions of the Judges there, that, generally speaking, the sheriff was not liable; but by no means to a judgment upon a case like the present, distinctly brought and argued before them. And that, therefore, the courts in late times are not so far bound by those cases but that they may take another view of the point, without being considered as unwarrantably overturning former decisions.

*511] *The case of *Cooper v. Chitty* is the leading case on the subject in modern times.

I admit that the facts of that case are not the same as here,—for there the sale was after notice of the act of bankruptcy, and after the commission and assignment,—and that the decision could not of itself be sufficient to authorize the Court to give judgment for the plaintiff.

That case has been followed by a variety of other cases, in some of which at least the facts were the same as the present.

I do not think it at all necessary to go through these cases, and comment upon them, and upon the language used by particular Judges, as that has been so fully done already. The result of these cases fully satisfies my mind, that in the present case the bailiff is liable, and I may say in addition, that I have known a great many cases tried at *nisi prius*, in which the point has never been doubted.

And I would also add in conclusion, that if the cases of *Bayley v. Bunning*, and *Lechmere v. Thorowgood*, had been fully brought before the Court upon a case like the present, and the judgment given according to the opinion there expressed by the judges, yet, if I had found that for a series of years there had been so many decisions and constant practice the other way, then, inasmuch as the latter authorities are according to what would be my opinion, if the question was now for the first time to come under consideration, I should say, that the Court ought to act upon the late authorities, though by that means the former decisions should be overturned.

I have not given any opinion as to the effect of the respective indemnities to Jewison and to Ingham, as I am of opinion that they are both liable to this action, independent of any question of indemnity.

*512] Upon the whole of the case, I am of opinion, that *the judgment of the Court of Exchequer ought to be reversed.

PARK, J. This case has been so fully discussed by my learned brothers who have preceded me, that I am much tempted merely to express my concurrence with the majority. The only reason why I prefer the contrary course is, that I may not be supposed to have taken no pains to instruct myself in a matter where the Court of Exchequer has delivered a unanimous judgment, supported, as that judgment is, by my learned brother sitting next me, and which judgment the majority of the judges now present think ought to be reversed.

The real point in this case is, whether a sheriff or a bailiff of a liberty who seizes the goods of a man under a writ of *fieri facias*, a secret act of bankruptcy having been previously committed, and of which the sheriff had no notice, is liable in an action of trover to the assignees of such man under a commission of bankruptcy, subsequently issued, founded upon the said previous act of bankruptcy. I am of opinion that he is.

It may certainly be hard on a sheriff or bailiff that he should be held liable in a case like the present, where no misconduct can be imputed to him or to his officers; but it appears to me that if on account of such hardship we were

to affirm this judgment of the Court of Exchequer, we should break in upon an established rule of law, established confessedly for above seventy years; admitted as a clear rule in all the text-books of writers upon bankrupt law; acted upon by all practisers in their advice to clients, and confirmed by some of the ablest men that have ever adorned the judicial seat from Lord Mansfield down to the present day; namely, from the year 1756.

The question really is, whether these goods, when the bailiff seized them, were the goods of the *bankrupt, or the goods of the assignees by relation to the act of bankruptcy. That the act of bankruptcy vests the goods in the assignees seems not to be disputed: then certainly the process having commanded that the goods of A. should be taken, the sheriff must at his peril answer, if he take goods which have become the property of B., by being sued in an action of trover. Mistake as to the right of property at the time of the seizure both in the plaintiff himself, and in the sheriff, as was truly stated by my brother Bayley in the case I am about to quote, will not excuse the sheriff. And indeed that was a very hard case: I mean the case of *Glasspoole v. Young*, 9 B. & C. 696, where a writ of execution issued against a man named Meering, the supposed husband of the plaintiff, who really believed herself to be his lawful wife at the time of the seizure of the goods, which had been her property; but after this, the woman discovering that a former wife was living, and the marriage with her consequently void, recovered the value of the goods against the sheriff in an action of trover, by the unanimous judgment of Lord Tenterden, and my brothers Bayley, Littledale, and James Parke. The rule of law, then, is undoubted, that the sheriff must at his peril seize the goods of the party against whom the writ issued; and if they have ceased, without fraud, to be the goods of that party, the sheriff is liable, if he seized them, though not cognizant of the change of property. The hardship, then, can be no argument if the law be clear, for there are many, many cases in which the law has thrown a similar liability on the sheriff, not regarding the hardship; and I am not aware of any exception in any bankrupt acts in favour of the sheriff. For, as Lord Ellenborough said, in the case of *Stevens v. Elwall*, 4 M. & S. 529, "The Court must be governed *by the principles of law, and not by the hardship of any particular case; for what can be more hard than the common case of trespass, where a servant has done some act in assertion of his master's right, that he shall be liable not only jointly with his master, but if his master cannot satisfy it, for every penny of the whole damage, and his person also shall be liable for it?" But the sheriff is in a much better situation, for though he must often act at his peril, and sustain losses, yet he has considerable fees in poundage, &c., to remunerate him.

It is admitted, indeed it was impossible to deny, that the point has been expressly decided over and over again; but it is desired that all those cases should be overturned because they all, it is said, depend upon the case of *Cooper v. Chitty*, and none of the latter cases refer to the cases before *Cooper v. Chitty*, and which are at variance with that decision: for those who wish to overturn, allege, that if the Courts had looked at those prior decisions, they never would have upheld Lord Mansfield's doctrine, and that of his brethren. This seems to me to be a most disingenuous argument, and not very complimentary to the Judges who, numerous and powerful in knowledge and talent as many of them have been, have decided those latter cases. It is true that in the arguments of some of them the older cases of *Bailey v. Bunning*, *Letchmere v. Thorowgood*, and others, have not been mentioned; but are we thence to infer that the learned Judges were unacquainted with or did not weigh those decisions? The fact is directly otherwise; and the fair and legitimate inference is the reverse. The later Judges, it is said, have followed *Cooper v. Chitty*. Be it so; then they must have read it, and they could not do so without seeing the cases I have alluded to, reasoned and commented upon both at the bar and on the bench; and therefore the fair and legitimate inference is, that the Judges were

*515] of opinion *that *Cooper v. Chitty*, if it did not overturn the former decisions, was more consonant to reason, public convenience, and sound policy, in holding the sheriff liable even in the case of mistake and ignorance: and it is to suppose that the Judges shut their eyes, and remained wilfully ignorant of the prior cases: besides, it is a mistake in the judgment of the Court of Exchequer, when they allege that none of the cases later than *Cooper v. Chitty* refer to *Bailey v. Bunning*; for the contrary is the fact. I have considered the cases alluded to; and although I do not highly approve of very long and elaborate judgments, yet I must say that in all the reports of the different stages of the case of *Letchmere v. Thorowgood*, and *Letchmere v. Toplady*, it is most difficult to get at the real history of that case; but, taking them altogether, one thing seems clear, that the sheriff was held not to be a trespasser in such a case as this; and no Judge in *Cooper v. Chitty*, nor in any case since, has so considered him. It was also held in *Letchmere v. Toplady*, where trover was afterwards brought, that it would not then lie, not that it would not lie generally speaking, but that the plea of a judgment in the case of trespass against the sheriff was a good bar by way of estoppel. Whether the Court was right or wrong in this latter opinion I do not stop to inquire: if wrong, it weakens the authority of the case altogether; if right, it does not militate against the position that trover generally will lie, though trespass will not, against the sheriff. In *Comberbach*, 123, he makes Lord Chief Justice Holt say, that the property of the goods is vested by the delivery of the writ of *feri facias* even against the king's extent. This Lord Mansfield truly says he could not have said, for no *inception* of an execution can bar the crown. Lord Holt himself in another case, says the direct contrary to what *Comberbach* *516] here *reports of him; for in *Smalcomb v. Cross*, 1 *Ld. Raym.* 251, his lordship says, "The property of the goods is not absolutely bound by the delivery of the writ to the sheriff." And this question is now happily set at rest by the decision of the House of Lords last session in *Giles v. Grover*. Besides, it is difficult to understand when, and by whom this case was decided. 3d *Modern* decided this case in Trinity, 4th James II., at which time Sir John Holt was not Chief Justice: for it is clear matter of history, that he was appointed upon the Revolution in the room of Sir Richard Wright, who continued all the Michaelmas term following the landing of King William to be Chief Justice; and no Hilary term was kept in consequence of the Revolution. *Comberbach* makes the decision take place in Trinity, first of King William, twelve months after the date of the former; and Shower states the decision to have taken place in Easter, first of King William. The case of *Letchmere v. Toplady* was in the Common Pleas, Hilary, second of William and Mary. My only object, in making these observations, is to show the extreme inaccuracy and inattention of those persons, who, by this inaccuracy in dates, may be presumed to have taken their accounts of what passed from others, but not to have been themselves present; for even the publisher of 3d *Modern*, says in his Preface, that he must confess that some of the late reports (of course not meaning his own) are collected with very little judgment. *Bayley v. Bunning*, 1 *Lev.* 173, which is also mentioned in *Phillips v. Thompson*, 3 *Lev.* 191, was undoubtedly an action of trover; but for the reasons so ably given by my brother Bosanquet, and which I therefore shall not repeat, it is clear that, even giving full credit to the decision it does not at all govern this case: Siderfin *517] does not *agree: but even if it were more applicable to this case, I cannot feel all that respect for such unsatisfactory accounts of that decision, so at least as to induce me to agree to overturn the uniform and consistent train of judgments of seventy-six years and more by some of the ablest judges that Westminster Hall has seen.

The oldest man now living remembers no other rule upon this point, than that which it is supposed *Cooper v. Chitty* established; and admitting, for argument only, that that was a novel decision, yet no inconvenience has resulted

from it; Judges have been followers of it, counsel and attorneys have advised on its strength, and merchants have, as assignees, known and abided by the rule; and it is, as we well know, frequently immaterial how points of law are determined, provided they are known and uniform; and, certainly, this point of law has been known and uniform for the long period I have mentioned. I was, therefore, surprised to observe in one of the arguments of this case in the court below, a statement, that there had been some recent decisions on this subject. Who were the Judges that decided *Cooper v. Chitty*? Lord Mansfield, who is not, I believe, remembered by any one present, myself excepted; but he was a Judge who, in the expressive language of one who knew him well, and who could duly appreciate his learning and ability, so enlarged and commented upon cases, and was so powerful in argument, that his hearers were sometimes lost in admiration, at the strength and extent of the human understanding. His colleagues, when *Cooper v. Chitty* was decided, were no other than Sir John Eardley Wilmot, afterwards Chief Justice of the Common Pleas; the very learned Mr. Justice Foster, and Mr. Justice Dennison. Was it a hasty decision? it was argued in two different terms by four of the most eminent advocates of that day, after which the Court took time to deliberate; and then Lord Mansfield delivered a clear, *lucid, and argumentative judgment of himself, and his three most learned brethren; and commented [*518 upon the cases of *Bailey v. Bunning*, and *Lechmere v. Thorowgood*, in a way which shows, at least, that they had by no means been overlooked by them. The case of *Cooper v. Chitty* is best reported in the first volume of Lord Kenyon's Cases, p. 395, although there is no material difference between Kenyon, Blackstone, and Burrow; and whoever reads with attention Lord Kenyon's note, though his Lordship was then a very young man, will discover all the accuracy and acuteness of that great mind, so well remembered by us who saw him, as many of us saw him, in the full splendour of it; and when reading this luminous judgment of Lord Mansfield, as reported by his eminent successor, I cannot but lament that in the course of some of the arguments in the case now under consideration, Lord Mansfield should be charged with making a very useless display of what would appear to be legal knowledge, and filling up six pages with what might have been expressed in six lines. I am sorry to say the judgments of modern days cannot claim a superiority in conciseness and beauty above those of Lord Mansfield. Were I, after the discussion this case has undergone at the bar, and after the luminous argument of my brothers who have preceded me, to travel through and to comment upon all the cases since *Cooper v. Chitty*, which have been uniform, I should indeed be justly chargeable with making useless display of legal knowledge. I shall merely mention them, and a host of learned persons who have affirmed the doctrine.

Smith v. Milles, 1 T. R. 475, was an action of trespass, and Ashurst and Buller, Justices, after time taken to consider, held it would not lie, but expressly took the distinction between trover and trespass; and a long passage *of Lord Mansfield's judgment in *Cooper v. Chitty* is read by Mr. Jus- [*519 tice Ashurst, and adopted by the Court. Mr. Justice Ashurst was not an eloquent man, but he was always reckoned a learned Judge; and of the high legal character of Mr. Justice Buller all the profession formed a very just estimate. In *Potter v. Starkey*, 4 M. & S. 260, Mr. Baron Wood first, and the whole Court of Exchequer, held that the sheriff was liable in trover, though he seized, sold, and actually paid over the money before a commission issued, and before any notice; saying that this necessarily followed from *Cooper v. Chitty*, for it was an unlawful interference with another's goods. In *Stevens v. Elwall*, 4 M. & S. 259, it was held that a servant may be charged in trover though the act of conversion be done for the benefit of the master, and Lord Ellenborough observed that the Court must be governed by the principles of law, and not by the hardship of any particular case. *Wyatt v. Blades*, 3 Campb. 396, is supposed (in the judgment we are now considering) not to show suffi-

ciently what the opinion of Lord Ellenborough was, nor whether the point now under consideration was there raised. The facts of the case were similar to those now before us; and it seems to me impossible that Lord Ellenborough, though the counsel might not have stated the case with much precision, could have decided as he did if he had not the supposed point of *Cooper v. Chitty* in his view. The case of *Lazarus v. Waithman*, 5 B. M. 314, was decided by the Court of Common Pleas, during the Chief Justiceship of Sir R. Dallas, in the same way as *Cooper v. Chitty* was. I speak not of any opinion of mine in that case, but I can speak of two of the Court, happily still alive, though no longer of our body,—two better lawyers could not be found,—I *mean my brothers Burrough and Richardson. The former states the point to have been settled long before he knew Westminster Hall: the latter (and no man had more practical experience) says, that the law, as to a question of this nature, had been long since settled, and had frequently occurred of late years at nisi prius. There must have been an accidental misstatement in the judgment below, when it is supposed that *Lazarus v. Waithman* was decided altogether upon *Cooper v. Chitty*, and that none of the earlier cases were mentioned; those who know, as I of course did, the infinite pains that that most valuable person Lord Chief Justice Dallas took to inform himself, by diligent research, and to procure information from others of every case and decision that at all bore upon matters before him, will not readily believe he was not aware of the case of *Bailey v. Bunning* and *Phillips v. Thompson*; but it unfortunately happens that, even if the Lord Chief Justice of that day were not entitled to all the commendation I most cheerfully and affectionately bestow upon him, the very cases supposed to have been overlooked by Judges Dallas, Burrough, Richardson, and myself, were expressly quoted and relied on by the learned counsel for the sheriff in *Lazarus v. Waithman*, and in *Price v. Helyar*, 4 Bingh. 597. We have to add the weight and authority of that very eminent and acute judge, Lord Chief Justice Best, delivering a most luminous argument after time taken to consider, as the joint opinion of his Lordship, myself, and Mr. Justice Burrough, the facts of that case being not possibly distinguishable from this. But the weight of authority and of name does not rest here: for in *Carlisle v. Garland*, 7 Bingh. 298, Lord Chief Justice Tindal, my brother Bosanquet and Alderson, all maintained the same point; *and again, that most eminent, and ever to be lamented Judge, Lord Tenterden, with the concurrence of my brothers Littledale, Taunton, and Patteson, in *Dillon v. Langdale*, 2 B. & Ald. 131, expressly like this case in every circumstance, says, “the sheriff must obey the writ, but he is also required to know whose goods he takes; we ought to consider ourselves bound by the many decisions which have taken place, establishing the liability of the sheriff.” And then his Lordship refers to the case of *Carlisle v. Garland* as in point. Indeed, it is admitted in the Court below, that the cases of *Potter v. Starkey*, *Lazarus v. Waithman*, *Price v. Helyar*, *Carlisle v. Garland*, and *Dillon v. Langdale*, cannot be distinguished either in facts or reasoning from the case now under consideration. I have formerly referred to the case of *Glasspool v. Young* as a much harder case against the sheriff than the present; and I shall not restate it; I only mention it for the sake of adding to the list of legal luminaries, who, for the last seventy-six years, have uniformly concurred in this opinion till now, the names of two eminent judges, Mr. Justice, now Baron, Bayley, and Mr. Justice James Parké. If, therefore, I even thought the case of *Cooper v. Chitty* wrongly decided, as some of my brethren seem to think, I do not feel myself strong enough, nor do I think myself justified in setting up my judgment against the immense host of those great men, who have so long considered this as a close and settled point of law.

I may add, without impropriety, that Lord Tenterden, in a conference with all the judges who had heard this case argued, concurred in the opinion I have formed; and when the opinions of that most eminent, most learned,

and ever to be lamented Judge, as well as humblest, and most unassuming of men are mentioned, they will *claim and receive from every other judge and lawyer, the most profound and unfeigned [*522 attention and respect, especially when I find him in a case having no connexion with this, declaring that the judges of former times (and I speak of the uniform judgment of about seventy years) ought to be followed and adopted, unless we can see very clearly that they are erroneous; otherwise there will be no certainty in the administration of the law. When, therefore, I find this law uniformly acted upon for much above seventy years, I rejoice, after a long judicial life, to declare my firm belief, that a new practice on this point should not be introduced. I think it cannot be done without danger. For these reasons and upon these authorities, I think the judgment of the Court of Exchequer ought to be reversed.

TINDAL, C. J. It has become unnecessary for me, after the full discussion which this case has undergone, to state at length the grounds upon which my judgment has been formed, or to comment upon the several cases which have been already brought before the notice of the Court. I shall endeavour, therefore, to compress within as short a compass as is consistent with making myself intelligible, the reasons upon which my mind has been brought to the conclusion that the judgment of the court below ought to be reversed.

The question arising upon this special verdict, is in substance this; whether the sheriff, who has seized the goods of a defendant under a writ of *fi. fa.*, and has sold and delivered them to the judgment-creditor in satisfaction of the debt, after a secret act of bankruptcy committed by the defendant, but before the issuing of a commission against him, is liable to an action of trover, at the suit of assignees subsequently chosen under such commission. And upon this question I can arrive at no other conclusion, upon the *construction of [*523 the statute upon which the bankrupt law now stands, without any reference to the cases decided on the point, than that the seizing and subsequent sale of these goods to the judgment-creditor, is a wrongful conversion, so as to make the sheriff liable in an action of trover.

This answer to the question above put, rests upon two distinct propositions; first, that the goods in question were, at the time of the sale under the writ, the property of the assignees, having become their property by relation from the time of the act of bankruptcy; secondly, that there is no exception, either express or implied, in the bankrupt act, in favour of a sheriff executing the king's writ. I shall proceed to consider each of these positions separately, and in order.

First, upon the just construction of the late statute, the goods at the time of the sale belonged to the assignees, and the sale was a wrongful conversion, because it was a sale of their goods.

That the ownership of the goods was not divested out of the bankrupt by the act of bankruptcy, or by the issuing of the commission, or by any other act than the execution of the commissioners' assignment, may indeed be readily admitted. If any authority were necessary for that point, the cases of *Cary v. Crisp*, 1 Salk. 108, and *Brassey v. Dawson*, 2 Str. 978, are decisive upon the subject.

But it seems equally clear, that by the necessary construction of the clause, by which the commissioners are directed to "assign all the bankrupt's money, goods, chattels, and debts, wheresoever they may be found or known;" such assignment, whenever made, shall operate by relation, so as to carry to the assignees all the property which the bankrupt had at the time of the act of bankruptcy.

*The twelfth section of the recent act of 6 G. 4, upon which the law [*524 now stands, varies indeed in some particulars of expression from the language of the earlier acts; but not so materially as to afford a ground for any difference of construction in this particular; in which it is certain no real

difference could have been intended. It has indeed been observed, in *one* case, by Lord Hardwicke, then Chief Justice of the King's Bench,—in *Brasseay v. Dawson*, 2 Str. 978—that this relation is a fiction of the law, and that fictions are not to be favoured. But I must confess myself unable to consider it as any fiction at all; for it appears to be the direct and positive enactment of the legislature, expressed in plain and unequivocal terms. That such an enactment is indeed attended in some cases with hardship must be admitted, but there seemed to have been no alternative for the legislature but either to allow these individual cases of hardship, or to submit to a general inconvenience; for unless the assignees were made to take the property of the bankrupt as it stood at the time of the bankruptcy, this general inconvenience must follow, that the estate would be subject to all the fraudulent or improvident dispositions and conveyances which failing men, in a state of bankruptcy, will inevitably have recourse to. That such relation was intended is evident from the consideration, that in various instances where the individual hardship was greater than was warranted by the general convenience, the legislature has from time to time, by new statutes, cut down the relation in particular cases; as, first, in the case of payment of debts to the bankrupt before notice of an act of bankruptcy (1 Jac. 1, c. 15); next, in the case of the sale of real property by the bankrupt, where the commission is not sued out within five years after the secret act of bankruptcy (21 Jac. 1, *c. 19); again, in the case of payments by the bankrupt to creditors for goods sold (19 G. 2, c. 32); and, lastly, in the case of conveyances, contracts, and other dealings and transactions with bankrupts *bonâ fide* made and entered into more than two calendar months before the date and issuing of the commission (46 G. 3, c. 65). All which provisions of the legislature do prove and establish two points, first, that such relation to the act of bankruptcy did at the time exist under the previous enactments; and, secondly, that nothing short of the authority of parliament itself was sufficient to relax the severity of the former law. The courts of law have uniformly held such construction of the bankrupt acts. I will refer to one case only, namely, the judgment of Lord Hardwicke, when Chancellor, in *Billon v. Hyde*, 2 Ves. 310, because it appears to me to import that at that time he did not consider this relation to the act of bankruptcy to be a fiction of law. Lord Hardwicke observes, “It is said that this rule (the relation to the act of bankruptcy), founded on this act of parliament, is contrary to the general reason of the law, which says that fictions of law and legal relations shall not enure to the wrong of any one, which is the general rule, invented to support the right and equity of the case. But the reason of taking this case out of that rule, is plainly this, and the law did intend it on this general rule, that it is better to suffer a particular mischief than an inconvenience: and the legislature foresaw that there would be a particular mischief which they cured by that proviso, but did not extend it further, because the inconvenience on the other hand, of suffering bankrupts to dispose of their effects by contracts or judgments, would put it in their power to defeat their just creditors of their debts, so that it would be difficult commonly to find out whether there was a mixture of fraud; so the legislature thought it better to lay down that general rule.”

Upon these grounds it may, I think, be safely concluded, that all the property belonging to the bankrupt, at the time of his bankruptcy, passes to his assignees by the commissioner's assignment, whatever may be the time at which such assignment is executed.

The second ground above referred to is, that there is no exception, express or implied, in the bankrupt act, in favour of the sheriff executing a writ after a secret act of bankruptcy; so that whilst servants of the bankrupt, judgment-creditors, who set the law in motion, vendees at the sheriffs' sale, and all other persons who assist in selling, disposing, or removing the goods of a bankrupt after a secret act of bankruptcy, would confessedly be held guilty of a wrongful conversion, neither is the sheriff, by reason of his situation and character,

exempted from the same liability. That there is no express exception, is evident from perusing the words of the statute; if there be any exception, therefore, it must be one that is implied.

Now, the only ground upon which such implied exception in favour of the sheriff is contended for, resolves itself at last into the hardship of the case: it is said to be a hard measure to make him answerable where he is obliged to execute the writ, where he is acting honestly in the execution of his duty, and is under an invincible ignorance at the time, that the goods are the property of the assignees.

The question therefore is, whether such hardship upon the sheriff can be held upon any legal grounds to work an exception in his favour. If once this principle were to be admitted, it would operate not only in cases where the ignorance of the sheriff was really invincible, but in many others where a small exercise of caution, inquiry, and investigation would have been sufficient to *have prevented him from executing the writ: such a construction, [*527 therefore, in order to prevent a mischief to the individual in a few cases, would occasion an inconvenience to the creditors at large.

Again, in how many cases does the law hold him responsible where he is equally honest in the performance of his duty, and his difficulty in choosing the right course is equally great?

In an execution against A., if he sells the goods of B. which are in A.'s possession and apparent ownership, by loan or otherwise, he is liable in trover to the rightful owner, even after he has paid over the money.

If bail are tendered to him, which appear sufficient at the time, he is bound to accept them, and to discharge the defendant from his custody; yet, if they fail before bail above is put in, the sheriff may become answerable in damages to the plaintiff, and not improbably for the amount of the debt.

He is answerable generally civiliter, for all acts of his bailiffs; for voluntary escapes permitted by them, and for extortion. If the hardship is urged in those cases, the answer is, that the officers give security to the sheriff; but it is obvious, that if their securities fall short, he is answerable to the party in his purse or in his person.

I would refer to the late case of *Glasspoole v. Young and Others*, 9 B. & C. 696, already stated by my Brothers Parke and Taunton, where the sheriff was held liable for the execution of his duty, under circumstances of ignorance equally invincible as the present.

By analogy, therefore, to the law by which the sheriff's responsibility is governed in many other cases, the mere circumstance of hardship ought not to form any ground of exemption from his liability in this particular case. *After all, the office of sheriff is an office. not only of risk, but one of [*528 profit also. So says Lord Mansfield, expressly, in the case of *Cooper v. Chitty*, so often referred to; an office, of which men are ready to take the risk upon themselves for the sake of the profit, in the character of under-sheriffs, bailiffs, and other officers, giving the sheriff a sufficient indemnity to secure him against any damage or loss from acts done by them in his name.

But the strongest argument against implying an exception in favour of the sheriff, appears to my mind to be the course pursued by the legislature itself, above adverted to; who have, by new and distinct statutes, from time to time, created new exceptions from the retrospective operation of the assignment, wherever the hardship to individuals was deemed sufficient to call for it. And as the legislature has so done in many cases, but not interfered in the present, why is such exception to be ingrafted upon the statute by us, whose duty it is to declare the law, and not to make it?

Upon these grounds, it appears to me, that no exception of any kind exists in the bankrupt act in favour of the sheriff, however honestly or innocently he may have acted in the execution of the writ directed to him, if he does, in fact, take under it not the goods of the defendant to the suit, but those of his as-

signees. And this appears to me to dispose of the whole point in controversy, for if the sheriff appears to be liable to the action upon the construction of the statute itself, without reference to any of the cases on the point, I think it must at once be admitted, there is no such weight of authority in favour of the sheriff from the decided cases, as to call for any contrary decision.

Indeed, the weight of authority to be derived from the cases subsequent to that of *Cooper v. Chitty*, seems to be admitted in the argument of this case in the Court *of Exchequer, to be against the sheriff; but it is contended, *529] that all the latter cases proceeded partly upon a misconception of the case of *Cooper v. Chitty*, and partly on the ground, that the earlier cases of *Bayley v. Bunning*, and some others, had not been brought to the attention of the courts of law when deciding such latter cases. I shall satisfy myself, therefore, with making a few observations upon the two cases of *Cooper v. Chitty*, and *Bayley v. Bunning*, as the learned Judges who have preceded me in argument have entered into a more laboured detail of the modern cases; and I would only observe, that they form a connected chain of decisions against the sheriff, some in each court of common law at Westminster Hall, for the last sixty years.

Now, with respect to the case of *Cooper v. Chitty*, it may be admitted at once that it forms no authority in the present case. The seizure by the sheriff was indeed after a secret act of bankruptcy, but the sale did not take place until after the assignment, and at a time when both commission and assignment were known to the sheriff. There could, therefore, be no doubt but that such a sale, with such a notice, was a wrongful conversion by the sheriff. Although, however, the facts of that case do not agree with the present, the judgment of Lord Mansfield lays down and adopts a broad distinction between the liability of the sheriff in an action of trespass, and his liability under the same state of circumstances in an action of trover; holding that the former action was not maintainable, but that the latter was. And it seems a sensible and rational distinction, that the sheriff having acted innocently in the taking, should not be liable in that form of action in which the jury may give damages for the taking, distinct from the value of the goods, but that he should, nevertheless, be subject to that action in which the proper measure of damages is the actual loss *530] which the plaintiff has sustained by the *sale. And the case of *Bailey v. Bunning*, when rightly understood, affords no authority in favour of the sheriff where he has sold the goods. Upon looking at the record in that case, it appears that it was an action against Mawley, the judgment-creditor, and Bunning, the bailiff of a hundred within the county of Northampton. The bailiff seized the goods after a secret act of bankruptcy, but he never sold the goods at all. For the jury expressly find, "that the money, goods, and chattels still remain in the hands of Bunning, neither sold nor delivered to Mawley." And upon this finding, the jury declare their doubt to be whether the goods were well taken or not by pretext of the writ of *fi. fa.*? Certainly a very inartificial finding; and the Court, after argument, and time to consider, held that the original taking was lawful. The reporters do indeed put the decision upon the ground of the official character of the sheriff, because the taking by him was lawful by virtue of the writ. But if the bailiff in that case, as in the present, had not only seized the goods, but had sold them, or delivered them over to the judgment-creditor, there is nothing in the case of *Bailey v. Bunning* to show that he would not have been held guilty of a wrongful conversion. I look upon the case of *Bailey v. Bunning*, therefore, to be a single case, standing upon very peculiar circumstances, and decided upon very narrow grounds; and that, in effect, it says no more than that, if the sheriff makes a seizure in obedience to a writ, which seizure is lawful at the time, then, if he neither sells the goods, nor delivers them over to the judgment-creditor, but keeps them in his own hands as a stakeholder between the assignees and the judgment-creditor, the original act of taking shall not be held unlawful so as to sustain an action

of trover. To that extent it shows the bailiff was favoured in his official character, but no further. But why, under the circumstances stated in *that special verdict, a subsequent demand by the assignee, and a refusal to deliver up the goods to him, should not have been held a conversion, [*531 if the special verdict had been properly framed, I confess myself wholly unable to discover.

But although the judgment of Lord Mansfield, in the case of *Cooper v. Chitty*, propounds a distinction between the responsibility of the sheriff, in the form of trespass and in the form of trover, not called for by the circumstances of that case, no one can deny that such distinction has been adopted in numerous decisions in the courts of Westminster Hall from that time to the present. It has been inserted in text writers on the law of bankrupt, as a distinction established by undoubted authority. It is laid down in digests of the law, as an acknowledged principle. It has been acted upon by the practisers in Westminster Hall of the present day, during the whole of their lives, without the slightest suspicion or doubt of its soundness. Judicial decisions in courts of justice are ranked by Lord Hale as one of the grounds or constituents of the common law. (Hale's Hist. Co. L. c. 4.) And if a series of judicial decisions are shown, some in each court of Westminster Hall, from the time of *Cooper v. Chitty*, down to the present period, in which the sheriff has been held liable to trover, for seising and selling after an act of bankruptcy, but before a commission; if neither the case of *Cooper v. Chitty*, nor the cases which preceded it, do when rightly understood, contravene that principle; surely the question should be considered as at rest, even if the principle on which it was originally established were involved in doubt.

I cannot conclude without adding a much greater weight to the opinion which I have formed, than that which might otherwise belong to it, by stating, that upon the discussion of this case among the Judges, after the *argument, the late eminently learned and accurate Chief Justice of the [*532 King's Bench, declared it to be his opinion, that from the numerous decisions in the courts of Westminster Hall, the law was settled against the sheriff, so that it was no longer a subject for argument; and that even if the question were *res integra*, he should come to the same conclusion.

For the reasons, therefore, which I have stated above, I think the present judgment should be reversed. Judgment reversed.

GOODBURN v. BOWMAN and Others. Jan. 17.

1. To an action for a libel charging plaintiff with having in two mayoralties bought coals at 6d. a bushel, having sold them to the poor at 4d., and having charged the corporation 8d., thereby pocketing 2d. a bushel, defendants pleaded that plaintiff did this in his first mayoralty, and in his second altered his charges, buying the coals at 6d., selling them to the poor at 3d., and charging the corporation 6d.

Held, ill.

2. The Court will not award a replender except where complete justice cannot be answered without it.

THE first count of the declaration stated, that long before the committing of the several grievances by the defendant, as thereafter next mentioned, there had been and still was in the town or borough of Richmond, in the county of York, a certain body politic and corporate, consisting of one mayor, twelve aldermen, and an indefinite number of free burgesses; and that for divers, to wit twenty years next before the committing of the several grievances, the mayor of the said town or borough, for the time being, at the expense of the body politic and corporate, annually provided, and still did provide, a quantity of coals to be distributed amongst the poor at a reduced price; that in the year 1824, one alderman William Terry became and was mayor of the said town

*533] and borough; and in the year 1814, and also in the year next preceding the mayoralty of W. Terry, the plaintiff had been and was mayor of the said town or borough, and as such mayor, had provided coals at the expense of the corporation, to be distributed amongst the poor at a reduced price, as thereinbefore mentioned; and had distributed, and caused the same to be distributed accordingly, to wit, at, &c.; yet the defendants, well knowing the premises, but contriving, &c., to injure the plaintiff in his good name, &c., falsely, wickedly, and maliciously did compose, print, and publish, and caused and procured to be composed, printed, and published, of and concerning the plaintiff, and of and concerning the conduct of him the said plaintiff when mayor of the town or borough aforesaid, during the several years in that behalf mentioned, and of and concerning the purchase of coals by the mayors of the said town or borough, and the distribution of the same as thereinbefore mentioned, and of and concerning the mayors of the said town or borough, and of and concerning the body politic and corporate, a certain false, scandalous, malicious, and defamatory libel, containing therein the false, scandalous, malicious, libellous, and defamatory matter following, of and concerning the plaintiff, and of and concerning the conduct of him the plaintiff when mayor of the said town or borough, and of and concerning the purchase of coals by the mayor of the said town or borough, and the distribution of the same; and of and concerning the mayors of the said town or borough, and of and concerning the body politic and corporate; that is to say, "It is well known that the mayor, at the expense of the corporation, annually provides a quantity of coals, to be distributed amongst the poor at a reduced price. The price of coals was 6*d.* per bushel, or in summer a little lower. The poor were charged *534] 4*d.* per bushel. The mayor charged the corporation *4*d.* per bushel more, making 8*d.* per bushel, and thus pocketed 2*d.* per bushel for the coals distributed amongst the poor. Who, let me ask, detected this speculation, and had it remedied? The alteration in the price was made in Mr. Alderman Terry's mayoralty." Meaning thereby, that the persons who had filled the office of mayor previously to the mayoralty of the said alderman William Terry, during the period in which coals had been provided and distributed as hereinbefore mentioned, and amongst others, the plaintiff, had, as such mayor, been guilty of speculation in the purchase of the said coals at the expense of the corporation, and the distribution of the same amongst the poor.

The defendants pleaded, first, not guilty; and then six special pleas of justification, none of which, taken singly, contained any complete confession of the matters charged in the declaration; but taking together the whole of the allegations in the respective pleas, they amounted to a confession of the cause of action. The sixth special plea, on which the defendants mainly relied, was as follows:

That long before, and at the time of composing, printing, and publishing, and causing, and procuring to be composed, printed, and published, the supposed libel in the first count of the declaration mentioned, to wit, on, &c., at, &c., George Craft, the younger, was a common councilman of the town and borough of Richmond, and continued to be such common councilman for a long space of time, to wit, until the 20th day of April, 1830, to wit, at, &c. That before the composing, printing, and publishing of the supposed libel in the first count mentioned, to wit, on, &c., in 1814, at, &c., the plaintiff was mayor of the said town and borough, and continued mayor thereof until the expiration of his year of office; and that John Foss, before the composing, printing, and publishing of the supposed libel in the *first count mentioned, to wit, on, &c., in 1822, at, &c., was mayor of the said town and borough, and continued mayor thereof until the expiration of his year of office; and that the plaintiff, before the composing, printing, and publishing of the supposed libel in the first count mentioned, to wit, on, &c., in 1823, at, &c., was mayor of the said town and borough, and continued mayor thereof until the expiration of his year of office: that the said alderman W. Terry, before the composing, print-

ing, and publishing, and causing and procuring to be composed, printed, and published, the supposed libel, to wit, on, &c., in 1824, at, &c., was mayor of the said town and borough, and continued mayor thereof, to wit, until the expiration of his year of office, at, &c. That the plaintiff, whilst he was so mayor of the town and borough as in the plea first mentioned, to wit, on the 20th of June, 1814, at the expense of the body politic and corporate, provided a large quantity, to wit, 360 bushels of coals, to be distributed amongst the poor at a reduced price. That the price of coals, during a large part of that mayoralty of the plaintiff, to wit, for eight months thereof, was a large sum per bushel, to wit, the sum of 6d.; and during the other part of that mayoralty, to wit, for four months during the summer thereof, the price of coals was a little lower, to wit, the price of 5½d. per bushel; and that the same were distributed amongst the poor at a reduced price of 4d. per bushel, to wit, at, &c. That afterwards, and after the expiration of that mayoralty of the plaintiff, to wit, on the 8th of April, 1815, at, &c., at a meeting of the body politic and corporate, the plaintiff exhibited and passed an account of his receipts, charges, and disbursements as such mayor as aforesaid, and therein charged to the said body politic and corporate the sum of 4d. per bushel for each and every bushel of the coals so distributed as aforesaid, over and besides, and in addition to the *said sum of 4d. per bushel charged to the poor as aforesaid; and the additional charge of 4d. per bushel was then and there by the said meeting allowed to the plaintiff. That John Foss, whilst he was so mayor of, &c., at the expense of the body politic and corporate, in like manner provided a large quantity, to wit, 357 bushels of coals, to be distributed amongst the poor at a reduced price; and that the price of the coals, during a large part of the mayoralty of John Foss, to wit, for eight months thereof, was a large sum per bushel, to wit, the sum of 6d. per bushel; and during the other part of the said mayoralty, to wit, for four months during the summer thereof, the price of coals was a little lower, to wit, the price of 5½d. per bushel; and that the same were distributed amongst the poor at a reduced price, to wit, the price of 4d. per bushel, to wit, at, &c. That afterwards, and after the expiration of the mayoralty of John Foss, and during the mayoralty of the plaintiff, to wit, on the 14th of April, 1823, at, &c., at a meeting of the said body politic and corporate, the said John Foss exhibited and passed an account of his receipts, charges, and disbursements as such mayor, and therein charged to the body politic and corporate the sum of 4d. per bushel for each and every bushel of the coals so distributed, over and besides, and in addition, to the sum of 4d. per bushel charged to the poor as aforesaid; and that George Croft the younger, at such last-mentioned meeting, pointed out and objected to such additional charge of 4d. per bushel, and then and there stated that the said last-mentioned coals might have been purchased at 5½d., or, at most, at 6d. per bushel; but the plaintiff, who was then and there present at such meeting, and as such mayor, as aforesaid, presided thereat, then and there stated, and asserted, that such additional charge of 4d. per bushel had usually been allowed to the mayor of the said town or borough for the time being; and the *additional charge of 4d. per bushel was then and there accordingly allowed by the meeting to John Foss. That the plaintiff, whilst he was such mayor as last aforesaid, also provided, at the expense of the body politic and corporate, a large quantity, to wit, 856 bushels of coals, to be distributed to the poor at a reduced price; and that the prices of coals, during the plaintiff's last mayoralty, was a certain sum per bushel, to wit, the sum of 6d. per bushel, and that the same were distributed to the poor at a reduced price, to wit, the price of 3d. per bushel, to wit, at, &c. That the plaintiff, after the expiration of the last-mentioned mayoralty, and during the mayoralty of the said W. Terry as in the first count mentioned, to wit, on, &c., at, &c., at a certain other meeting of the body politic and corporate, exhibited and passed an account of his receipts, charges, and disbursements as such mayor as last aforesaid, and that an alteration then and there took place in the additional sum of 4d., so wrongfully

charged to the said body politic and corporate; and the plaintiff then and there charged in his account, and was allowed a lesser sum, only, to wit, the sum of 3*d.* per bushel, over and above the sum of 3*d.* so charged to the poor as afore-said. And this, &c.; wherefore, &c.

To the special pleas, the plaintiff replied *de injuria*, &c.; and at the trial before James Parke, J., last summer assizes for the county of York, the jury found for the plaintiff on the general issue, and also upon the issue raised on the 5th plea of justification, with one farthing damages; and for the defendants on the other issues.

In Michaelmas term last, the plaintiff moved for leave to enter up judgment, non obstante veredicto, on the several issues found for the defendants, on the ground that the pleas on which those issues were raised, were bad in law; inasmuch as they did not state that the coals, which had been provided by the *538] plaintiff, had *been in fact purchased for less than the plaintiff charged for them, but merely that they *might have been* purchased for less by the plaintiff.

Bompas, Serjt., showed cause. If the pleas are bad, neither party can have judgment; the plaintiff himself having tendered immaterial issues instead of demurring. And there must be a repleader, for none of the pleas, taken singly, confess the cause of action, and each must stand or fall on its own merits. In *Lambert v. Taylor*, 4 B. & C. 152, Lord Tenterden says: "The plea being bad, the defendant certainly cannot have judgment, although the issue is found for him, the issue being taken on an immaterial matter. And the question whether the plaintiff can have judgment, or whether there ought to be a repleader, depends upon the question whether the plea does or does not contain a confession of a cause of action: if a cause of action be confessed by the plea, and the matter pleaded in avoidance be insufficient, the plaintiff is entitled to judgment, notwithstanding the verdict. If the plea does not confess a cause of action, there must be a repleader." *Pitts v. Polehampton*, 1 Ld. Raym. 390; *Staples v. Heydon*, 2 Ld. Raym. 922.

And the circumstance of the plaintiff's having a verdict upon the general issue, will not dispense with the necessity of a repleader; for, in *Rex v. Roger Philips*, 1 Burr. 301, Lord Mansfield says: "The rule of law as to such an immaterial issue joined, and verdict upon it, is, 'that when the finding upon it does not determine the right, the Court ought to award a repleader, unless it appears from the whole record, that no manner of pleading the matter could have availed.'"

*539] Assuming, however, that the cause of action is *sufficiently confessed, the sixth plea, at least, contains an answer to this action, on the merits. The facts set out, disclose peculation committed by the plaintiff, which is the substance of the charge complained of in the declaration; and after verdict, it must be taken that such charge has been established in proof.

Jones and Stephen, Serjts., in support of the rule, were directed by the Court to confine themselves to the sufficiency of the plea upon the merits, after verdict. They contended, that the facts set forth in the plea nowhere showed that in both his mayoralties the plaintiff had pocketed 2*d.* per bushel, the difference between the price at which the coals were purchased, and the price at which they had been charged to the corporation; which was the substantial allegation of the libel. The price which the plaintiff himself paid for the coals is nowhere stated. Consistently with the allegations in the plea, the plaintiff may have provided the coals from his own pit, or the corporation may have allowed the extra charge as a compensation for the mayor's trouble, so that the charge of peculation is nowhere justified; and short of that, the plea is not sufficient. *Mounteney v. Walton*, 2 B. & Adol. 673; *Lewis v. Clement*, 3 B. & Ald. 702.

Cur. adv. vult.

TINDAL, C. J. The declaration in this action, which contained three counts, set forth a libel, imputing to the plaintiff, who had been twice mayor of the

borough of Richmond, that he had been guilty of speculation during his mayoralty, by pocketing 2*d.* per bushel for coals, which had been provided by him as mayor, to be distributed amongst the poor at reduced prices. To this declaration the defendants pleaded the general issue, and *six special pleas of justification, on the ground that the charges imputed by the libels were true. To the special pleas, the plaintiff replied *de injuria*, &c., and at the trial, at the last assizes for the county of York, before Mr. Justice James Parke, the jury found for the plaintiff on the general issue, and also upon the issue raised on the fifth plea of justification, with one farthing damages; and for the defendants on the other issues.

A motion was made in last Michaelmas term, that the plaintiff might be at liberty to enter up judgment *non obstante veredicto*, on the several issues found for the defendants, on the ground that the pleas on which those issues were raised, were bad in law, inasmuch as they did not state that the coals which had been provided by the plaintiff, had been, *in fact*, purchased for less than the plaintiff charged for them, but merely that they *might have been* purchased for less by the plaintiff.

On showing cause against the rule nisi, which was granted by the Court, it was insisted on the part of the defendants, first, that admitting the pleas to be bad, the plaintiff having taken issue upon them, instead of demurring, had himself tendered immaterial issues; and, besides, it was contended, that as the pleas did not contain any confession of the matters charged in the declaration, there could not be any judgment entered for the plaintiff, but that a repleader must be awarded. Secondly, it was argued that the pleas are substantially good.

It will be more convenient to consider the latter point first, and for that purpose we must see what the charge in the libel is, and how far the allegations in the pleas correspond with and justify such charge. Upon advertng therefore to the libel, it appears that it contains a statement, that the mayor of this borough for the time being, and which office the plaintiff had filled in two different years, viz., in 1814 and 1823, had annually *provided coals at the expense of the corporation, to be distributed to the poor at reduced prices. That the price of coals was 6*d.* per bushel, or in summer a little less. That the poor were charged 4*d.* per bushel. That the mayor charged the corporation 4*d.* per bushel more, making 8*d.* per bushel, and thus pocketed 2*d.* per bushel for the coals distributed among the poor. The declaration adds an innuendo, "thereby intending that the persons who had filled the office of mayor previous to the mayoralty of one Terry, during the period in which coals had been provided and distributed as thereinbefore mentioned, and amongst others, the plaintiff had, as such mayor, been guilty of speculation in the said purchase of coals, at the expense of the corporation, and the distribution amongst the poor." Upon looking at the pleas, it appears that none of them, except the sixth, contain any allegation that the plaintiff ever charged 4*d.* per bushel to the poor, and 4*d.* to the corporation, but they expressly state that the plaintiff charged 3*d.* to each. There is an end, therefore, of all those pleas, and indeed the counsel for the defendants hardly endeavoured to support them, but relied principally on the sixth. That plea which is pleaded to the first count, only alleges that the plaintiff, in his mayoralty of 1814, charged the poor 4*d.* per bushel, and charged to, and was allowed by the corporation, 4*d.* per bushel more: that, in his second mayoralty, he charged 3*d.* to the poor and 3*d.* to the corporation. This plea, therefore, we think is also bad; for, upon reading the libel, as any common person would, we think it intends to impute that each mayor charged the double four-pence during his mayoralty, and that the plaintiff, having been twice mayor, charged the double four-pence twice. Now the drawer of this plea appears to have understood the libel in that way, and to have applied the plea to the two mayoralties of the plaintiff; but he proceeds to *state the double four-pence to have been taken in the first mayoralty only, and alleges, that at the meeting of the corporation to pass the

account of the second mayoralty, an alteration took place in the said additional sum of four-pence, so charged by John Foss, a prior mayor, to the corporation: and that the plaintiff charged, and was allowed in his account, the sum of 3*d.* per bushel, over and above the sum of 3*d.* so charged to the poor as aforesaid; and does not allege that the plaintiff, in that mayoralty, charged 4*d.* to either.

This makes it unnecessary to give any opinion upon the other objections taken to the pleas, viz., that they do not allege what price the plaintiff actually paid for the coals; and that, consistently with the allegations in the pleas, the plaintiff may have provided the coals from his own pits, and therefore there is no justification of the charge of speculation which the libel expressly makes. Or again, that consistently with the allegations in the pleas, the corporation may have allowed the extra charge as part of the allowance made to the mayor for his execution of the office in general, or of that part of it which related to the providing and distributing the coals.

We are of opinion, in the first place, that, taking together the whole of the allegations in the respective pleas, they fully amount to a confession of the cause of action. But if this point were doubtful, it may not be improper to observe, that most of the cases in which the question respecting a repleader has been considered, were before the statute of Anne, when only one plea could be put upon the record. If, therefore, such plea did not contain a confession, there was no part of the record by which the deficiency could be supplied. In the present case there is a verdict upon the general issue, which finds that the defendant did publish the libels. And, although in considering the merit or *543] *demerit of any individual plea, recourse cannot be had to another unless expressly referred to by such plea, yet as the application to enter the verdict is founded upon the whole record upon which it appears that the defendant has committed the grievance complained of, and has not shown any sufficient justification, it may be considered that in that point of view there is enough to warrant the application. But no rule is better established than this, that the Court will not grant a repleader except where complete justice cannot be answered without it. So the law is laid down by Ashurst, J., in *Symmers v. The King*, Cowp. 510. In the present case, why should a repleader be granted in order to enable the defendant to confess the ground of action more formally, when the Court see already upon the face of the record, that the jury have found him guilty of publishing the libels complained of, and attempted to be justified by the pleas? If it be said that the defendant, in a new plea, might state new matter in avoidance of the action, what would that be in effect, but to allow him to take advantage of his own error in pleading? Upon the whole, we think the special pleas do sufficiently confess the action, but do not sufficiently avoid it; and, consequently, that the rule for entering the judgment for the plaintiff, non obstante veredicto, must be made absolute.

Rule absolute.

*544] *COLLINS and Others *v.* GWYNNE. Jan. 17.

1. A bond given to commissioners by a collector of assessed taxes, and his surety, to secure due payment of moneys collected, need not be stamped, although not taken in the precise amount required by 43 G. 3, c. 99, s. 18.
2. Such a bond need not be taken to his majesty and his successors.
3. The collector in default on such bond is a competent witness against his surety.
4. The sale of the collector's lands and goods is not a condition precedent to putting such bond in suit.
5. To pay money collected for a given year to the account of a different year, is a breach of the condition for due payment.

THIS was an action of debt on a bond entered into by the defendant as surety for one Richard Bigg, a collector of assessed taxes for the year 1828 ending

April 5th, 1829. At the trial before Alderson, J., London sittings after Trinity term 1831, a verdict was found for the defendant, with liberty reserved to the plaintiffs to move to set it aside, and to enter a verdict for themselves for the penalty of the bond, and nominal damages for the detention of the debt, together with the sum of 693*l.*, or such part of that sum as the Court might think them entitled to as damages for the breaches of the condition of the bond in Bigg's not duly paying over to the receiver-general the moneys collected by him for the above year. The plaintiffs accordingly moved to have the verdict entered for them, when it was ordered by the Court, with the consent of counsel on both sides, that the final entry, and verdict, and judgment, should abide the opinion of the Court on the following case:—

The plaintiffs declared upon the bond, which was dated the 27th of August 1828, as having been entered into by the defendant with the said R. Bigg and one Samuel Cordozo, jointly and severally, to the plaintiffs, as three of the commissioners under the *laud tax and assessed taxes act*, for the Tower division, in the county of Middlesex, in the penal sum of 4048*l.* To that declaration the defendant pleaded various pleas. The first was *non est factum*, after cravingoyer of the bond, and setting out the condition, which was as follows:—“Whereas the above bounden Richard Bigg hath been duly [7545 nominated and appointed by the commissioners appointed for putting in execution the said acts of parliament within the said division and county, one of the collectors of the rates and duties above mentioned, rated, laid, and assessed upon the parish of St. Matthew Bethnal Green, in the Tower division, and county of Middlesex aforesaid, for the year 1828, ending respectively the 25th of March and 5th of April 1829. Now the condition of this obligation is such, that if the above-bounden Richard Bigg do and shall well and faithfully demand and collect all and every the sum and sums of money in the said assessments charged and specified, of the respective persons from whom the same shall or may be payable; and shall and do, in case of non-payment thereof, duly enforce the powers of the said acts against such persons who may make default therein; and well and truly pay, or cause to be paid, unto the receiver-general of the said taxes, rates, and duties for the said county of Middlesex, all such sum and sums of money as shall come to the hands of the said R. Bigg as such collector, upon the days and at the times by the said acts appointed for the payment thereof, and according to the true intent and meaning of the said acts; and also do and shall, when thereunto required, at such times and places as shall be appointed for that purpose, give and render, or cause to be given and rendered unto the commissioners appointed, or to be appointed, to put the said acts in execution, or to any of them, a just and true account in writing of all such sum and sums of money which he the said R. Bigg shall have collected and received by virtue or on account of the said assessments, and shall forthwith pay and deliver the same unto the said commissioners, or any two of them, or unto such person or persons whom they or any two or more shall appoint, then this obligation shall be void, or else remain in full force and effect.”

*The second plea was a general plea of performance of the condition of the bond, on which the plaintiffs, in their replication, assigned [7546 several breaches, the third of which was, that Bigg had not duly paid over to the receiver-general the moneys received by him as collector of the assessed taxes for the said division, in respect of the rates and assessments mentioned in the condition, viz., for the year 1828-9. On that, an issue was taken by the defendant on his rejoinder. The issues on the third and fourth pleas,—that the bond was invalid on the ground of supposed fraud and misrepresentation;—on the ninth plea, that Bigg was not duly nominated to act as collector;—on the tenth plea, that the commissioners had not delivered to Bigg duplicate assessments, with a warrant for collecting them;—and on the twelfth plea, that Bigg had absconded to avoid the payment of the arrears due;—were all found

for the plaintiffs. The plaintiffs had previously obtained judgment on demurrer to two more of the defendant's pleas.^(a)

The fifth plea stated, that Bigg did demand and collect all the assessments, and that from that time to the time of exhibiting the present bill, he had lands, goods, and chattels within the jurisdiction of the commissioners, of which they had notice, and which might have been seized and sold by them, but which they neglected to sell. The sixth plea stated the same, only leaving out the mention of lands, and stated that he had the goods after default in payment of the moneys collected, of which the commissioners had notice. The seventh stated, that after Bigg made default, he had goods and chattels within the jurisdiction of the commissioners, which they might have seized and sold, and which would have been sufficient to satisfy all Bigg's deficiencies; but that the commissioners neglected to do this, as also to imprison Bigg himself; and that *547] no receiver-general, or deputy receiver-general, did or would call upon Bigg to make the payment of all sums received by him.

The eighth,—that the commissioners did not, at the time in the statute mentioned, call before them the said Bigg, and examine him upon oath or affirmation, and assure themselves of the sums paid to Bigg as such collector, or make any order thereon for the payment of the same to the receiver-general.

And the eleventh stated, that, although a large sum of money came to the hands of Bigg, the receiver-general did not call upon and hasten him to make payment of the same upon the days and at the times in the said acts provided and appointed.

To the fifth plea, the plaintiffs replied that Bigg did not faithfully demand and collect all the assessments; that he had no lands within their jurisdiction which they could seize and sell of which they had notice; and that all the goods and chattels of the said Bigg within their jurisdiction, and of which they had notice, were seized and sold, and were inadequate to the satisfying the deficiencies of Bigg. To the sixth plea,—that they did seize all the goods and chattels of which Bigg was possessed within their jurisdiction, and of which they had notice, which as before alleged, were insufficient to satisfy the deficiencies of Bigg. To the seventh,—that they did seize and sell all the goods and chattels of which Bigg was possessed within their jurisdiction, and that the same were insufficient to satisfy his deficiencies; and that the receiver-general of the said rates, duties, and assessments for the said county of Middlesex, did call upon Bigg, as such collector, to make payment of all sums received by him of the said duties, and that Bigg fled and absconded to places to the commissioners unknown to prevent their imprisoning him.

To the eighth,—that the said commissioners did call *before them *548] and examine Bigg, the collector, upon oath, and assure themselves of the sums paid to the said Bigg, and did make order thereon for the payment of the same to the receiver-general on the day and time appointed for receiving the same.

To the eleventh,—that the receiver-general did call upon and hasten Bigg to make such payments, upon the days and at the times in the said act provided and appointed. And thereupon issue was joined.

To the replication of the plaintiffs to the fifth plea, the defendant rejoined, that after the receipt of large sums of money by Bigg, and his omission to pay the same to the receiver-general, Bigg had lands within the jurisdiction of the commissioners, which they might have seized and sold, but that they neglected so to do. To the sixth,—that the commissioners did not seize and sell all the goods and chattels of Bigg within their jurisdiction, in manner as the plaintiffs had in their replication alleged. To the seventh,—that the receiver-general did not call upon Bigg, as such collector, to make payment of all sums of money received by him of the said duties; nor did Bigg, before they could have im-

(a) See determination on the argument of the demurrers, 7 Bingh. 423.

prisoned him, abscond and fly to places to the receiver-general, deputy receiver-general, and the commissioners unknown, in manner as the commissioners had in their replication alleged. To the eighth,—that the commissioners did not, at the times mentioned in the replication, and as often as was necessary, call before them the said Bigg, and examine him upon oath or affirmation, and assure themselves of the sum or sums of money paid to the said Bigg as such collector, nor did they make any order thereon for the payment of the same to the receiver-general. On which several rejoinders issue was joined.

The execution of the bond was admitted at the trial, subject to a question reserved, first, as to the necessity of a stamp, which it had not, although, as to the penalty *and condition, it was not conformable to 43 G. 3, c. 99; see [7549 7 Bingh. 423; secondly, whether it was valid, not being made to his Majesty, his heirs and successors, pursuant to the statutes, particularly the 3 G. 4, c. 88.

The material issues for the consideration of the Court were, first, whether Bigg duly paid to the receiver-general all such sums as had been collected by Bigg, according to the true intent and meaning of the assessed tax acts, for the years 1828–9. Secondly, whether Bigg had lands, which the commissioners could have seized and sold under the 43 G. 3, c. 99, s. 52. Thirdly, whether Bigg had goods which the commissioners could have seized and sold. Fourthly, whether the commissioners had examined Bigg on oath as to the sums which he had collected, and had made any order for the payment of the same to the receiver-general, according to the 39th section of the 43 G. 3, c. 99. And fifthly, whether the receiver-general did call upon and hasten Bigg to make such payment, upon the days and times, by the said acts in that case made and provided, appointed for the same. The last two of these issues had been found for the defendant, and the question on that part of the case was, whether the defendant's eighth and eleventh pleas, which were grounded on the neglect of the commissioners and the receiver-general, respectively, were good or bad in point of law after verdict.

With reference to the other three material issues above noticed, there was no sufficient evidence against the defendant, unless Bigg was a competent witness; and upon his being received as a witness after objection made by the defendant's counsel, the jury found that Bigg had paid over to the receiver-general, all the sums received by him for assessments for the years 1828–9, but that he did not pay in all those sums to the service of that year, the sum of 2430*l.* only having been paid by *Bigg to the service of that year, and [7550 6093*l.*, the residue of the sums so received, having been expressly paid by him to the service of former years, during which he had also been collector; but the defendant had not been his surety during those former years. It appeared in evidence, that the sum had accordingly been passed to the credit of Bigg's account of those former years, and a receipt given for the amount of those years, his account for which was completely paid up. The jury also found, that Bigg had lands or houses after his alleged default in paying the latter sum, of the value of 121*l.*, which could have been seized and sold by the commissioners under the 43 G. 3, c. 99, s. 52; and that he had goods after such default of the value of 200*l.*, which could have been seized and sold by the commissioners; but that the commissioners had not notice that Bigg was possessed of any houses, lands, or goods, at the time of his default. The jury however found, that the commissioners had reasonable grounds for believing that he possessed household goods at the time, of the value of 200*l.*, which might have been seized and sold.

The question for the opinion of the Court was, whether a verdict should be finally entered for the plaintiffs for the penalty of the bond and nominal damages, and also for the said sum of 698*l.*, or any and what part of that sum as damages on the third breach assigned in the replication; or, whether the defendant was entitled to have a verdict entered for him on the issue taken on the

third breach, or to judgment on his fifth, sixth, seventh, eighth, or eleventh pleas; or a nonsuit. The case was argued in Easter term, 1832, by

Taddy, Serjt., for the plaintiffs. First, the bond does not require a stamp. That depends on 43 G. 3, c. 99, s. 13, 3 G. 4, c. 88, and 55 G. 3, c. 184. The latter statute exempts bonds given by collectors or their sureties, and ex-
 *551] cludes any doubt which might arise on *the other statutes requiring collectors' bonds given in respect of the assessed taxes to be taken in a certain amount. And even those other statutes contain no negative words which preclude the bond from being taken for something more (see *Collins v. Gwynne*, 7 Bingh. 423). As to the objection that the bond has not been given to his majesty and his successors, in 3 G. 4, c. 88, there are provisions applying to the receiver-general, and to the collector; and by the provisions applicable to the collector, the bonds are not required to be given to his majesty.

Secondly, Bigg was a competent witness: he is liable to the defendant, and therefore, does not relieve himself. It is alleged that his liability to the crown is preponderant, because, in addition to the sum deficient, he is liable to penalties. But he does not in terms contract any liability to the crown: his liability is to the receiver-general: 3 G. 4, c. 88. And he came to show himself liable to the penalty. The general rule is, that the witness is competent if liable on both sides. An exception, indeed, has been made where, in addition, he is liable to cost on one side: *Jones v. Brooke*, 4 Taunt. 464: But here the argument as to costs operates in favour of his competency, for his testimony goes to fix his liability to the defendant's costs; and he is not called for the defendant but for the plaintiffs. It would lead, however, to great inconvenience to weigh with minuteness all the conflicting motives of a witness; the better course, therefore, is, to adhere to the rule in *Rex v. Bray*, Cas. temp. Hardw. 358.

Thirdly, the money has not been duly paid to the receiver-general; for though it has been received and paid in, it has been paid in to a year for which it ought not to have been paid. The language of the bond is, "that he shall *well* and *truly* pay, according to the intent of the acts." He has failed to do this, if he
 *552] has not paid *to the service of the proper year. To insure payment to the proper service was the object of the bond. Suppose he had paid to the service of a year fifty years past, or to a wrong receiver? The receiver-general has no option, and cannot transfer from one account to another. An improper payment is equivalent to throwing the money away; in which case, the defendant's responsibility could not be doubted. This is not a mistaken but a wrongful act, and it is for wrongful acts the surety is liable. It is not the duty of the receiver-general to see that every year is paid up before an ensuing year is received; and even if the receiver-general had neglected his duty, that would not discharge the surety. A payment made *solvitur ad modum solventis*, particularly when, as here, an appropriation is made by the payer. By the 43 G. 3, c. 99, s. 48, the receiver-general is bound to give a receipt; the account is closed, and cannot be unravelled without great inconvenience. *Plover v. Long*, 1 Stark. 153, shows the mode in which payments are to be applied.

Fourthly, if the receiver-general did not hasten, or the commissioners examine the collector, as found on the eleventh and eighth pleas, that is a matter for which they may be answerable, but it does not discharge the defendant. The collector having been guilty of a breach of duty, it is no answer to say that others have neglected their duty also. The hastening by the receiver-general, and the examination by the commissioners, are not conditions precedent to the collector's paying; and the fault is not in the omission to collect, but in the paying to a wrong account. The commissioners, it is true, are the plaintiffs, and it is objected that, having misconducted themselves, they ought not to call on the defendant. But their duty was to examine the collector, not
 *553] to go to the receiver's books and see that the payment was made *to the right account; and the mere laches of the obligee does not discharge the

obligor. *Trent Navigation Company, v. Harley*, 10 East, 35; *Orme v. Young*, 1 Holt, N. P. C. 84. It makes no difference that the question arises on a matter of public duty, unless the legislature or the bond make the inquiry of the receiver a condition precedent.

Fifthly, the thirteenth section of 43 G. 3, c. 99, does not impose as a condition precedent to the suit on the bond, that the collector's lands and goods shall all be seized; the commissioners have not put the bond in suit for more than the deficiency, and that is the object of the statute; otherwise, if the collector had lands to never so small an amount, the commissioners would be precluded from suing till the lands were sold, though the sale might never make up the deficiency. And the act only empowers, does not require them to seize. Besides, the jury have found that the commissioners had not notice of the collector's having lands.

Bompas, Serjt., for the defendant. The bond ought to have been stamped. The general exception in 55 G. 3, c. 184, must be construed with reference to the statutes which regulate the bonds to be exempted; and this bond is not a collector's bond under the statutes 43 G. 3, c. 99, s. 13, and 3 G. 4, c. 88, because it has not been taken in the form, and according to the regulations required by those statutes; particularly as to the amount of the penalty and the conditions annexed, see 7 Bingham, 428.

Secondly, Bigg was not a competent witness, because he had a judgment against him at the suit of the crown; for 43 G. 3, c. 99, s. 41, enacts, that if moneys in the hands of the collectors cannot be recovered under the warrant of the commissioners, or the commissioners shall neglect to issue such warrant, the amount shall be *recoverable as a debt upon record. And there is great difference between liability to mesne process and liability to actual [*554 judgment: the immediate liability preponderates over the remote; as with persons in possession of land or goods, who are incompetent witnesses to prove their own occupation or property. *Doe v. Bingham*, 4 B. & Ald. 672; *Bland v. Ansley*, 2 N. R. 331. So bail are not competent to give evidence for the defendant, though they may recover over against him; their immediate interest being to get rid of the suit. And Bigg's lands and chattels would be freed from any extent on the judgment of the crown by the judgment against the defendant and satisfaction entered on it. Bigg has also a preponderant interest against the defendant in respect of liability to penalties and interest accruing thereon, under the statute 3 G. 4, which will be discharged by satisfaction on the judgment against the defendant.

Thirdly and fourthly, The condition of the bond as to payment has been discharged by the conduct of the receiver-general and the commissioners. The condition referring to the statute, its effect is the same as if the regulations of the statute had been inserted in the condition; and those regulations have not been pursued by the commissioners, particularly as to the examination of the collector, and the order to pay, required by 3 G. 4, c. 88, regulations 3, 4. The performance of their duties by the commissioners is a condition precedent to the collector's paying the receiver; and the receiver-general was bound to examine the duplicates and certificates given by the collector, and to ascribe the payments to the right year. In *Farr v. Hollis*, 9 B. & C. 315, the requisition of the magistrates to the collector of county rates to pay over the rates, was alleged as a condition precedent to the liability of a surety on a bond conditioned for due *payment by the collector. The eighth and eleventh pleas, [*555 therefore, are sufficient, and an answer to the action, by showing the neglect of conditions precedent.

Fifthly, The lands and goods of the collector ought to have been seized before this action was brought: the issue on the sixth plea is on the neglect to seize, not on the notice. But the commissioners cannot require to have notice: they are bound to inquire, and act upon their belief. In *Peppin v. Cooper*, 2 B. & Ald. 431, it was assumed by the Judges that the omission to seize the goods of

the collector who had made default, was a discharge of the bond. And there is no way in which the value of the land can be ascertained except by sale.

Taddy, in reply, was relieved from the objection as to the stamp. As to the competency of the witness Bigg, his liability cannot be compared to that of bail or tenant in possession, for both are, in some sort, parties to the cause, and their loss will be immediate. So in *Bland v. Ansley*, the execution which the action was brought to impeach, was an execution against the witness objected to, giving him therefore an immediate interest in the verdict. The present case is not of that nature; for though it is contended that the sum for which the witness would have shown himself liable, becomes a debt on record, he is not released from that debt by a judgment against the surety, for the Court might still issue process against him, and reimburse the surety. And the judgment in this cause would not be evidence to discharge Bigg from any claim by the crown for interest accruing on penalties. As to the objection, that the collector is not bound to pay over till ordered to do so by the commissioners, the collector is bound to pay over to the receiver-general quarterly, whether he is *556] ordered by the commissioners or not, and oftener if *ordered by them. 3 G. 4, c. 88. Regulations 7, No. 1. Regulations, 3, 4.

The issue upon the seventh plea is in effect found for the plaintiffs, and there is nothing in the fifth, sixth, seventh, eighth, or eleventh pleas which can operate as a condition precedent to the putting this bond in suit for the deficiency. In *Peppin v. Cooper* the facts were altogether different from those in the present case; the question turned on the sale of the goods of a surety who was also a collector; and the language of the Judges must be taken with reference to that question. No doubt if lands are seized, they must be sold before the bond is put in suit, but it does not follow that the bond shall not be put in suit till every portion of land and item of furniture has been sold. To consider the sale a condition precedent to that extent, would be a construction of the act too inconvenient to be adopted. In *Farr v. Hollis*, the only question was, whether the requisition of the magistrates should have been alleged to have been made by an order of Court, and the case has no bearing upon the present. If the argument, that the neglect of the commissioners discharges the defendant be ill founded, there is the less ground for the same argument in respect of the conduct of the receiver-general. *Cur. adv. vult.*

TINDAL, C. J. Upon this special case various objections have been taken on the part of the defendant against the right of the plaintiffs to recover on the bond stated in the declaration, whereof two are objections against the evidence offered and received at the trial of the cause. It is objected, in the first place, that the bond, not being stamped, was not producible in evidence; and secondly, that Bigg, the collector, was not an admissible witness upon those issues on which he was called as a witness by the plaintiffs. As these objections go to the maintenance of the action generally, *it may be advisable to take them first in order before we proceed to the rest. *557]

The objection on the ground of the want of a stamp, rests on the argument, that this bond cannot be held to be within the exemption of the general stamp act, 55 G. 3, c. 184, "as a bond given by collectors of assessed taxes, and their sureties, for the due payment of moneys collected by them, or otherwise relating to their officers," because it is not a bond given in conformity with the directions of the 48 G. 3, c. 99, s. 13, nor with those of 3 G. 4, c. 88. It is argued that the bond is not authorized by the former act, inasmuch as the penalty exceeds the amount of the duty assessed for the district; we think, however, the direction of the 13th section of that act, that the collector should give security to the commissioners "equal to the amount of the whole duty and sums of money assessed in, and to be collected in each district or place," is virtually complied with by a security given in such sum as is large enough to include, though it may exceed the exact amount of such duties. Such is the natural meaning of the words above referred to, and if any other meaning had been in-

tended, we think the form of expression usually met with in acts of the legislature, of a sum "not exceeding the amount," &c., would not fail to have been employed. It is however further objected, that the bond ought to have been given to his Majesty, his heirs and successors, according to the 3 G. 4, c. 88, No. 1, of Rules and Regulations, art. 8; and that the present bond not being made to the King, but to the commissioners, cannot be held to fall within the exemption of the preceding acts. But the whole of the rules and regulations comprised within No. 1, relate to the office of receiver-general; and the 8th clause, which is particularly relied on, appears to be confined to the cases of "bonds entered into with, or taken from the receiver-general, or with or from any other persons to *be appointed under that act, or their sureties, to remit the moneys arising by the taxes granted by the said acts, or any [*558 of them, or any other duties under the management of the commissioners for the affairs of taxes;" an enactment which does not appear by any reasonable intendment to comprehend the case of a bond given by the collector and his security. By the former statute, the 43 G. 3, this bond had been expressly directed to be given to the commissioners, and there are no words in the rules and regulations No. 1, which at all import a repeal of the former statute in this respect, or indeed which relate to collectors' bonds at all. We therefore think the bond given in the present case to the commissioners, is a valid bond, and that it is exempted from the stamp duty, both by the general clause of exemption in 55 G. 3, c. 184, and also by the express enactment of the 43 G. 3, c. 99, s. 13.

The next objection taken at the trial was, to the competency of Bigg the collector, as a witness on the part of the plaintiffs. As to which the objection shaped itself thus; first, it was said he had an immediate interest in the event of this suit, because, under the 43 G. 3, c. 99, s. 41, all the arrears of sums collected, which cannot be recovered under the warrant of the commissioners, are made recoverable as a debt upon record to the King. It was therefore contended, that a verdict and judgment against Gwynne, the surety in this action, would have the effect of removing the lands and goods of the witness from the process, or from the actual possession of the crown.

In the first place it is to be observed, that on the general question of his interest in the event of the suit, he, in fact, stands indifferent; for he is liable on his bond to the commissioners for the amount of the arrears, if this action should fail; and he is liable to the defendant in precisely the same amount, if this action should succeed, and the defendant pays the arrears. And, in answer to the particular shape which the objection now *assumes, it appears to us that it is not the judgment against this defendant, but the satisfaction of such judgment by the defendant, which would have the effect contended for; because, notwithstanding the judgment against Gwynne, the process of the crown would still remain in force against the person, lands, and goods of Bigg until actual payment of the debt. The obtaining such judgment, therefore, is one step only towards such an effect; it is by no means the immediate, or even the necessary, cause of such a consequence. The witness, therefore, does not stand in the situation of the tenant in possession in ejectment, who cannot be called by the defendant, because the witness is necessarily and immediately concerned in interest; for a verdict and judgment against the defendant would, of necessity, and without any further step, be the means of removing the witness from his tenancy. In all the cases put in argument, the interest of the witness in the event of the suit is certain, immediate, and necessary; in this case, a judgment against the defendant would not have any certain, immediate, or necessary effect on the interest of Bigg; on the contrary, it may never have any effect at all. But it was argued that Bigg was interested directly in the event of the suit, inasmuch as under No. 3, Rules and Regulations, 3 G. 4, he was liable to a penalty of 50*l.* if he did not pay in the money collected by him on a day ordered by the receiver-general, and a further penalty

at the rate of 5 per cent. per annum for the whole sum by him detained. And it is contended that the witness is interested in proving what he was called to prove, that his payments were made in satisfaction of the earlier arrears, and not those of the last year of 1828, so as to avoid the penalty of further arrears of interest. But we think the judgment obtained against the defendant on this point, by means of the evidence of Bigg, could not be made available by Bigg *560] himself in his own favour, in case any subsequent action should be brought against him for the penalty of the arrears of interest: *Smith v. Prager*, 7 T. R. 60. Such action, as it appears to us, would be decided upon the evidence produced by the crown as to the non-payment by him of the arrears on the day fixed by the receiver-general; and by any evidence on the part of the defendant, other than the production of the judgment in this cause, of actual payment of such arrears either by himself or the surety. We therefore think the objection as to the competency of Bigg ought not to prevail.

As a verdict has been found for the defendant upon the issues raised on the eighth and eleventh pleas, it will be more convenient to consider next, the objections raised by the plaintiffs to the validity of those pleas: for unless those pleas are bad in law, so that the plaintiffs are entitled to their judgment non obstante veredicto, the consideration of the further objections raised on the part of the defendant would become unnecessary. The eighth plea states in effect, that the commissioners did not, at the times in the statute mentioned, call Bigg before them and examine him upon oath, and assure themselves of the sums paid to him as such collector, or make any order thereon for the payment of the sums to the receiver-general; upon which allegation the plaintiff takes issue in his replication. This plea is drawn upon the assumption that the compliance with the directions given to the commissioners by the thirty-ninth section 43 G. 3, c. 99, forms a condition precedent to the right of the commissioners to put the bond in suit. For unless these acts to be done by the commissioners form a condition precedent by the positive enactment of the statute, the defendant cannot avail himself of the non-performance of acts not made a part *561] of the condition of the bond itself. We are all of opinion, however, that the proper construction of that section is, to treat it as directory only; as containing a direction to the commissioners very useful in itself; having for its immediate object the further security of the revenue, by enabling the commissioners from time to time to investigate the state of the collector's accounts, and to ascertain whether his payments keep pace with his receipts. The commissioners, therefore, in not obeying so useful a direction, may have made themselves responsible for carelessness and negligence. But to hold their compliance or non-compliance with the direction, a condition on which the bond was to be available or not, would, as it appears to us, exactly contravene the very object and design for which the provision itself was introduced, namely, the giving additional certainty and security for the payment over of the duties collected. But the argument on this plea has rested mainly upon the ground, that until the collector has been called before the commissioners and examined by them, and an order has been made, no time for the payment of the duties received by him can be held to have been fixed or appointed, and consequently no breach of the condition "for the payment by him upon the days and at the times by the said acts appointed for the payment thereof" can be held to have been incurred. Upon reference, however, to various parts of 49 G. 3, and the 3 G. 4, times for payment to the receiver may be fixed under the provisions therein contained, without any reference to and quite independent of the particular provisions on which the plea is framed, for investigating the state of the accounts, and for hastening the payment by the collector. See particularly forty-eighth section of 43 G. 3, the 3 G. 4, No. 1, Rules and Regulations, art. 7. And again, No. 2, Rules and Regulations, art. 2; in all which cases payments are *562] directed to be made at the office of the receipt of the receiver-general, at times fixed for that purpose, quite independently of any previous exa-

mination by the commissioners or any order made thereon. The plea, therefore, neither shows by express averment that there was any impossibility to pay "upon the days and at the times by the said acts appointed for the payment thereof," nor does it state any facts inconsistent with the practicability of such payment being made. We therefore think the allegations in the plea do not amount to a discharge from the performance of the condition; but merely show a neglect on the part of the commissioners to make the examination and issue the orders, if such in fact had become necessary.

The 11th plea states in substance, that although a large sum of money came to the hands of Bigg, yet the receiver-general did not call upon him and hasten him to make payment of the same. It is unnecessary to state in detail the grounds upon which we hold this plea also to be insufficient as a legal bar to the action; as they are precisely the same in principle as those which have been just stated with respect to the 8th plea. We come, therefore, to the three remaining pleas, upon which points have been raised for our consideration.

The 2d plea is a plea of general performance on which the plaintiff has assigned for one of his breaches, "that Bigg had not duly paid over to the receiver-general the moneys received by him as collector of the assessed taxes for the said division, in respect of the rates and assessments mentioned in the condition, viz., for the year 1828-9." This involves the main question between the parties, viz., whether the payment by Bigg to the receiver-general, of all the sums received by him for assessments for the year 1828-9, but the not paying in all these sums to the service of that year, but on the contrary, the paying in the sum of 693*l.*, part thereof *expressly to the service of former years, during which he had been col-
[*563]lector, was a satisfaction of the condition of the bond; and we think [*563] such payment is not "a duly paying over to the receiver-general," within the meaning of the condition. The two acts so often referred to evidently contemplate that the money raised by assessments in a given year shall be paid for the service of that year, and no other. Indeed, they are manifestly framed upon a supposition, that a new collector will be appointed for each succeeding year. If the receipts of a given year are not to be considered as appropriated to the service of the same year, it is obvious, that if any deficiency occurs on the part of the collector in the account with the receiver for the current year for which the duties have actually been collected, a second assessment must take place upon the inhabitants of the same parish or place, to make good such deficiency. If the collector has left the arrears of the former year unsatisfied, and attempts to make good such deficiency from the moneys collected for the current year, the hardship is as great on the parish as if he had appropriated it for his own private purposes. And it is exactly to prevent the hardship cast upon the parish by the misappropriation of the collector, that the statutes direct a security to be taken upon his appointment. But as the defendant would manifestly be answerable in case of the misappropriation of the duties, why should he not also in case of the wrongful payment of them to the receiver? It is argued, that it was the fault of the commissioners, or of the receiver, that the one had not made out the proper certificate and order for payment under 3 G. 4, c. 88, in which case the receiver could not have carried the money to any other than the proper account, and that the commissioners ought not to avail themselves of their own omission. It may be admitted that the commissioners had been negligent, *but the non-compliance by them, or by the receiver, with the
[*564]duties imposed upon them by the statute, cannot, on the other hand, [*564] excuse the collector for "the improperly paying," as the jury have expressly found that he did, the sum of 693*l.* which had been collected for the year 1828-9, to the service of former years. This "improper payment" is the voluntary act of the collector; for had he found the money expressly for the current year, the receiver-general could not have made the appropriation which is now complained of. The collector therefore appearing to us, by his own voluntary act, to have made a wrongful payment, we think the surety is liable for the amount of such payment, under the terms of the condition of the bond.

There remains only two other points reserved upon this case, viz.: whether Bigg had lands which the commissioners could have seized and sold under 43 G. 3, c. 99, s. 52. And whether he had goods which they might have seized and sold. These questions arise upon the fifth, sixth, and seventh pleas; the fifth plea stating, that Bigg demanded and collected all the assessments, and that, from that time hitherto, he had lands, goods, and chattels within the jurisdiction of the commissioners, of which they had notice, and which ought to have been seized and sold by them, but which they neglected to do; the other two pleas stating the same in substance as to the *goods* of the collector. Now, the jury find specially upon the issues raised on these pleas, that Bigg had *lands* or houses after his alleged default, of the value of 121*l.*, which could have been seized and sold by the commissioners under the 43 G. 3, c. 99, s. 52; and that he had goods after such default of the value of 200*l.*, which could have been seized and sold by the commissioners. But they further find that the commissioners had not notice that Bigg was possessed of any houses, lands, or goods *565] at the time of his default, *but that they had reasonable grounds for believing that he possessed household goods at that time of the value of 200*l.*, which might have been seized and sold.

The defendant contends, that under the proviso contained in the thirteenth section of the 43 G. 3, the sale of the lands and goods so found to belong to the collector must precede the commencement of the action against the surety; and relies upon the dictum of the Chief Justice of the King's Bench in giving his judgment in *Peppin v. Cooper*, 2 B. and Ald. 481, as an authority for that proposition. That dictum, upon referring to the facts of the case then under judgment, appears to us scarcely to warrant the conclusion contended for; it appears, however, to us to be unnecessary to decide that point; for we all agree in opinion, that the sale of the collector's lands and goods can only form a condition precedent to the right to put the bond in suit against the surety, when the existence of such property of the collector is known to the commissioners at the time of commencing the action. A determination to the contrary would make it necessary for the commissioners to forbear so long to put the bond in suit, that all the benefits of it would, in many cases, be lost both against the collector and the surety. It is true, the necessity of notice to the commissioners is not expressly made part of the legislative enactment, but it is necessarily to be implied by the nature of the provision itself, which must have considered goods and chattels unknown to the commissioners as upon the same footing as if they had not existed.

As to the subsequent finding of the jury, "that the commissioners had reasonable grounds for believing that the collector had household goods;" such finding, neither by the rules of pleading, nor in the natural *meaning *566] of the words themselves, can supply the want of actual notice or knowledge; it does not even amount to an assertion of actual belief in the commissioners. Upon the whole, therefore, we think the judgment must be entered for the plaintiffs, with the assessment of damages to the amount of 693*l.*, upon the breach of the condition thirdly assigned in the replication.

Judgment for the plaintiffs.

BARRATT v. PRICE. Jan. 17.

Where a sheriff has illegally arrested a defendant in one action, he cannot detain him in another.

THE question in this case was, whether the defendant was entitled to be discharged out of custody in this action, he having been detained by the sheriffs of London under a *ca. sa.* issued at the suit of the plaintiff, which had been lodged with them before the time of their arresting the defendant upon *mesne process* issued at the suit of another plaintiff.

The arrest in the former action had been made by one Richard Jackson, the son and assistant of William Jackson, one of the serjeants at mace to the sheriffs of London. At the time of such arrest the warrant was held by W. Jackson, to whom it was directed, not by Richard Jackson; but after Richard Jackson had arrested the defendant without any warrant, he delivered him into the custody of a police officer under a false charge of felony, and then brought his father to the police station, and the father, by handing the warrant over to the son, endeavoured by fraud to make the arrest appear to have been legal. On the ground of such fraud on the part of the sheriff's officer, and his son, one of the learned Judges, on an application made before him in **vacation*, ordered the defendant to be discharged from that arrest. But the [*567 defendant being detained under the ca. sa. issued by Barratt,

Wilde, Serjt., obtained a rule nisi to discharge him from this detainer, on the ground that the apprehension by the sheriff in the former action being illegal, the same sheriff could not justify a subsequent detainer.

Bompas, Serjt., who showed cause, relied on *Howson v. Walker*, and *Crowden v. Walker*, 2 W. Blk. 828. There it appeared that one Herne had got over some pales, and thrown up the sash of the defendant's window, to get into the house, and afterwards broke open an inner door, in order to arrest him; and all this without any warrant directed to himself; and accordingly did arrest the defendant at the suit of *Howson*. The plaintiff's attorney being sent for, and finding Herne's mistake and irregularity, sent for one William Howse, to whom the warrant was really directed, and gave him charge of the defendant; and Howse having another writ against him at the suit of *Crowden*, carried him to Aylesbury gaol, and charged him with both these actions. Upon a motion to discharge the defendant out of custody, in both actions, and for an attachment against Herne, it was held by the Court that a defendant illegally in custody at the suit of one plaintiff, was not privileged from arrest at the suit of another, unless there were some collusion. *Bompas* therefore contended that though an arrest be illegal, a subsequent detainer in another action is justified, except in the case of a party privileged from arrest; and referred also to *Spence v. Stuart*, 3 East, 89; *Davies v. Chippendale*, 2 B. and P. 282, 367; *Barclay and Others v. Faber*, 2 B. and Ald. 743; and the authorities collected in 1 Chitt. Rep. 579.

**Wilde.* The principle to be deduced from all the cases is, that if the sheriff be no party to the illegal apprehension, he may justify a [*568 subsequent detainer for a legal claim; but if he be either party or privy to the illegal apprehension, he cannot justify a subsequent detainer. In *Howson v. Walker* the sheriff's officer who detained the defendant was entirely unconnected with Herne, who arrested him, and was not privy to the arrest. In all the other cases referred to, either the apprehension was legal at the outset, and set aside for some collateral matter, or if illegal, the sheriff who detained was not connected with the sheriff who arrested. But in *Birch v. Prodger*, 1 N. R. 135, where an attachment for non-payment of money to A. having been issued against B. from the Court of Common Pleas, and the process being in the hands of an officer, who had not been able to serve B. therewith, B. was met by A. in the street, and carried by violence to the chambers of C., who was A.'s attorney, and there detained while the original process was sent for and served upon him; the officer also was sent for (but not by A.); and on B.'s leaving the chambers of C. he was arrested; the court held that the arrest was illegal, and discharged B.

Cur. adv. vult.

TINDAL, C. J., after stating the facts as *antè*, p. 566, proceeded,—

The question now arises, Whether the same sheriffs can legally detain the defendant in custody under another writ which they held against him at the time of such illegal arrest? And we are of opinion that they cannot; and the ground on which this opinion is formed, is shortly this,—that the first arrest was illegal by the wrongful act of the sheriff himself. In two of the cases

*569] *cited on the part of the plaintiff, viz., *Davies v. Chippendale*, and *Barclay and Others v. Faber*, it was held, that although the defendant was entitled to his discharge out of custody upon the original arrest at the suit of A., he was not entitled to be discharged also from a detainer subsequently lodged with the same sheriff against him by B., whilst in custody under the former writ. But in both those cases the arrest was not an illegal act on the part of the sheriff: in each case the sheriff had acted in strict conformity with his duty in obeying the writ, though upon objections taken to the affidavit under which the defendant had been held to bail in the action at the suit of A., the Court thought him entitled to his discharge. Those cases we think will not govern the present, where the party is under an illegal imprisonment by the act of the sheriff's officer, that is, for this purpose by the act of the sheriff himself. But the plaintiff relies on the case of *Howson v. Walker*, 2 W. Blk. 823, as decisive in his favour. Upon looking, however, at the facts of that case, we think it is distinguishable from the present. In that case Herne, who broke into the house, and made the arrest, does not appear to have been connected with the sheriff's officer who held the warrant and afterwards made the arrest under it. In the first place no warrant whatever had been made out to Herne. Again, when Howse, the sheriff's officer to whom the warrant in that action was directed, heard of the transaction, he went to the defendant, and having another warrant also against him at the suit of Crowden, carried him to gaol, and charged him with both those actions. The sheriff's officer, therefore, did nothing to identify himself with Herne. The illegal arrest of the defendant by Herne, was no act of the officer or the sheriff, but the act of a stranger; *570] the taking the *defendant to prison and charging him in the action at the suit of Crowden, was in fact a new arrest, rather than a detainer; and there was no more objection to the sheriff's arresting the defendant in this second action, because at the time he found him he was illegally imprisoned, than if he had found him at large.

The principle to be derived from the cases appears to be, that where the sheriff arrests the defendant in one action, it operates virtually as an arrest in all the actions in which the sheriff holds writs against him at the time; for it would be only an idle and useless ceremony to arrest the defendant in the rest; it would be "*actum agere*:" and this detainer will hold good, though the Court may, upon collateral grounds unconnected with the act of the sheriff, order the party to be discharged from the first arrest. But where the sheriff has by his own act illegally arrested the defendant, the defendant is not in custody under the first writ, he is suffering a false imprisonment; and such false imprisonment being no arrest in the original action, cannot operate as an arrest under the other writs lodged with the sheriff.

We therefore think this rule must be made absolute.

Rule absolute.

TAYLOR v. LADY GORDON. Jan. 17.

Costs of an arbitration under an order of *Nisi Prius*, are not costs in the cause.

THIS was an action brought by the plaintiff against the defendant, his late landlady, to recover from her the value of certain buildings, fixtures, and tenant-rights, alleged to be due to him as outgoing tenant of a farm at Linwood and Market Rason, according to the custom of the country where the farm *571] lands and premises *were situate, and for land tax and other demands of the plaintiff. A set-off was pleaded by the defendant for 548*l.* 10*s.*, and a sum of 300*l.* was paid into court.

At the trial before Bayley, B., last spring assizes for the county of Lincoln, it was agreed to take the opinion of the jury as to whether there was a custom

beyond the common law with respect to buildings and fixtures : and whether there was a custom to allow an outgoing tenant one whole year's rent and rates of the land summer fallowed by him the year previous to his quitting. The jury found in favour of the latter and against the former custom, except as to buildings five or six inches in the ground, and crow fencing, which the jury thought a tenant had a right to remove. And then, by an order of *nisi prius*, a verdict for 500*l.* was taken for the plaintiff, subject to the award of a barrister, who was to order for what sum the verdict should be finally entered, and assess the damages between the parties, and was to inquire into several special matters relating to buildings, fixtures, &c., to which the plaintiff might lay claim at common law, or under the custom found by the jury. If either party, by affected delay or otherwise, prevented the arbitrator from proceeding, he was to pay such costs as the Court should think reasonable. In other respects, the order of *nisi prius* was silent on the subject of costs. The award was to be ready by the first day of the then next Trinity term.

The arbitrator, after reciting in his award the order of *nisi prius*, awarded to the plaintiff a sum beyond the sum paid into court, and directed that each party should pay his own costs of the arbitration, and the expense of the award equally between them. Upon taxation of costs, the prothonotary having, notwithstanding the terms of the award, allowed the plaintiff his costs of the arbitration,

* *Wilde*, Serjt., obtained a rule *nisi* for a review of the taxation, upon the ground that the plaintiff, under the order of *nisi prius*, was entitled to his costs in the *cause* only, and not to his costs occasioned by the reference, in awarding which the arbitrator had exceeded his authority. [*572]

Objection was also made to a charge for the attendance of one Smith, at the assizes, as a witness for the plaintiff, it being alleged that he was there in his capacity of attorney, conducting another cause. This, however, was denied by Smith.

Taddy, Serjt., who opposed the rule, contended, that upon a reference by order of *nisi prius*, the costs of the reference are costs in the cause, the referee standing in the place, and discharging the functions of the jury. He relied on *Tregoning v. Attenborough*, 7 Bingh. 733, where, in trover, a verdict was taken for plaintiff to the full amount of the goods converted, the plaintiff consenting to take them back in reduction of damages, upon its being referred to an arbitrator by an order of *nisi prius*, to ascertain the amount of deterioration, which amount, with the costs in the cause, were to be paid to plaintiff; and it was held, that the expense of witnesses attending the arbitration were costs in the cause. The same principle was acted on in *Mackintosh v. Blyth*, 1 Bingh. 269.

Wilde. In *Mackintosh v. Blyth*, the referee merely certified the amount of the verdict, and made no formal award; he might, therefore, be considered to supply the place of the jury, and the costs incurred before him to be costs incurred before the jury. In *Tregoning v. Attenborough*, the reference was exclusively in the case of the defendant, for without it the plaintiff might have *taken out execution for the full amount of the goods converted; but he consented to take instead, the goods themselves, and what should [*573] be found to be the amount of the damage done to them by the defendant. The defendant, therefore, impliedly undertook to defray the expense of that investigation. But in the present case, the arbitrator was to inquire into several matters collateral to the cause, upon which the parties might respectively have conflicting rights; as fixtures, the custom of the country, and the like. The costs of such an inquiry could not be called costs in the cause.

Our. adv. vult.

TINDAL, C. J. We agree in opinion that the prothonotary should review the taxation of costs in this case. The general rule in cases of reference is this, that where the order of *nisi prius* is silent upon the subject of the costs of

the reference and award, the arbitrator has no authority to adjudicate upon them, but each party must bear his own expenses and the half of the award. The case of *Tregoning v. Attenborough*, 7 Bing. 733, is distinguishable from the present. There the reference of the amount of the deterioration of the goods which the defendant had undertaken to deliver up, was consented to entirely and exclusively for the benefit of the defendant. If such reference had not taken place, the plaintiff might have taken out execution for the whole of the damages recovered by the verdict. The expenses therefore of such investigation were strictly and properly within the meaning of the parties' expenses in the cause, because the amount of the verdict of the jury was to be ascertained by such finding of the arbitrator. But here a very large field of inquiry was opened before the arbitrator, quite independent of the question at issue in the *574] cause. The parties have made a bargain with each other, consisting of many particulars, in which there is no mention of costs of the reference to be given by the arbitrator. On the contrary, the parties expressly stipulate, that if there is any wilful delay, either party shall pay such costs, not as the arbitrator, but as the Court shall direct. We think, therefore, that in this particular case, the costs of the reference do not follow the costs of the cause, but each party must bear his own costs, and half the award.

As to the objection taken to the allowance of Mr. Smith's costs and expenses, the prothonotary will at the same time, take into his consideration whether Smith attended at the assizes merely as a witness in this cause, or on any other account at the same time, and make the proper allowance under the circumstances. Rule absolute.

SMALL and Others v. MOATES. Jan. 17.

A lien on the lading of a ship having been expressly reserved to the owner by a charter-party, held that goods which the charterer purchased and put on board, and then transferred with a stipulation to convey them to their destination for a certain amount of freight, were, even as against an endorsee of the bill of lading, subject not only to that freight, but to the shipowner's lien for a balance due to him under the charter-party, whether possession of the ship was by the charter-party completely out of the shipowner and vested in the charter, or not.

THIS was an issue directed by the Court of Chancery, to try whether the plaintiffs, as endorsees of the bills of lading of certain rice and saltpetre, were at the time of the arrival of the ship *York* in the port of London, entitled to have from the defendant, as owner of the said ship, the possession of said rice and saltpetre, on payment of reasonable freight for the carriage thereof from *575] Calcutta. The plaintiffs maintained the affirmative of such issue. At the trial before Tindal, C. J., London sittings after Trinity term, 1831, a verdict was found for the plaintiffs, subject to the opinion of this Court upon the following case:—

The plaintiffs were merchants in London, and the defendant was, during the voyage, hereafter mentioned, owner of the ship *York*. In the month of March, 1827, a charter-party was entered into between the defendant on the one part, and Henry Richard Wilkinson, mariner, freighter of the said ship, of the other part, by which the said owner, for the considerations thereafter mentioned, agreed with the said H. R. Wilkinson that he the said H. R. Wilkinson should be and he was thereby accordingly appointed to the command of the said ship for and during the voyage and service thereafter expressed; and that the said ship should be found at the expense of the owner, with all stores, &c.; and that the said ship being so found, Wilkinson should be at liberty to load on board her in the port of London all such lawful goods as he might think fit, &c.; and should set sail and proceed with the same to such port or ports

in the East Indies as he might think fit, and there unload and reload all such lawful goods, &c., as he might think proper, and finally return to the port of London, when and where the said intended voyage and service was to end and be completed: the ship during the voyage was to be kept tight, &c., at the expense of the owner, who was to appoint one mate on board for and during the said intended voyage and service: in consideration whereof, and of everything above mentioned, Wilkinson agreed to *accept, receive, and take the said ship into his service* for a voyage from London to the East Indies and back to the port of London, and to take upon himself the command of the said ship, and navigate her to the best and utmost of his power, skill, and *ability; to take care of her for the owner; and that the said ship should be and remain in the service of him, Wilkinson, for the space of twelve calendar months certain, to be accounted from the day the ship should be ready to receive a cargo on board in the port of London, and to continue until her return to and being finally cleared inwards by his Majesty's officers at the same port of London: and further, that Wilkinson, his executors, or administrators, should pay, or cause to be paid unto the said owner, his executors, administrators, or assigns, freight *for the use or hire* of the said ship, at and after the rate of 12s. sterling per ton, register measurement, per calendar month, for and during the aforesaid space of twelve calendar months certain, to commence and be accounted as above mentioned; and at and after the like rate for all such further time (if any) as might be necessary to complete the said intended voyage, and until the return of the said ship to and being finally discharged in the port of London as above mentioned, or up to the day of her being lost, captured, condemned, or last seen, or heard of: such freight to be paid in manner following, that is to say, the sum of 1500*l.* part thereof in cash on the day the said ship should be cleared outwards at the custom-house in London on her said intended voyage; the sum of 1500*l.* further part thereof on the day the ship should be reported inwards at the same custom-house, by approved bill or bills payable at two months' date from that period; and the residue and remainder upon the final discharge of the said ship from her said intended service by the like bill or bills payable at two months' date from that period. Wilkinson further agreed to pay and defray all port charges, tonnage, dock dues, pilotage, and other charges that might attach to the said ship during her said intended service, and likewise *to find and provide a proper and sufficient crew of officers and men and boys to navigate and manage the said ship, and pay and defray the wages of such crew, and also furnish and provide at his own expense all provisions and other necessities for such crew during the said intended voyage and service, together with all coals, firewood, or other fuel, water, and all extra water-casks and dunnage, for the cargoes; and that upon the final discharge of the said ship in the port of London, he would well and truly deliver up unto the said owner, his executors, administrators, or assigns, the said ship, her boats, oars, stores, tackle, apparel, and furniture, agreeably to an inventory which should be made thereof previous to her sailing from the port of London, reasonable use, wear and tear excepted, together with her certificate of registry, and all other papers, vouchers, and documents in anywise belonging or relating thereto. Fifteen days to be allowed for repairs in case of accident; such repairs to be completed in the least possible time; Wilkinson thereby undertaking to act abroad in all such cases as the agent of the said owner and for his benefit, and to forward every necessary document to the said owner to enable him to recover any claim he might have on the underwriters of the said ship during her said intended voyage; to save harmless and keep indemnified the said owner and all other owners of the said ship and his or their respective executors, administrators, and assigns, from all claims and demands whatsoever for wages as well of him Wilkinson, as master or commander of the said ship, or of any other person acting as master thereof, as of any of the officers or crew of the said ship for and during the whole of the

said intended voyage and service; and also from all claims, penalties, and forfeitures to which the owners of the said ship might in any manner become liable in consequence *of any illegal act or acts to be done or committed by the commander, officers, or crew of the said ship during the said intended voyage. And lastly, it was expressly agreed and understood by and between the said parties thereto, that the right of ownership of the said ship should, during the continuance of the charter-party, remain firmly and be fully vested in the said owner, his executors, administrators, and assigns, *and that he and they should at all times during the said intended voyage and service have a full and complete lien upon the loading of the said ship as well for all losses and damages which the said owner, his executors, administrators, or assigns might sustain or be put to in consequence of the non-payment of any of the bill or bills to be given for freight as thereinbefore mentioned, as for all arrears of freight to become due under and by virtue of those presents*, and for seamen's wages, port dues, dock charges, bills drawn by the master, or other sums which ought to have been paid by Wilkinson, but which the said owner might have been called on for and been obliged to pay; and that the said owner, his executors, administrators, or assigns should have full power and authority to hold and retain the said goods until full payment, reimbursement and satisfaction of all such losses, charges, damages, and arrears of freight, and other sums paid for on account of Wilkinson, and which he of right ought to bear, pay, and sustain agreeably to the tenor, true intent and meaning, of the charter-party. And to the true performance of all and every the promises and agreements therein contained, on the part and behalf of the said parties respectively, they bound themselves, their heirs, executors, and administrators, each unto the other of them (especially the said owner, the said ship or vessel her freight and *579] appurtenances, and the said freighter, the *goods to be laden in her), in the sum of 3000*l.* of lawful money, firmly by those presents. In witness whereof, &c.

The ship sailed upon the voyage in the East India private trade, with Wilkinson as master and commander, and arrived at Calcutta on the 26th of December, 1827. The outward cargo being discharged, Wilkinson endeavoured to procure a homeward cargo: he shipped on freight to a large amount, but could not get a sufficient quantity to complete his cargo; and in January, 1828, he purchased the rice and saltpetre in question as dead weight, and paid for them in bills at two months' sight. When the bills were nearly due Wilkinson had no funds to meet them, and apprehending that he or the ship might be detained by process from the Supreme Court if the bills were not paid when due, to enable him to pay for the goods he applied to and agreed with Messrs. Boyd, Beeby, and Co., merchants at Calcutta, for an advance of 800*l.* upon the security of the said rice and saltpetre. In pursuance of that agreement, Wilkinson made and endorsed the following bills of lading, and delivered the same to 'Boyd, Beeby, and Co. "Shipped, by the grace of God, in good order and well conditioned, by H. R. Wilkinson, in and upon the good ship called the York, whereof is master, under God, for this present voyage, H. R. Wilkinson, now riding at anchor in the Hoogly, and by God's grace bound for London, to say, one thousand and fifty bags of rice, two hundred bags of saltpetre, being marked and numbered as in the margin, and are to be delivered in the like good order and well conditioned at the aforesaid port of London, the act of God, the king's enemies, fire, and all and every other dangers and accidents of the seas, rivers, and navigation of whatever nature and kind soever, excepted, unto order, or to *580] assigns, he or *they paying freight for the said goods at 1*s.* 6*d.* per ton of twenty cwt., with average accustomed. Dated in Calcutta, 18th of March, 1828, Henry R. Wilkinson."

In further pursuance of the said agreement, Boyd, Beeby & Co. advanced to Wilkinson the sum of 800*l.* upon the aforesaid security (which was applied in discharge of the bills he had so given for the rice and saltpetre), and Wilkin-

son handed to Boyd, Beeby, and Co. a bill of exchange for 800*l.*, dated Calcutta, 18th of March, 1828, drawn by Wilkinson on Small and Co. of London, and payable at six months' sight.

Boyd, Beeby, and Co. likewise paid 36*l.* for premiums of insurance on the said goods from Calcutta to London, for the repayment of which, they, by the direction of Wilkinson, drew upon the plaintiffs a bill for that amount.

Boyd, Beeby, and Co., in the usual course of business, endorsed and transmitted the said bills of lading to the plaintiffs as a security for the repayment of the amount for which the said bills of exchange were drawn upon them. The plaintiffs paid the two said bills of exchange, when due, upon the security of the bills of lading aforesaid.

Wilkinson could not have got the money if he had subjected the goods to any higher freight. He himself made the offer to the house of Boyd, Beeby, and Co. that those goods should be shipped at that low freight, it being unusual for merchants or other persons than ship-owners, to ship rice, because it rarely pays more than the freight.

The ship arrived in the East India Docks the 16th of September, 1828, and the rice and saltpetre were landed and lodged in the custody of the East India Company, and were sold by them with the consent of all parties, and without prejudice, for 1157*l.* 11*s.* 5*d.*

*On the 25th of September, 1828, a commission of bankrupt issued against Wilkinson, under which he was found and declared a bankrupt. [*581]

Wilkinson was indebted to the defendant for freight under the charter-party,

£980 3 9

And the defendant paid for seamen's wages and other charges, 768 4 11

Total,

£1748 8 8

The question for the opinion of the Court was, whether the plaintiffs, upon payment of reasonable freight in respect of those goods, were entitled to the possession of them as *bonâ fide* endorsees for value of the bills of lading: or, whether the defendant, as owner, had any lien in respect of the whole moneys due under the charter-party, which must prevail against the plaintiffs' claim: and a verdict for the plaintiffs or the defendant was to be entered accordingly. The case was argued last Trinity term, by

Coleridge, Serjt., for the plaintiffs. Whatever rights the ship-owner may have, under this charter-party, against goods which are the property of the charterer, the endorsee of this bill of lading ought not to be deprived of the rights he acquires under it by any special clause of lien in a charter-party, of which he can have had no notice. The party to whom freight is due appears on the bill of lading; so that the owner or endorsee of the bill is entitled to receive the goods upon proof of payment of the freight, even though the bills have been erroneously signed as for freight paid. *Howard v. Tucker*, 1 B. & Adol. 713. Independently of the special clause, the *right of the ship-owner [*582] to detain goods for freight is his lien, arising from legal implication.

There can be no lien, however, without possession, and upon this charter-party it appears that the possession of the vessel passed out of Moates to Wilkinson. For the Court does not rely upon a single expression, but looks to the effect of the whole instrument. Wilkinson fills the double situation of captain and charterer. He is called the freighter—is to load a cargo on board—to find pay and provision for the crew—to take the ship into his service, and to pay freight by time, not for goods, but for the use and hire of the vessel by measurement: he is to pay all port and other charges, and after the voyage to deliver up the ship. And notwithstanding the clause that the right of ownership and lien shall remain in Moates, the construction of the charter-party must turn upon the intention to be collected from the whole instrument. In *Hutton v. Bragg*, 2 Marsh. 339, a part of the ship was reserved to the master, who, as well as the crew, was appointed by and paid at the expense of the owner; and

yet because the whole object of the voyage was for the use of the charterer, he was held owner for the time. *Tate v. Meek*, 8 Taunt. 298, was not decided so much upon the fact of possession as upon the circumstance that, independently of the charterer's possession, the owner was to have a lien, and the shipper of goods was to pay freight on the delivery of the goods *as per charter-party*, which affected him with notice of the charter-party. *Yates v. Railston and Yates v. Meynell*, 8 Taunt. 298, were decided on the same ground. In *Christie v. Lewis*, 2 B. & B. 410, it was held that the possession did not pass: Dallas, C. J., *dissentiente*. But there the master was to receive and deliver the goods, and *583] the ship was navigated at the *owner's expense. Here Wilkinson covenants to take and deliver the ship, and to defray the expense of the navigation; and the stipulation that the right of ownership shall remain in Moates cannot contravene the effect of the whole instrument, with which it is wholly incompatible; as, "*let to hire*" was, with the effect of the instrument in *Christie v. Lewis*.

In *Abbott on Shipping*, 191, it is laid down: "Although the ship and freight are by the terms of a charter-party expressed to be bound to the performance of the covenants on the part of the owners or master, and this is conformable to the maritime law; yet, as I have before observed, there does not appear at present any mode of obtaining in this country the benefit of the security of the ship itself in specie for the performance of such a contract made here. It seems also that the operation of such a clause, as a lien on the cargo, must be restrained to enforcing the payment or security of sums capable of being ascertained by computation, and which are, according to the terms of the instrument, properly payable in some form on the delivery of the goods, and that it is not to be applied to the breach of a covenant, which gives an action for unsettled damages, as a covenant to furnish a full lading. It has been held that the master could not detain the cargo for the breach of a covenant to furnish a full lading, nor for demurrage, in a case where the charter-party did not contain this clause; and nothing was said in argument as to the omission of it. Neither can the owners in all cases have the full benefit of this clause as giving a lien on the cargo for the payment of what is usually denominated freight." And he cites *Paul v. Birch*, 2 Atk. 621, where two persons, who were factors, hired *584] a ship of one Paul at the rate of 48*l.* per month, and *executed a charter-party, by which the goods to be put on board were made liable to him, and they had power to appoint the master and mariners. Some merchants in the West Indies loaded the ship with goods, and allowed the factors 9*l.* per ton for the carriage. The factors who had thus chartered the ship in their own name, became bankrupts: Paul instituted a suit in the Court of Chancery to compel the merchants to pay him for the hire of the ship, insisting that they were liable to do so by reason of this clause in the charter-party. But Lord Chancellor Hardwicke decided that he should recover of them no more than they had engaged to pay the factors for the freight, and that they were not liable to make up the deficiency to him. His Lordship observed, that by the general law the cargo is liable to pay the freight, but that in this case the 48*l.* per month was improperly termed the freight of the goods, being rather the hire of the ship; that the factors had made an agreement with the master on their own account, and not on the part of the merchants, and therefore the merchants were not liable; otherwise they would be in the hardest case imaginable, for they would be liable to any private agreement between the occupier of a ship and the original owners of it. "A person," said his Lordship, "that lets out a ship to hire ought to take care that the hirer is a substantial man; it is his business to look into this; and if the persons who hire are not competent, the master must suffer for his neglect. Whatever hardship, therefore, there may be on the one hand to the person who lets out to hire, the hardship is much greater on the other side; and what gives additional weight to the merchants' case is the great convenience this gives to trade in general."

In *Mitchell v. Scaife*, 4 Campb. 298, a ship was chartered for a *particular voyage for a gross sum by way of freight. The captain signed [*585 bills of lading for the cargo (which was the property of and consigned to a third person), specifying a rate of freight amounting to a less sum than that mentioned in the charter-party. It was held that the ship-owner had no lien on the cargo beyond the freight specified in the bill of lading. In *Watson v. Rawson*, under similar circumstances (N. P., coram Lord Tenterden, Feb., 1831), the claim for freight was in like manner limited to the amount due upon the bills of lading. Nothing but the special clause distinguishes this case from that and the preceding. But the general law cannot be restrained, as to third persons, by an agreement between owner and charterer, otherwise there is an end of the transfer of bills of lading by endorsement.

Taddy, Serjt., *contra*. The special clause is compatible with the rest of the instrument, and sufficiently distinguishes this from the cases cited: in all of them the only question was as to the existence of the right of lien; but no such question can arise here, because it is specially reserved to the ship owner. *Christie v. Lewis* turned on the words *let and take to hire*, the absence of which had been adverted to in *Saville v. Campion*, 2 B. & Ald. 503. In that case (1819,—*Scaife v. Mitchell* was in 1815—), by charter-party it was covenanted, that the owner should receive on board, in London, all such goods as the freighter thought fit to load, and should proceed therewith to Madras, and there, after delivering his outward cargo, receive from the freighter's agents a homeward cargo, and deliver the same in London; and that all the cabins, but one, which was reserved for the use of the captain, should be at the disposal of the freighter, who was to *appoint a supercargo to superintend the stow- [*586 age of the goods. Freight was to be paid at so much per ton on the register tonnage of the ship. The captain and crew were paid by the owner. It was held that, there being no express words of demise of the ship itself in the charter-party, the freighter did not thereby become the owner for the voyage; but that the possession continued in the owner, and that he, therefore, had a lien upon the cargo for his freight. In *Faith v. East India Company*, 4 B. & Ald. 630, by a charter-party, freight was agreed to be paid for the use or hire of the ship at a certain rate per ton, for a voyage out and home, in manner following, viz., a certain sum in advance on the ship's clearing outwards, and the residue half in cash and half in approved bills, upon the delivery of the homeward cargo; the owner also appointed C. S. master, at the request of the charterer, who executed a bond, conditioned for the faithful performance of the master's duty; and the owner expressly instructed C. S. to be careful to sign all bills of lading with the clause, "freight payable as by charter-party:" the ship was consigned to C. & Co., in Calcutta, by whom she was put up, for her homeward voyage, as a general ship, and different merchants shipped goods by her, C. & Co. taking for homeward freight, bills payable sixty days after delivery of the cargo; and a new master having been appointed by C. & Co., in conjunction with C. S., signed bills of lading with the clause, "paying freight agreeable to freight-bill:" the freight bills were made payable in London to B. & Co., to whom the charterer was indebted for advances on the outward cargo, and who, as well as C. & Co., were cognisant of the terms of the charter-party; and it was held, that the owner of the ship had a lien on those goods to the extent of the homeward *freight. And, per Abbott, C. J., "As to the [*587 sub-freighters, who were wholly unconnected with the charterer, it was quite immaterial to whom they pay the freight due for the conveyance of their goods; and as to the goods shipped by C. & Co., they must either stand in the same situation as those of the other freighters, or, if considered as the goods of charterer and master, must be liable to pay the freight as per charter-party."

Then, if such be the construction of the charter-party from *Moates*, the endorsement of the bills of lading makes no difference. In *Watson v. Rawson*, Lord Tenterden may have thought the owner of the goods was exempt by a

previous contract. In *Christie v. Lewis, Burrough, J.*, says: "It has been urged, that the persons who put the goods on board at Demerara (on which this freight arose), were strangers to the charter-party. In answer to this, I am of opinion, that they cannot be so considered: for the goods to be shipped at Demerara, were, by the charter, to be such as the freighter or his agents should send. The shipper of these goods, therefore, must be taken to have acted under the authority of the freighter, and must be deemed to have notice of the charter-party and its contents." And *Richardson, J.*, said, "By the law of England and all commercial countries, the owner of a ship has a lien on the cargo for his freight; and this doctrine is laid down in many well-known books of authority. Agreements may, undoubtedly, be entered into by which the owner may consent to relinquish this right, but the mere circumstance of his entering into an agreement, touching the mode in which he shall be paid for freight, will not, of itself, divest him of his right to lien; that can only be excluded by express terms." The shippers here should have inquired for the charter-party. If they omit to do so, they come in under the charter-party, and their rights are not higher than the charterer's.

*588] *Coleridge*, in reply. The object of the special clause is, to give Moates a lien for those charges for which he would have been liable if he had been in possession: as port charges, pilotage, and the like: that is, in case *Wilkinson* should fail to pay them, pursuant to his contract. In *Savile v. Campion*, Lord Tenterden examines the charter-party clause by clause, and sums up: "So that there is not any one act to be done on board the ship by the freighter or his agents, except the stowage of the goods, which is specially provided for; and this special provision, as well as the clause relating to the cabins, would be unnecessary, if it had been intended that the freighter should have possession of the ship; because, in that event, he might stow and place goods and persons as and where he himself should choose, unless restrained by some special contract on his part." *Mitchell v. Scaife* is recognised in 1821, in *Faith v. East India Company*, in which case, all parties were consensual of the terms of the contract. And though *Wilkinson* might have no right to claim the goods in question exempt from lien, it does not follow that he may not confer a clear title on another. In *Watson v. Rawson*, Lord Tenterden did not decide on the ground of any previous contract. *Cur. adv. vult.*

TINDAL, C. J. The question stated upon the pleadings in this issue is, "Whether the plaintiffs as endorsees of certain bills of lading of certain rice and saltpetre which had been shipped by one Henry Richard Wilkinson on board the *York*, in the river Hoogly, at Calcutta, and conveyed therein to the port of London, were, at time of the arrival of the said ship in the port of London, entitled to demand and have from the said defendant as owner of the said ship the possession of the said goods and merchandise upon payment or tender to *589] the said *defendant, as such owner, of certain reasonable freight for the carriage and conveyance of such goods and merchandise from Calcutta to London." And after consideration of the facts stated in the special case, as also of the arguments urged before us on the part both of the plaintiffs and the defendant, we are of opinion that the plaintiffs are not entitled to the possession of the rice and saltpetre, on the payment of reasonable freight for the carriage and conveyance of the same from Calcutta to London, but that the defendant, the owner of the ship, is entitled to retain the same for the whole of the freight and other payments due to him, under the express reservation contained in the charter-party.

Whether upon the proper construction of the charter-party under which this vessel sailed, the possession of the vessel was completely taken out of the defendant and vested for the time in the master, who was also the charterer of the vessel, as contended on the part of the plaintiffs; or whether, as contended on the part of the defendant, the possession of the master, notwithstanding his being also the charterer, and notwithstanding the peculiar terms of the charter-

party, still continued to be the possession of the ship-owner; would have been a question which must of necessity have been determined by us in order to decide the right of lien set up on the part of the defendant, if there had not been an express agreement between the parties as to this right of lien, inserted in the charter-party itself. The charter-party states "that it is expressly agreed and understood between the parties that the ownership of the ship during the continuance of this charter-party shall remain firmly, and be fully vested in the said owner, and that he shall at all times during the said intended voyage and service, have a full and complete lien upon the lading of the said ship, as well for all losses and damage which the said owner may sustain or be put to in *consequence of the non-payment of any of the bills, to be given for [590 freight, as for all arrears of freight, &c.; and shall have full power and authority to hold and retain the said goods until full payment of all such losses, charges, damages, and arrears of freight paid for or on account of the said H. R. Wilkinson, and which he of right ought to bear and pay agreeably to the true intent of the said charter-party." And after so full and unequivocal a declaration of intention that the owner shall retain the right of lien upon the lading of the vessel, we think it unnecessary to discuss whether such consequence would, or would not have followed from the relation in which the parties have placed themselves with respect to each other by the other provisions of the charter-party. An express contract is the strongest and surest ground upon which the right of lien can in any case be placed: and in this charter-party the charterer has in effect covenanted with the ship-owner, that whatever may be the legal operation of the charter-party, as between themselves, the charterer's possession of the ship shall be the possession of the owner, so far as the right of the latter to a lien on the cargo is in any way concerned. It is contended, however, on the part of the plaintiffs, that, admitting such right of lien to exist with respect to so much of the lading as was the property of the charterer, no such lien can extend to any part of the lading on board the vessel which was the property of third persons: that in the present case the rice and saltpetre are the property of the plaintiffs, who became the endorsees of the bill of lading, for a valuable consideration, without notice of the terms of the charter-party; and, consequently, that they stand in the same situation as any shipper, whose goods are put on board under a bill of lading, and who is entitled to receive them after the voyage is performed upon tendering the freight mentioned in the bill of lading, without *being affected by any private [591 agreement between the charterer and the owner of the ship. That a shipper putting his goods on board the ship, as a general ship, upon the faith of a bill of lading signed by a person whom the owner has allowed to bear the character of master, would be entitled to receive his goods at the end of the voyage upon payment of the freight reserved by the bill of lading, may be readily admitted, as well upon the reasonableness of the proposition itself, as upon the authority of the decided cases referred to by the plaintiffs in the course of the argument. No question, however, arises in this case, as to goods the property of third persons, originally loaded by them on board the ship; all such goods having been duly delivered, so far as appears, to the consignees, or the endorsees of the bills of lading. But the present case is reduced to the single inquiry, whether, under the circumstances stated in the special case, the rights of the plaintiffs, with respect to these goods, are the same (as contended for them), as the rights of an endorsee for a valuable consideration of a bill of lading given to a shipper, who has loaded his goods on board the ship, as a general ship, and without notice of any agreements between the charterer and the owner of the ship: and we are of opinion that the rights of the plaintiffs are not the same with the rights of shippers under the circumstances above supposed. In the present case the rice and saltpetre were purchased by Wilkinson, the master of the ship, and shipped by him as dead freight on his own account in January, 1828. From the moment these articles were loaded

on board, the lien of the defendant attached upon them for the freight and other payments, due to him, under the express contract contained in the charter-party. If the master had sold this cargo of rice and saltpetre to a third person, *592] but still retained it in his possession on board the ship, to be *carried to London, it is difficult to state the principle upon which this lien, once vested in the ship-owner, should have become divested from him by such sale. Where goods are put on board a general ship under a bill of lading, and the owner of the ship has by the charter-party reserved to himself a lien upon the goods laden on board the ship, for his freight due under the charter-party, he has such lien to the extent of the freight due for these particular goods under the bill of lading, whether the goods remain the property of the same person during the voyage, or are sold, before delivery, to a stranger: or, in other words, the extent of the ship-owner's lien remains unaltered, whether the bill of lading is endorsed to a third person for a valuable consideration, or the goods are deliverable to the original consignee. And upon the same principle it would seem to follow that if the lading of the ship belongs to the charterer, and such lading is subject to the ship-owner's lien for the freight reserved by the charter-party, such lading if it be sold by the charterer after it is put on board, would pass to the purchaser, subject to the lien which the ship-owner had before the sale.

Such would have been the case if Wilkinson had transferred the property in the cargo by an actual sale. But, looking at the whole of this transaction, it appears to us that it is not, in any point of view, a sale by Wilkinson to the *plaintiffs*, nor can the plaintiffs be considered as endorsees of the bill of lading for a valuable consideration. The whole of the transaction by which the property was altered took place at Calcutta, between Boyd, Beeby & Co. on the one part, and Wilkinson, the charterer of the ship, on the other part. The plaintiffs were entire strangers to any part of the transaction; and have no other concern in it except as agents and correspondents of Boyd, Beeby & Co., upon whose title, and whose title only, they can stand.—For the bill of lading was *593] *endorsed by Boyd, Beeby & Co. to the plaintiffs for no other purpose than to enable them, out of the proceeds of the rice and saltpetre, to pay the amount of the bills of exchange drawn upon them by Wilkinson in favour of Boyd, Beeby & Co. for the sums advanced by the latter to Wilkinson. If, therefore, the plaintiffs are unable, from a defect in the title of Boyd, Beeby & Co., the endorsers of the bill of lading, to retain the proceeds of these goods in satisfaction of the bills of exchange drawn upon them, they may repay themselves the amount of the money so paid to the use of Boyd, Beeby & Co., out of other funds in their hands, if any, or may recover it back by action against Boyd, Beeby & Co.

The case, therefore, must be considered as if Boyd, Beeby & Co. were the plaintiffs on the record, and the question as to these parties will turn upon this point, what is the real character of the transactions at Calcutta? And it appears to us that it amounts in substance to an assignment by Wilkinson to Boyd, Beeby & Co. of the bags of rice and saltpetre then laden on board, and being his property, as a security for the payment of 800*l.* which had been advanced by them to him. The case states in terms that Wilkinson applied to Boyd, Beeby & Co. for a loan of 800*l.* upon the security of the rice and saltpetre, and that the bill of lading was made and endorsed to them in pursuance of that agreement; that the 800*l.* was advanced under such agreement; and that the bill of lading was endorsed to the plaintiffs as a security for the repayment of the amount of the bills drawn on the plaintiffs. The whole transaction, therefore, was a security, and nothing more. But if a formal assignment by way of mortgage had been actually made, such assignment must have been subject to the owner's lien which had already attached, and was then actually existing: for Boyd, Beeby & Co. claiming under Wilkinson, could

only take what he could legally grant; that *is, the right to the cargo, subject to the ship-owner's lien for the freight and other payments due under the charter-party. [*594]

It has been urged in argument, that this construction throws a considerable hardship on Boyd, Beeby & Co., who acted in ignorance of the existence of any charter-party, or of the reservations thereof. But it seems a sufficient answer, that a very little inquiry on their part would have been sufficient to enable them to discover the rights of the ship-owner reserved by the charter-party. It was surely no more than what common attention to their own interest required, to make some inquiry as to the terms on which the master's goods were to be carried, before they advanced money on the security of the goods; more particularly when the very form of the bill of lading, signed by Wilkinson as master, by which he appears to be also the shipper of the goods, and to make them deliverable to his own order on payment of certain freight, was calculated to provoke some inquiry as to the exact relation in which Wilkinson stood with respect to the ship.

But whatever may be the hardship on either party, this case is to be determined by reference to their strict legal rights; and as it appears to us that the title of the defendant, as ship-owner, to a lien on these goods, is prior in point of time to that of the plaintiffs', as endorsees of the bill of lading for the purpose of securing advances made to the master, we think the defendant's lien is to be preferred to the plaintiffs' title under the endorsement, and, consequently, that the verdict should be entered for the defendant.

Judgment for the defendant.

*HAGUE v. LEVI. Jan. 21.

[*595]

Affidavit to hold to bail for 50*l.*, for money had and received to plaintiff's use, and money lent by plaintiff, without distinguishing how much is due on one account and how much on the other, Held sufficient.

Jones, Serjt., moved to discharge the defendant on entering a common appearance, for a defect in the affidavit to hold to bail, which did not disclose the plaintiff's residence, and alleged that the defendant was indebted to the plaintiff in the sum of 50*l.* for money had and received to the plaintiff's use, and for money lent by the plaintiff, without distinguishing how much was due on the one account and how much on the other.

But the Court thought the affidavit sufficient, and *Jones* Took nothing.

MARSHALL v. PITMAN. Jan. 23.

Where a party, having no stock in trade, is rated as an inhabitant of a parish, his remedy is by appeal to the quarter sessions. Replevin does not lie for a distress under such a rate.

THIS was an action of replevin by the plaintiff for taking his goods. The defendant justified the taking, as a distress for a poor rate, under the 43 *Elix.* c. 2.

At the Summer assizes for the county of Somerset 1832, a verdict was found for the plaintiff, damages 1*s.*, subject to the opinion of this Court on the following case:—

The plaintiff was a surgeon and apothecary, and an inhabitant and the occupier of a house in the parish of Shepton Mallett. The plaintiff was rated to

*596] the relief of the poor of the said parish in four several rates: the *first made on the 29th September 1831, the second on 16th November, the third on the 28th December in the same year, and the fourth on the 15th February 1832. The form of the assessment was as follows:

"An assessment for the relief of the poor on the 29th day of September 1831, at 1s. in the pound:—P. B. Marshall, or occupiers,—house and garden, 1l. 16s. P. B. Marshall, profits on stock in trade, 13s."

"16th November, P. B. Marshall, occupier,—for house and garden, 1l. 16s."

Same date—"assessment on the inhabitants of Shepton Mallett, on their stock in trade or personal property.—P. B. Marshall, apothecary, 13s."

28th December 1831,—the same, verbatim, as the assessment of 16th November.

15th February 1832,—the same, verbatim, as the assessment of 16th November.

These several rates were duly made, allowed, and published, and the several sums duly demanded of the plaintiff. The plaintiff paid the several assessments on him as occupier, but refused to pay the several sums of 13s. according to the other assessments, and there was no evidence of his having appealed against any of the rates to the quarter sessions in due form of law. Upon such refusal, a warrant of distress was issued for the last-mentioned sums. The plaintiff's goods were seized under such warrant, and replevied by the plaintiff.

At the time of making the rates in question, the plaintiff was an inhabitant of the said parish, and carried on an extensive business as surgeon and apothecary, and had a stock of drugs and medicines which he dispensed to the patients whom he attended as apothecary, but did not sell them to any other persons. He made up the prescriptions of physicians for patients whom he attended *597] jointly with such physicians, but not for any *one else. He had no shop open to the street, nor had he any personal property or stock in trade in respect of which he was liable to be rated, unless the stock of drugs and medicines made him liable. Although the last three rates were expressed to be on the inhabitants, on their stock in trade or personal property, yet, in fact, no personal property, except stock in trade, was included in the rate.

The case set out a copy of a bill of the plaintiff's, with several items, delivered to one of his patients, for pills, draughts, powders, and mixtures; to another, for attendance, applications, cure of fractured arm, pills and mixtures; and to a third, for bleeding, pills, draughts, powders, mixtures, blisters, introducing a catheter into the bladder, and ointment. The inhabitants of the parish of Shepton Mallett had been rated in respect of their stock in trade for upwards of the last 100 years up to the time of these several rates. During all that time, surgeons and apothecaries, inhabitants of the parish, had been rated for their stock of medicines and drugs in the same manner as the plaintiff was in the said several assessments, and such sums had been paid. In the years 1829 and 1830 the plaintiff was a partner with one John Mines, a surgeon and apothecary at Shepton Mallett; and during that time, they were jointly rated for their profits on their stock in trade as such apothecaries; and such assessments were paid. J. Mines died in November 1830, and the stock of drugs, medicines, and bottles, to the value of 100l., was removed from the place of business of Mines and the plaintiff, to the place of business of plaintiff; and the counter, drawers, and shelves, were also removed to the same place. A Mr. Edgar, at the trial, proved that he was a surgeon and apothecary, and had resided in the parish for twenty-five years; that during that time he had been *598] rated to the relief of the poor for the *medicines and drugs which he kept as apothecary, and had paid those rates. He made a profit on his drugs, which he sold generally only to his patients, and not by retail: if families, who were his patients, at other times wanted medicines, he sold them; but never to strangers. In one of his residences he had a shop open to the street.

The questions for the opinion of the Court were, first, whether the plaintiff could maintain this action, he not having appealed to the quarter sessions: if not, the verdict was to be for the defendant. Secondly, whether the plaintiff, under the above circumstances, was liable to be rated: if he was so liable to be rated, the verdict was also to be for the defendant. Either party to be at liberty to turn the case into a special verdict.

The case was argued by *Wilde*, Serjt., for the plaintiff, and *Merewether*, Serjt., for the defendant. It will be convenient to begin with the

Argument for the defendant. This action does not lie against the defendant. The plaintiff's remedy, if he be aggrieved by the rate, is by appeal to the court of quarter sessions. By the 43 Eliz. c. 2, s. 1, it is enacted, that the overseers of every parish "shall take order from time to time, by and with the consent of two or more justices of peace,—to raise weekly, or otherwise (by taxation of every inhabitant, parson, vicar, and other, and every occupier of lands, &c.—in such competent sum and sums of money as they shall think fit),—competent sums of money for and towards the necessary relief of the lame, impotent, old, &c.—to be gathered out of the same parish, according to the ability of the same parish."

Had the plaintiff been neither an inhabitant of the parish, nor an occupier of land, &c., within it, the defendant would have been acting without jurisdiction. But it is found that the plaintiff was an inhabitant; the *magistrate therefore, whether the plaintiff possessed personal property or not, acted within his jurisdiction, in consenting that the plaintiff should be put on the rate in respect of such inhabitancy, and if the plaintiff had no personal property, or was rated too highly, his only course was to appeal against the rate; for inhabitants are to be rated according to their ability. *Rex v. Gosse*, 7 B. & C. 60. In *Milward v. Caffin*, 2 W. Bl. 1330, the plaintiff was rated for lands not in his occupation; the justices therefore had no jurisdiction, and the action might well lie. So, in *Lord Amherst v. Lord Somers*, 2 T. R. 372, the plaintiff had been rated for the occupation of stables which had not been used by him, but by a troop of horse-guards. In like manner, if the rate be altogether a nullity, as for want of publication or otherwise, the justices are without jurisdiction: *R. v. Newcomb*, 4 T. R. 368. But in *Hutchins v. Chambers*, 1 Burr. 587, Lord Mansfield says, a mere defect in the rate, unappealed from, does not avoid the warrant of distress. In *Bonnell v. Beighton*, 5 T. R. 182, where an inclosure act gave commissioners power to set out and make roads, &c., and directed that the expenses of making and repairing those roads, and all other expenses should be borne by the proprietors in certain proportions, to be ascertained by the commissioners in one general rate, and then gave an appeal to the sessions in all cases where the parties should think themselves aggrieved; it was held, that an objection to the rate on account of the commissioners having expended money on an improper object, could not be tried in an action of trespass, but that the party aggrieved must appeal to the sessions. The same principle was recognised in *Cortis v. Kent W. W. Company*, 7 B. & C. 314, and *Fawcett v. Fowles*, 7 B. & C. 394. In **Durrant v. Boys*, 6 T. R. 580, it was held, that if a person rated to the poor had any ob-
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[600]

jection to the rate, e. g., that it was made for six months, he must appeal to the next sessions; and if he did not appeal, he could not bring trespass against those who distrained on him for non-payment of the rate.

At all events, the plaintiff's drugs and medicines constituted a stock in trade, or visible personal property yielding a profit, for which he is liable to be rated. Surgeons and apothecaries retail their drugs at a higher price than they buy them, and the application of skill in compounding medicines no more exempts the materials from rateability, than the application of the shoemaker's skill exempts the leather which forms his stock in trade.

Argument for the plaintiff. The plaintiff was liable to be rated, and within the defendant's jurisdiction, not as an inhabitant simply, but as an inhabitant

having ability to contribute to the rate. If he had no ability, he was not liable to be rated, and not within the defendant's jurisdiction. But he had no ability, unless his medicines constituted stock in trade; and they are no more stock in trade than the ink and parchment of a lawyer, or tools of a mechanic. They are mere accessories to personal skill, which cannot be the subject of a rate: *R. v. Startifant*, 7 T. R. 60. Stock in trade constitutes the ability of the occupier; and if the justice is without jurisdiction where a party is rated in respect of premises which he does not occupy, so he is without jurisdiction where an inhabitant is rated in respect of ability which he does not possess; in the

*601] one case as in the other, there is nothing on which the rate can attach. **Milward v. Caffin*, therefore, and *Lord Amherst v. Lord Somers*, are cases in point for the plaintiff. The rate being without objection, is a nullity, and cannot be enforced, even though confirmed on appeal. *R. v. Newcombe*. Although therefore an appeal may lie against a rate, a party aggrieved by it is not in all cases precluded from proceeding by action. If it were otherwise, he might be without redress where an improper rate is confirmed on appeal. But wherever the rate is a nullity, the justice is without jurisdiction, and an action lies if he issues a warrant of distress. The quantum, indeed, or any overcharge in the rate, is only to be controverted by an appeal to the quarter sessions. *Nolan*, 257 (4th ed.)

TINDAL, C. J. The first question upon this case is whether the plaintiff can maintain this action, not having appealed to the court of quarter sessions against the rate: and that involves the question, whether the magistrates had jurisdiction to make the rate, because if they had, that rate was a subject of appeal. Looking at the words of the statute of 43 Eliz. c. 2, s. 1, I am of opinion the magistrates had jurisdiction. The words are that the overseers of every parish "shall take order from time to time, by and with the consent of two or more justices of the peace—to raise weekly or otherwise (by taxation of every inhabitant, parson, vicar, and other, and of every occupier of lands, &c.,—in such competent sum and sums of money as they shall think fit),—competent sums of money for and towards the necessary relief of the lame, impotent, old, &c.,—to be gathered out of the same parish, according to the ability of the same parish."

To rate in such sum as they shall "think fit" does not import that they have a power to rate arbitrarily, but to rate the occupier according to the value of his

*602] occupation, the inhabitant according to his visible personal property; *and in order to determine whether the magistrates had jurisdiction we have only to see whether the defendant was inhabitant or occupier. In *Milward v. Caffin*, it was a dry question of fact whether the defendant was an occupier; for it was admitted that if he were, the quarter sessions had jurisdiction in the matter. So here, we must see whether the defendant is an inhabitant; for if he be, the rate is a question of amount for the sessions. It is admitted that if he had the smallest amount of property to be rated, his proper course would be by appeal to the quarter sessions; but it is contended that where he has nothing rateable he is entitled to proceed by action. But the sounder distinction seems to be, that as an inhabitant possessing visible personal property, he is liable to be placed on the rate, although his rateable property turns out afterwards to amount to nothing. This is the ground of my opinion, which renders it unnecessary to decide the second point.

PARK, J., concurred.

BOSANQUET, J. I am of the same opinion. It is admitted that one question is, whether or not there has been an excess of jurisdiction. By the statute of Eliz. the overseer is required to "take order from time to time, by and with the consent of two or more justices of peace,—to raise weekly or otherwise (by taxation of every inhabitant, parson, vicar, and other, and every occupier of lands, &c.,—in such competent sum and sums of money as they shall think fit),—competent sums of money for and towards the necessary relief of the lame,

impotent, old, &c.—to be gathered out of the same parish, according to the ability of the same parish.”

The plaintiff was an inhabitant and possessed personal property; but whether he was of ability to pay rates was a matter for the judgment of the overseers, subject to an appeal to the quarter sessions. From that decision there *might have been a case to the King’s Bench. This Court cannot over- [603] look those circumstances, and therefore I am of opinion the action does not lie.

ALDERSON, J. I am of opinion this action does not lie. The real question is, whether the justices have jurisdiction in the matter; if they have, the course of proceeding is by appeal, subject to a case to the Court of King’s Bench. The act says, that the overseers of every parish “shall take order from time to time, by and with the consent of two or more justices of the peace,—to raise weekly or otherwise (by taxation of every inhabitant, parson, vicar, and other, and every occupier of lands, &c.,—in such competent sum or sums of money as they shall think fit),—competent sums of money for and towards the necessary relief of the lame, impotent, old, &c.,—to be gathered out of the same parish, according to the ability of the same parish.”

That explains the case of *Milward v. Caffin*, in which the plaintiff, who had been rated as an occupier, was proved not to be such.

It is contended that the plaintiff is not rated as an inhabitant simply, but as an inhabitant with stock in trade, and that if he has no stock in trade it is gross injustice to treat him as a person liable to be rated. But the existence of the jurisdiction is one thing, and the mode of exercising it another, and if the plaintiff be an inhabitant he is within the jurisdiction of the justices. This case would go great lengths if we were to decide that every inhabitant could not be rated. Before the late act, it was a grave question whether a party might not insist on being rated, though only a lodger, in order to obtain a vote.

I give no opinion on the second point. But on the first, as we are not the Court to which the appeal should be made, our judgment must be for the defendant.

Judgment for the defendant.

*BANCKS v. CAMP. Jan. 23.

[604]

Averment, that the defendant, who had made a note promising to pay plaintiff 10*l.* fourteen days after date, and had delivered it to plaintiff, promised, when it was due, to pay plaintiff according to the tenor and effect thereof: Held sufficient on special demurrer.

THE declaration stated, that the defendant, on the 9th of November, 1832, at London, made his promissory note in writing and delivered the same to the plaintiff, and thereby promised to pay to the plaintiff, fourteen days after the date thereof, 10*l.* on account of Captain William Henry Driscoll; which period had now elapsed: and the defendant, in consideration of the premises, then and there promised to pay the amount of the said note to the plaintiff, according to the tenor and effect thereof. Upon special demurrer,

Jones, Serjt., objected that it was not, with sufficient certainty, shown in the declaration that the supposed promise alleged to have been made by the defendant was made to the plaintiff; but merely that the defendant promised to pay to the plaintiff the amount of the note; and non constat but that such promise was made to another person. It did not appear from the declaration that the supposed promise was made to any person whatsoever.

TINDAL, C. J. The necessary intendment on this count, is, that the promise must have been made to the plaintiff and to no other. The count states, that by the note which was made by the defendant and delivered by him to the plaintiff, the defendant promised to pay the plaintiff 10*l.* fourteen days after date, and that when the note was due, the defendant promised to pay according to

the tenor thereof. By the tenor of the note, coupled with the delivery, his promise was to the plaintiff. The utmost ingenuity cannot discover a third person to supplant him.

The rest of the Court concurred in giving Judgment for the plaintiff.

*605]

*MUSSELBROOK v. DUNKIN. Jan. 24.

An award is to be considered as published when the parties have notice that it is ready for delivery on payment of the reasonable charges.

AN award in this cause, made by a barrister under an order of Nisi Prius, was ready for delivery on the 19th of May last, of which the parties had notice; but an objection being raised to the arbitrator's charges, a rule was obtained in Trinity term, June 14, to refer it to the prothonotary to tax those charges.

That rule was made absolute June 16, the last day of Trinity term; and the prothonotary concluded his taxation in July.

Neither party, however, took up the award till Saturday, the 24th of November last, when the defendant obtained possession of it by paying the charges allowed by the prothonotary; whereupon the plaintiff, on the last day of Michaelmas term, Monday, Nov. 26, obtained a rule nisi to set aside the award, on the ground of partiality and misconduct in the arbitrator; his having employed a deputy; the reception of improper evidence; and a decision contrary to evidence.

Taddy and Coleridge, Serjts., who showed cause, contended that the application came too late. By analogy to the rule prescribed for awards made under the statute of 9 & 10 W. 3, c. 15, the application ought to have been made before the last day of the term ensuing the publication of the award. The publication is when the parties receive notice that the award is ready for delivery: and even if under the circumstances of this case the award should be considered as not ready for delivery till the month of July, still, an application to set it aside should have been made before the last day of Michaelmas term:

*606] **Rogers v. Dallimore*, 6 Taunt. 111; *Rawsthorn v. Arnold*, 6 B. & C. 629; *Taylor v. Gregory*, 2 B. & Adol. 774. In an order of reference, where the arbitrator's time is limited, the word publish can scarcely have a different meaning from the same word in the statute; and awards under such orders would almost always be published beyond the time allowed, if not deemed to be published at the time they are ready for delivery.

Wilde and Bompas, Serjts., in support of the rule. An award cannot be said to be published to a party before he has notice of its contents. The defendant had no notice of the contents of this award till the 24th of November; if, therefore, he had made his application even in the present term, it would have been an application within the first term after the award was published to him. It would be hard if one party by submitting to an improper charge could take up an award, and so affect the party who resists the charge with notice of publication. The omission to take the award up earlier is the laches as much of the party opposing this application as of the party making it; the party opposing, therefore, is estopped to take the objection.

TINDAL, C. J. I think the plaintiff comes too late. In all cases within the statute W. 3, a definite time is prescribed for applications such as the present, namely, before the last day of the term next after the award shall have been made and published. Upon the meaning of the word made no difficulty arises: the question is, what is meant by the word published? I think that word is satisfied by the award's having been made, and notice having been given to the

*607] parties that it is within *their reach on payment of just and reasonable expenses. And I concur in thinking that the award cannot be said to be

ready when it is only to be had on submitting to a wrongful demand. But here all objection to the arbitrator's demand was ended by the prothonotary's taxation in July. It has been urged that it would be hard that the contents of the award should be considered as published to both parties by the mere act of one of them in taking it up: but there are many cases in which neither party is willing to take up the award; and the arbitrator might be deprived of any compensation for his trouble, if notice that the award is ready for delivery upon payment of reasonable expenses were not held a publication of the award.

The objections, too, on which it is sought to set aside this award, are (except the last, which affords no ground for the motion) such as might have been made in Trinity term, when the arbitrator's demand was referred to the prothonotary.

PARK, J. I am of the same opinion. The applicant knew all the available grounds of objection in the Trinity term, and I see no reason for departing from the practice, which has been to consider awards under an order of nisi prius in the same light as awards under the statute 9 & 10 W. 3.

BOSANQUET, J. Assuming that the award was not published till the prothonotary's taxation of the arbitrator's demand, still the case falls within the rule which has been adopted in conformity with the statute 9 & 10 W. 3.

ALDERSON, J. I am of the same opinion. This award must be considered to have been published in July. The party was bound to apply before the last *day of the ensuing term, unless he accounts for the delay. It is not accounted for here, because all the available grounds of objection [*608 were known in July. Rule discharged.

WARD v. SHEW and Another. Jan. 25.

An authority to tenants "to pay rent to J. S., whose receipt shall be their discharge;" does not entitle J. S. to distrain, although he receives the rents for his own benefit.

THE defendant, Shew, a bankrupt, had conducted himself so satisfactorily towards his creditors, that they required the assignees to reconvey to him his unsold freehold and leasehold estates, and among them a house in the occupation of the plaintiff.

Before the conveyance was executed the assignees gave Shew the following authority:

"Mr. J. Shew having completed an arrangement with Messrs. Arnot and Co., his assignees, for the five houses in Chequer Alley, on the 21st of May, instant, and the arrears of rent due thereon, the tenants on the respective premises are hereby authorized to pay their rents to the said J. Shew, whose receipt shall be their discharge.

"24th May, 1831. "BOWDEN & WALTERS, Solicitors to the Commission."

Upon the strength of this authority, Shew, in the name of the assignees, distrained on the plaintiff for rent arrear; whereupon the plaintiff commenced this action on the case.

The declaration contained several counts for excessive and irregular distress, and one count in trover. The defendants pleaded the general issue, not guilty, and gave in evidence the above authority in justification of the distress. At the trial before Tindal, C. J., a verdict *having been given for the defendants on all the special counts, and for the plaintiff on the count in trover, [*609

Jones, Serjt., obtained a rule nisi to set aside the verdict for the plaintiff on the ground that the defendant had an interest coupled with an authority, or at all events an authority to receive rents, which entitled him to distrain, upon

the same principle as a receiver appointed by the Court of Chancery. In *Pitt v. Snowden*, 3 Atk. 750, Lord Hardwicke said, "receivers appointed by the Court have a power, where they see it necessary, to distrain for rent, and need not apply first to the Court for a particular order for that purpose." *Willatts v. Kennedy*, 8 Bingh. 5. So they have a power to sue for double value under the statute. *Wilkinson v. Colley*, 5 Burr. 2694.

The judge's report having now been read, the Court called on

Jones to support his rule. He contended that inasmuch as the defendant was to receive the rent for his own benefit, and his receipt was to discharge the tenant, his case was stronger than that of a receiver in Chancery.

TINDAL, C. J. I think we may decide this question without infringing on the rule as to a receiver of the Court of Chancery. Such a receiver is an officer appointed by the Court, under certain well-known rules, and responsible to the Court for any abuse of authority: here, by the very terms of the instrument under which the defendant justifies, the tenants only are authorized to pay their rent to the defendant, and to take his receipt as a discharge. What is that but an intimation that the former course of payment being discontinued, *610] they were *to be discharged if they paid to Shew? But that by no means confers on him a power to distrain. If Shew had authority to distrain, he could only have distrained as bailiff to the assignees, and they would have been responsible for any abuse of such authority. Can it be supposed that they would invest him with a power of fighting the battle as to disputed rents at their expense?

PARK, J. This is a power to the tenants to pay Shew, but not a power to him to demand, much less to distrain, for rent. *Hogg v. Snaith*, 1 Taunt. 347, is directly in point. There it was held, that a power of attorney to receive all salary and money, with authority to recover, compound, and discharge, and to give releases, and appoint substitutes, did not authorize the attorney to negotiate bills received in payment, nor to endorse them in his own name: nor did a power to transact all business: and that evidence of a usage at the navy-office to pay bills endorsed by the attorney in his own name, and negotiated by him under such a power, could not be received to enlarge the operation of the power. Mansfield, J., said, "If the evidence of usage had been ten times as strong, it would not have authorized this transaction." And Lawrence, J., referred to *Hay v. Goldsmidt*, 1 Taunt. 349, where, under a power to transact all business, "I. and R. Duff received an India bill for 2920*l.* 8*s.* 10*d.*, payable to the testator or his order, which each of them endorsed 'for Major-General Patrick Duff, per procuration, James Duff, Robert Duff.' They discounted the bill with the defendants, and raised money on it. The defendants, by their broker, received of the India Company the money due on the bill. At the trial, a verdict *611] was found for the plaintiffs; *and Erskine, for the defendants, having obtained a rule nisi, for setting aside the verdict and entering a nonsuit, the question for the Court of King's Bench was, whether J. and R. Duff had any authority to endorse and discount the bill? The Attorney-General (Gibbs) and Wilson, showed cause, and contended that the power of attorney gave the Duffs authority to receive only, and not to negotiate the bill. Erskine and Gaselee, contra, relied on the words to '*transact all business*,' as giving an authority to do more than merely to receive, and contended, that the endorsement was only a substitution of other persons for the attorneys themselves, which the power enabled them to make. The cases of *Howard v. Baillie*, 2 H. Bl. 618, and *Gardner v. Ballie*, 6 T. R. 592, were referred to in the course of the argument. The Court was of opinion that the power to transact business did not authorize the Duffs to endorse the bill. The most large powers must be construed with reference to the subject-matter. The words '*all business*,' must be confined to all business necessary for the receipt of the money.

That case is precisely in point. The authority of a receiver in chancery to distrain is not disputed, but it rests on totally different grounds.

BOSANQUET, J. If this had been an action of replevin, and the defendant had made cognisance as bailiff of the assignees, his authority might have been traversed; and the question whether he had authority or not, depends on the construction of the instrument of May 24, 1831. But the nature of that instrument is an authority to the tenants to pay, not to the defendant to distrain. The authority to the tenants to pay might perhaps authorize the defendant to demand, because his receipt is to be a discharge to the tenants; but authorities *must be construed strictly with reference to their subject-matter, and here there is no power to distrain. In *Murray v. East India Company*, [*612 5 B. & Ald. 204, it was held, that a power of attorney, authorizing an agent to demand, sue for, recover, and receive, by all lawful ways and means whatsoever, all moneys, debts, and dues whatsoever, and to give sufficient discharges, did not authorize him to endorse bills for his principal. This case is distinguishable from that of receivers in Chancery, because they are appointed by and responsible to the Court, and act under settled rules. The present is a private authority, and must be construed in the ordinary way.

ALDERSON, J. I am of the same opinion. The instrument contains an authority to the tenants to pay, and to the defendant to give a discharge, and all powers necessary for those purposes are implied in that authority; but the authority for which the defendant contends, is one which would render the assignees responsible to the tenants in respect of all acts done by the defendant. That would be an authority much larger than is necessary for the purpose of receiving rents, and therefore this rule must be discharged.

Rule discharged.

*HOPCRAFT v. KEYS. Jan. 26.

[*613]

Defendant having only a defeasible title, demised to plaintiff for years: before the first quarter's rent was due, plaintiff was evicted by title paramount to defendant's, and remained out of possession for some weeks; he then entered again under a new agreement with the person who had evicted him by title paramount:

Held, that defendant was not entitled to distrain, and that the eviction might be given in evidence on the issue of non tenuit.

REPLEVIN.—The defendant made cognisance as bailiff of Hawkins, for a quarter's rent of a house, due on the 12th of May, 1832, from the plaintiff as tenant to Hawkins.

The plaintiff pleaded non tenuit, upon which issue was taken.

It appeared at the trial before Tindal, C. J., that Hopcraft was let into possession by Hawkins, upon the 12th February, 1831, as tenant for one year certain, at a rent payable quarterly; Hawkins undertaking to finish the house by a certain time, and to give Hopcraft the option of a lease at the end of the year. But Hawkins himself had no other title to the premises, than an agreement with one Kent, bearing date the 17th September, 1830, by which Kent agreed to grant him a lease after Hawkins should have finished the houses described in the agreement; reserving to himself an express power of re-entry, and avoiding the agreement, if the houses were not completed within six months from the date of the agreement. It was proved at the trial, that the houses were not finished within the time, and that Kent, upon the 2d of April, which was before any rent became due from Hopcraft to Hawkins, re-entered for the condition broken, and turned all persons found upon the premises, and amongst others, Hopcraft, out of possession. Kent immediately put a man into possession of Hopcraft's house, who remained there for five weeks; after which Kent proceeded to finish the house, which took up eight or nine weeks more; and subsequently to this, Hopcraft took the house from Kent upon a new [*614 *agreement, and for a different rent, under which agreement he was in possession at the time of taking the distress.

It was contended on the part of Hawkins, that all this was the result of collusion between the plaintiff and Kent; but that point was left to the jury, who, being of opinion there had been no fraud or collusion, found for the plaintiff:

A rule nisi was obtained to set aside this verdict, on the ground that the plaintiff having taken under Hawkins, was estopped to say he had no title: *Balls v. Westwood*, 2 Campb. 11; *Parry v. House*, Holt N. P. 489; *Neave v. Moss*, 1 Bing. 360; *Rogers v. Pitcher*, 6 Taunt. 202; *Doe v. Lady Smythe*, 4 M. & S. 347; and that at all events the eviction by Kent should have pleaded, and could not be given in evidence on the issue of non tenuit.

Andrews, Serjt., who showed cause, admitting that a tenant may not in general dispute his lessor's title, contended, nevertheless, that he may show such title to have expired before the time of the distress: *England d. Syburn v. Slade*, 4 T. R. 682; *Neave v. Moss*, *Gravenor v. Woodhouse*, 1 Bingh. 38; and though it be necessary to plead the eviction where the lessor himself has dispossessed the lessee, yet where the lessor's title has expired, and the tenant actually holds under another, those facts may be properly established under the issue of non tenuit.

Wilde and Coleridge, Serjts., *contra*, in addition to the cases cited upon obtaining the rule nisi, referred to the authorities cited in Serjt. Williams's note 2 to *Salmon v. Smith*, 1 Wms. Saund. 204, to show that the eviction of the *615] plaintiff *by Kent ought to have been pleaded; in which case Hawkins might have been prepared with evidence to show collusion.

TINDAL, C. J. I hope nothing which I am about to observe, will be supposed to break in upon the established rule of law, that the tenant so long as he remains in possession, shall never be allowed to dispute the title of the landlord from which such possession was received. But upon the facts proved at the trial of this cause, the rule, as it appears to me, does not apply to the present case; for upon the whole of the evidence, Hopcraft, at the time of the distress, was not in possession under any tenancy he derived from Hawkins, but under a new and distinct holding which he took from Kent, at a period long subsequent to the time when Hawkins's title had expired. The facts were these: Hopcraft was let into possession by Hawkins upon the 12th of February, 1831, as tenant for one year certain, at a rent payable quarterly; Hawkins undertaking to finish the house by a certain time, and to give Hopcraft the option of a lease at the end of the year. * But Hawkins himself had no other title to the premises than an agreement with Kent, bearing date the 17th of September, 1830, by which Kent agreed to grant him a lease, after Hawkins should have finished the houses described in the agreement; reserving to himself an express power of re-entry and avoiding the agreement, if the houses were not completed within six months from the date of the agreement. It was proved at the trial that the houses were not finished within the time, and that Kent, upon the 2d of April, which was before any rent became due from Hopcraft to Hawkins, re-entered for the condition broken, turning all persons found upon the premises, and amongst others Hopcraft, out of possession. Kent im-*616] mediately put a man into possession of *Hopcraft's house, who remained there for five weeks, after which Kent proceeded to finish the house, which took up eight or nine weeks more, and subsequently to this, Hopcraft took the house from Kent upon a new agreement and for a different rent, under which he was in possession at the time of taking the distress. All this might indeed have been colourable, and the result of collusion between the tenant and the ground landlord to get rid of Hawkins; and if it had been so, no doubt it would not have had such effect; but the point was left to the jury, who thought there was nothing fraudulent or collusive. I thought, therefore, at the trial, and still think, that it was competent for the plaintiff to show that his landlord had a defeasible title only, and that such title was actually defeated before any rent became due, and that the rule above adverted to could not apply to the case

where the tenant had been actually turned out of possession, and kept out a considerable time, and afterwards entered under a new agreement *bonâ fide* entered into with a different person.

It is objected, however, that such evidence, if it amounts to an answer to the distress, could not be given in evidence under *non tenuit*, but should have been pleaded specially as on eviction. It may be admitted, that in ordinary cases, an eviction must be specially pleaded; but here the only question was, whether Hopcraft held as a tenant to Hawkins at the time of the distress, not whether he had been tenant to him on former and different occasions; and this was negatived by the evidence, which showed that, at the time of the distress, he was in upon a contract *bonâ fide* entered into with another person long subsequent to the time when such former tenancy was determined. Such evidence appears to me to be applicable to the issue upon *non tenuit*, and I therefore think the rule should be discharged.

*PARK, J. The rule by which a tenant is precluded from contesting his landlord's title, is so well established that it cannot be disturbed; [*617 but I put this case on the ground taken by my Lord Chief Justice, that at the time of the distress Hawkins's title had expired, and the plaintiff did not at that time hold as his tenant.

BOSANQUET, J. I am of the same opinion. All collusion in this case has been negatived by the finding of the jury. The question is, whether the plaintiff was tenant to Hawkins at the time of the distress. It is true that a tenant cannot dispute his landlord's title, but he may show that the title has expired. And what are the facts here? Kent had a right to re-enter on the 2d of April, if the houses were not finished according to the agreement of the 17th September. He did so, and turned the plaintiff out. It was not necessary that the plaintiff should contest the right of Kent to enter, whose title was clear; he went out, and was actually out of possession for some weeks. It has been contended that this eviction ought to have been pleaded. If Hawkins, during the continuance of the term demise by him to the plaintiff, had evicted his own lessee, the eviction ought to have been pleaded. But when his title had expired, in consequence of which the plaintiff had been turned out, and had again come into possession under a new and distinct demise by Kent, it appears to me that he was entitled to give that matter in evidence under the issue of *non tenuit*.

ALDERSON, J. I am not free from doubt in this case, but as the rest of the Court entertains a clear opinion, I am not prepared to disagree.

Rule discharged.

*ALLAN and Another v. KENNING. Jan. 28.

[*618]

"Whereas, W. C. is indebted to you, and may have occasion to make further purchases from you, as an inducement to you to continue your dealings with him, I undertake to guarantee you in the sum of 100*l.* payable to you in default on the part of the said W. C. for two months:"
Held, a continuing guaranty.

ASSUMPSIT on the following guaranty:—

"Gentlemen,

"Whereas, W. Couchman is indebted to you in a sum of money, and may have occasion to make further purchases from you, as an inducement to you to sell him such goods, and continue your dealings with him, I hereby agree and undertake to guarantee you in the sum of 100*l.*, payable to you, in default on the part of the said W. Couchman, for two months.

"July 24th, 1829.

"To Messrs. ALLAN."

J. KENNING.

The declaration, setting out the guaranty according to its supposed legal effect, stated the 100*l.* to be payable to the plaintiffs on *two months' notice* of the default of W. Couchman.

At the time of the guaranty Couchman was dealing with the plaintiffs at a credit of four months. In January, 1880, he failed, being at that time more than 100*l.* in debt to the plaintiffs.

At the trial before Tindal, C. J., it was contended, on the part of the defendant, this guaranty was to enure for two months only from the time it was given; but the Chief Justice esteeming it a continuing guaranty, a verdict was found for the plaintiffs, which

Jones, Serjt., obtained a rule *nisi* to set aside, and enter a nonsuit instead, upon the objection taken at the trial, and also for a variance in the declaration, contending that, by no construction of the guaranty, could the defendant claim two months' time for payment after notice of Couchman's default; for, if so, *619] the plaintiffs *might be obliged to give six or eight months' credit instead of two.

Andrews and Stephen, Serjts., who showed cause, argued that, as Couchman was dealing at a credit of four months, the guaranty would have been useless if it were to secure the plaintiffs for no more than two months from its date; and that, as to the alleged variance in the declaration, it was the only exposition which the obscure language of the latter part of the guaranty admitted of. They contended, also, that this objection had not been taken at the trial, and, therefore, ought not to be entertained now.

Jones having been heard in support of his rule,

TINDAL, C. J., said, I entertain no doubt that this is a continuing guaranty, and that it was to be binding on the defendant till the parties came to an understanding that they would be off.

"Whereas, W. Couchman is indebted to you in a sum of money, and may have occasion to make further purchases,"—it is to be observed that there is no limitation of time for such purchases—"as an inducement to you to sell him such goods, and *continue* your dealings with him, I hereby undertake to guarantee you." This indicates a clear intention that the dealings should be continued until further notice.

Is there, then, any variance in the statement of the defendant's undertaking? That depends on the natural meaning of these words, "I undertake to guarantee you in the sum of 100*l.*, payable to you in default on the part of the said W. Couchman for two months." I should infer from these words, that on the default of W. Couchman for two months, the defendant would immediately be

*620] liable; but it is alleged in the declaration, that *he was to be liable

on receiving two months' notice of Couchman's default. As it might not be possible to serve the defendant with immediate notice, that construction might protract his liability beyond the period intended. It seems therefore that the statement objected to is a variance. But as it is not agreed whether the objection was taken at the trial, instead of a nonsuit there must be a new trial on payment of costs by the plaintiff; however, as the plaintiff will be permitted to amend, it will be better that the defendant should consent to pay the sum sought to be recovered, deducting his costs of the late trial.

The rest of the Court concurring, the rule was made absolute for a new trial.

Rule absolute accordingly.

PATTERSON v. POWELL. Jan. 29.

Notice of trial given by an attorney who has omitted to take out his certificate is irregular.

NOTICE of trial by proviso in this cause having been given by one who was

an attorney duly certified at the commencement of the cause, but who at the time of the notice in question had failed to take out his annual certificate,

Wilde, Serjt., moved to set aside the notice of trial as irregular.

Taddy, Serjt., who showed cause, contended that though the attorney might be liable to penalties he was still the attorney in the cause till another was appointed by the authority of the Court. If a cause be commenced by one who is not an attorney, it may be admitted the *proceedings are irregular; but when the cause has been properly commenced, the client ought not to suffer from an inadvertence as to a mere fiscal regulation foreign to the merits of the cause. [*621

Sed per Curiam. The rules of the Court require that all notices in a cause shall be signed by an attorney in the cause. Here the notice was signed by one who had not taken out his certificate, and therefore was not entitled to practise at all. What difference is there between setting aside this one proceeding, and the one by which the cause is commenced? The words of the statute 37 Geo. 3, c. 90, s. 30, are, that if any person without certificate shall sue out any writ, or carry on any action, he shall forfeit 50*l.*; and by a 31, "every person admitted, sworn, and enrolled in any of the said courts as therein mentioned, who shall neglect to obtain his certificate thereof, in the manner before directed, for the space of one whole year, shall from thenceforth be incapable of practising in his own name, or in the name of any other person, in any of the said courts, by virtue of such admission, entry, and enrolment, and the admission, entry, and enrolment of such person, in any of the said courts, shall be from thenceforth null and void."

Rule absolute.(a)

(a) See *Welch v. Pribble*, 1 D. & R. 215.

*FAIRCLOTH v. GURNEY, Clerk. Jan. 9.

[*622

1. A sum contracted for, to be paid as an annuity, being partly secured by the transfer of a policy of insurance on the life of the grantor, was in the annuity deed, increased by the amount of the annual premium on the policy, which the grantee covenanted to pay: Held, that this covenant was not a pecuniary consideration to be specified in the memorial, and that the amount of the annuity was properly described in the memorial as a total compounded of the sum originally contracted for with the annual premium of the policy added to it.
2. The deed by which the annuity was granted, contained a charge on a rectory, but a warrant of attorney which accompanied the deed, though it recited the deed, gave no authority to sequester the rectory: Held, that the deed was only void *pro tanto*, and that the warrant of attorney was unimpeachable.
3. The deed recited the consideration for the annuity to have been paid in notes and sovereigns: the memorial stated it to have been paid in notes: Held sufficient.

By indenture of November 17th, 1828, Gurney, in consideration of 720*l.* paid to him by Faircloth, as it was recited, partly in notes of the Bank of England and partly in sovereigns, for the purchase of an annuity of 113*l.* 19*s.* 6*d.*, covenanted with Faircloth to pay him such annuity for ninety-nine years if Faircloth, one Spicer, and one Luking, or either of them, should so long live. By the same deed Gurney charged his rectory of St. Clement's Danes, in Middlesex, with the payment of this annuity, giving Faircloth a power to sequester it upon any of the quarterly payments of the annuity being in arrear thirty days. Gurney covenanted not to vacate the living, or if he took another in exchange, to charge the substituted rectory with this annuity. As a further security, a policy of assurance effected on Gurney's life for 1000*l.* was by the same deed assigned to Faircloth; Faircloth covenanting with Gurney to pay the annual premium on the policy, 33*l.* 19*s.* 6*d.* There was a power to sell the policy if it should become necessary; the surplus produce of the policy after payment of all arrears and charges to go to Gurney, his executors, &c.

Faircloth agreed after two years, upon three months' notice, to accept 800*l.*, together with all arrears and costs occasioned by non-payment of the annuity, in redemption of the annuity. In the recital of the deed it was stated that Faircloth had agreed to defray the expense of preparing and engrossing the securities, and enrolling a memorial of the same.

*623] In addition to this deed Gurney executed a warrant of attorney of the same date, authorizing Faircloth to enter up judgment against him for 1440*l.* and costs. The warrant of attorney recited the deed, and authorized Faircloth to sue out such execution or executions as he should think fit for any arrears of the annuity, but did not expressly authorize a sequestration of the rectory, or refer to it in any way other than by reciting the deed.

The memorial stated the nature and date of the instruments by which the annuity was secured, to be, "Indenture or deed of grant of annuity of the 17th of November, 1828," and "Warrant of attorney to confess judgment for the sum of 1440*l.* besides costs of suit: same date." And the consideration, and how paid, "Seven hundred and twenty pounds paid in notes of the Governor and Company of the Bank of England;" which was according to the fact.

Faircloth died in December, 1828.

Gurney having deposed that he had stipulated to receive 800*l.* for the consideration of the said annuity, he, Gurney, paying the reasonable expenses of preparing the securities, but that Faircloth's agent had deducted 80*l.* for the expenses, of which he had never rendered any account, leaving Gurney only 720*l.* to receive; and that it was the consideration of the grantee's paying the premium on the policy, and nothing else, which induced him to increase the annuity to 113*l.* 19*s.* 6*d.*,

Stephen, Serjt., obtained a rule nisi calling on Faircloth's representatives to show cause why the warrant of attorney given as above, and the judgment signed and entered up thereon, should not be set aside, and why the deed of annuity should not be delivered up to the defendant or his attorney, to be cancelled on the following grounds:—First, that the memorial of the deed did not mention the covenant by the plaintiff to pay the annual premium of 33*l.* 19*s.* 6*d.* upon the policy for *1000*l.* assigned to him by the defendant, the *624] same being a substantive part of the consideration for which the annuity was granted. Secondly, that if it was not necessary to mention that covenant, the deed should have been memorialized as granting an annuity of 80*l.* only, and not of 113*l.* 19*s.* 6*d.* Thirdly, that no memorial had been enrolled of the assignment of the policy. Fourthly, that Norton, the attorney of the plaintiff, misapplied 80*l.*, part of the consideration money for the annuity, and omitted to insert the same in the deed and memorial as part of the real consideration money. Fifthly, that the deed recited the 720*l.*, the alleged consideration money, to have been paid in notes and sovereigns, but the memorial mentions notes only. Sixthly, that the deed contained a charge on the Rectory of St. Clement Danes, whereof the defendant was then rector.

Gurney having now filed an affidavit which afforded some colour for supposing that the rule had been obtained on his behalf (see ante, p. 456), the Court consented to hear

Wilde, Serjt., in answer to the objections thus raised to the validity of the annuity.

With respect to the fourth objection, Brown, Gurney's agent, deposed that Gurney had proposed to grant an annuity of 80*l.* for the sum of 800*l.*; but that Faircloth required the assignment of the policy of assurance as a security; that the annuity should be increased by 33*l.* 19*s.* 6*d.*, the annual premium on the policy, Faircloth covenanting to pay the premium, and to defray all the expense of preparing the securities, upon Gurney's consenting to take 720*l.* for the annuity, instead of 800*l.*; that these terms were explained, and fully assented to by Gurney; that the money was paid in notes; and that, upon the execution of the deed, the parties forgot to erase the words "*and sovereigns.*"

As to the first and second objections, it was contended *that it is not necessary, under the 53 Geo. 3, c. 141, to state in the memorial any [*625 other than the *pecuniary* considerations for granting the annuity. In *Yems v. Smith*, 3 B. & Al. 206, Abbott, C. J., says, "It is only necessary to read the schedule, the seventh column of which has these words:—'Consideration, and how paid.' It is obvious, therefore, that the consideration there spoken of is a consideration which can be *paid*. The clause for redemption cannot, therefore, come within the schedule; and, if anything not specified in the schedule be necessary, the schedule itself would be worse than useless."

If it be unnecessary to specify the clause for redemption, it must be equally so to set out particular covenants.

As to the third,—in *Morris v. Jones*, 2 B. & C. 232, it was held unnecessary to specify in the memorial the assignment of a policy of assurance, by way of collateral security, even where that assignment was by a separate deed; *a fortiori* it must be unnecessary where the assignment is contained in the deed pointed out by the memorial.

As to the fifth objection,—if the payment were made in money, it is immaterial whether it was paper money or coin. The object of the statute, in requiring a memorial of the mode of payment, was to prevent the borrower from being paid in goods, which he could only sell at a sacrifice.

With respect to the sixth,—it must be admitted that the charge on the rectory is void; *Newland v. Watkin*, 9 Bingh. 113, and the authorities there referred to: but the deed is only void *pro tanto*, and stands good in all other respects. *Mouys v. Leake*, 8 T. R. 411. And upon an application to cancel an annuity deed, the Court has a discretionary power to deal with the case according to justice. *Girdelstone v. Allan*, 1 B. & C. 61.

**Stephen*. The payment of the premium on the policy by the grantee was part of the pecuniary consideration moving Gurney to the grant: [*626 for it is the same thing whether money be paid to the grantor, or paid for him; particularly where the object of the grantor, in raising money, is to relieve himself from difficulties: and Gurney expressly deposes, that but for the covenant by the grantee to pay the premium, an annuity of 113*l.* 19*s.* 6*d.* instead of 80*l.* would not have been granted.

With respect to the mode of payment, the grantee is estopped by his deed to say that it was not in notes and sovereigns: the memorial, therefore, cannot be said to state the payment according to the fact. The memorial indeed would be useless for the purpose of giving a clue to the transaction, and might even mislead, if it did not pursue the statement in the grant; and though the discrepancy here may appear to be slight, yet it is impossible to draw any line, and facts or writings may be misstated to a mischievous extent if the Courts allow any departure from the precise enactment of the statute.

But the charge on the rectory is clearly void: *Shaw v. Pritchard*, 10 B. & C. 241; *Flight v. Salter*, 1 B. & Ad. 673; *Gibbons v. Hooper*, 2 B. & Ad. 734: and if so, the covenant to pay the annuity and the warrant of attorney must also fall to the ground; for the charge on the rectory is the principal security; the covenant to pay and the warrant of attorney are only accessories; the accessory must follow the fate of its principal; and no one shall be permitted to do indirectly what he cannot do directly: *Doe dem. Mitchinson v. Carter*, 8 T. R. 57, 300. But if the covenant to pay, and the warrant of attorney to enforce it, be allowed to stand, the grantee may issue a sequestration against the rectory, and so obtain indirectly what the deed is not allowed to secure to him directly. In **Mouys v. Leake*, the Court refused to cancel the deed; [*627 but at that time it had not been expressly determined that a charge on the rectory was void, and Lord Kenyon abstained from deciding the point.

TINDAL, C. J. Upon this motion for setting aside an annuity granted by the defendant, and a judgment for securing it, entered up under warrant of attorney, the first objection, which involves also the second, is, that unless the

covenant of the plaintiff for paying the premium of the insurance be deemed an essential part of the consideration for granting the annuity, it must be deemed an annuity for 80*l.*, and not for 113*l.* 19*s.* 6*d.*; and if it be an essential part of the consideration, it ought to have been specified in the memorial. It is said that this covenant was a moving cause for the grant of the annuity: but, are moving causes of such a nature, considerations, within the meaning of the act, to be specified upon the memorial? The words of the act are, "that the memorial shall, among other things, contain the pecuniary consideration or considerations for granting the annuity, in the form or to the effect following." Then follows a general form of the memorial; and one of the columns is headed, "Consideration, and how paid."

In any ordinary meaning of these words, this covenant cannot be considered as a pecuniary consideration; and in *Buckridge v. Flight*, 6 B. & C. 53, Abbott, C. J., says, "It is not required that there should be a memorial of the *transaction*, but of the instrument whereby the annuity is granted and secured:" in *Morris v. Jones*, 2 B. & C. 235,— "It appears, both from the words of the enacting clause, and from the general form of memorial given, that the *pecuniary* *628] consideration is the only consideration *contemplated by the legislature:" and in *Yems v. Smith*, 3 B. & Al. 208,— "If anything not specified in the schedule be necessary, the schedule itself would be worse than useless." In *Morris v. Jones*, which has a strong reference in its facts to the present case, it was agreed between the grantor of an annuity and the grantee, that the latter should advance a specific sum of money upon annuity (to yield to the grantee 7 per cent. per annum), secured upon landed estates, of which the grantor was tenant for life; and that, for securing the sum advanced, certain policies of assurance already effected on his life should be assigned to the grantee. The amount of the annual sums payable was fixed at a sum composed of 7 per cent. upon the principal sum advanced, and the amount of the annual premiums payable on the policies to be assigned; and in the deed of grant this was stated to be the annuity granted. The policies were assigned by a separate deed: and there was a stipulation in it, that they should be reassigned to the grantor whenever he redeemed the annuity. In the memorial, the principal sum advanced was stated to be the consideration paid; and the annuity to be the annual payment reserved by the deed; but the assignment of the policies was not mentioned. It was held, that it was not necessary to mention the latter deed in the memorial, and that the principal sum advanced was properly stated to be the consideration paid for the annuity. Upon the third objection, therefore, that case is stronger than the present, because the policies were assigned by a separate deed. Inasmuch, then, as the memorial, in the present case, sets forth the deed which contains the assignment of the policy, I cannot consider it in that respect insufficient. Neither upon the words of the statute, nor upon the *629] decisions, nor upon the reason of the thing, is more *necessary, with reference to the consideration or the assignment of the policy.

That disposes of the first three objections.

The fourth is a mere question of fact; but we should be very careful how we proceed where an annuity has been paid without objection for such a length of time. In *Ex parte Maxwell*, 2 East, 85, Lord Kenyon refused to interfere where the annuity had been paid for more than six years after the death of the grantee: he said, "I know not where such a mischief is to stop, if this could be permitted. This may be the only provision made for the younger branches of a family. The legislature, for the safeguard of the subject in their personal dealings with each other, have thought it wise to pass a statute of limitation to personal actions. I know not why that should be disregarded in this more than in other instances." And in *Barber v. Gamson*, 4 B. & Ald. 281, Holroyd, J., said, "In a proceeding on a penal clause, it ought clearly to appear that the practices have been such as clearly to show, on the part of the grantee or his agent, some misconduct which has been prejudicial to the grantor."

Here, it is true, the annuity has been paid only five years : but one of the parties is dead ; and, after all, it comes to a question of fact, on which Gurney and Brown make different statements ; in which case, according to the ordinary practice, we must take the last affidavit as an answer.

That brings me to the fifth objection, that the deed states the consideration to have been paid in notes and sovereigns, the memorial, in notes only.

At this distance of time, that would be a subtle objection on which to vacate the grant of an annuity ; but we must allow it, if it rests on sufficient ground. Now, the *deed must have been prepared before the parties met to execute it ; and, at the time the deed was prepared, a doubt perhaps, existed [*630 in the mind of the draftsman, whether the money would be paid in notes or sovereigns : he adapts the language of the instrument to either event, and, without further examination, the deed is executed. But notwithstanding such an expression in the deed, is there any rule which prevents the parties from showing how the money was actually paid ? I know of none, and I can see no objection to their showing that it was paid in notes.

The last objection is, that the deed contains a charge on the rectory. No doubt, such a charge cannot be supported ; but the circumstance that such a charge is inoperative will not avoid those parts of the deed which are good ; nor can we, because the deed contains such a charge, set aside the warrant of attorney ; because many cases have decided that the warrant of attorney is objectionable only where it contains an express reference to a sequestration, but legal where it refers only to other modes of execution. I think, therefore, that this rule should be discharged with costs.

PARK, J. I am of opinion that the charge on the rectory, although it cannot be supported, does not avoid the other parts of the deed. And as to the warrant of attorney, two recent cases expressly point at the distinction on which we now act. In *Flight v. Salter*, 1 B. & Adol. 673, the warrant of attorney expressly authorized the party to proceed by way of sequestration, and the warrant was held void ; while in *Newland v. Watkin*, 9 Bingh. 113, a party who held a warrant of attorney without such a clause was held entitled to set aside a judgment entered up by another creditor under a warrant containing the clause.

*With respect to the omission to specify in the memorial the covenant to pay the premium on the policy, *Morris v. Jones* is a case [*631 expressly in point.

So, upon the question of fact ; *Mootham v. Howe*, 7 Taunt. 596, and *Ex parte Maxwell*, are decisive to show the caution with which the Court ought to proceed after an annuity has been paid so long, and one of the parties has ceased to live. In *Mootham v. Howe*, where the application to set aside an annuity was made eleven years after the grant, the Court said, "The time of the statute of limitations, too, is passed, and that gives them a *quietus*." And in *Ex parte Maxwell*, Lord Kenyon was indignant at the application being made so long after the death of the grantee.

The objection as to notes and sovereigns is too trumpery to merit any observation. I think the rule should be discharged with costs.

BOSANQUET, J. I am of the same opinion. Upon the result of the affidavits, it appears that Gurney proposed to raise a sum of 800*l.*, and was content to grant for it an annuity of 80*l.* : that, to prevent disputes, the grantee offered to give 720*l.* and to pay all the expenses ; but to secure the keeping up of a policy of assurance on Gurney's life, which was assigned as a collateral security, it was agreed that the grantee should covenant to pay the annual premium on the policy, and that the annuity should therefore be increased by the amount of the premium, 38*l.* 19*s.* 6*d.*, making in the whole 113*l.* 19*s.* 6*d.*

That gets rid of the objection that the amount of the consideration has not been truly stated in the memorial, and that a part of the consideration was retained.

*632] *And I cannot think that the covenant to pay the premium comes within the meaning of the *pecuniary* consideration required by the statute to be specified in the memorial.

As to the alleged variance between the deed and the memorial on the mode of payment by notes or sovereigns, the consideration, as actually paid, is truly stated in the memorial. The objection, therefore, must be founded either on the 2d or the 4th section of 53 G. 3, c. 141. Now the second section requires that the memorial shall state the pecuniary consideration for the grant, but does not provide for the case of any error in the deed. The fourth requires that if any part of the consideration be received in goods, it shall appear on the memorial. But there is no pretence to say that any part of the consideration here was received in goods. There can be no ground therefore for yielding to such an objection.

The charge on the rectory, though not sustainable, does not affect the rest of the instrument, because it is independent of the grant of annuity; and as to its not affecting the warrant of attorney, *Newland v. Watkin* is a case in point. It does not follow that an illegal use will be made of an instrument in which the power of sequestration is not referred to; but where such a power is expressly mentioned, it may be presumed that the party will avail himself of it.

ALDERSON, J. I am of the same opinion. The first, second, third, and fifth objections resolve themselves into one, namely, that the consideration is not stated in the memorial in the way required by the statute. But the statement required by the statute is a statement of the *pecuniary* consideration for the annuity; and I am of opinion that this covenant to pay the premium of the policy of the insurance does not fall within the meaning of a pecuniary *633] consideration. And there is good reason *why the statute should distinguish between the various considerations, and not load the memorial with more than is necessary to give that clue to the entire contents of the deed which, according to *Crowther v. Wentworth*, 6 B. & C. 366, it was the object of the legislature to attain. "By the fifth section of 53 G. 3," says Bayley, J., "the grantee of the annuity may obtain a copy of the deed of grant, and he may thereby be furnished with a full description of it, provided he be enabled by the information required by the second section to obtain that copy at the public office."

With respect to the alleged discrepancy between the statement of payment in notes and sovereigns, and of payment in notes only, in most deeds the manner in which the pecuniary consideration is paid does not appear. In that, the memorial is required to be more explicit; but it is sufficient if the statement in the memorial be according to the fact.

The fourth objection is answered on the affidavits. The sixth applies to the charge on the rectory, with respect to which I agree with the rest of the Court. In *Mouys v. Leake*, 8 T. R. 411, where in a deed of grant of rent-charge out of a benefice, the grantor also covenanted personally to pay the rent-charge or annuity, and gave a warrant of attorney to confess judgment as a collateral security for payment, the court refused to order the deeds to be delivered up to be cancelled.

Rule discharged with costs.

*634] *COOPER v. LEAD SMELTING COMPANY. Jan. 29.

Upon an issue under the interpleader act, where money is paid into Court to abide the event, the successful party is not allowed to take the money out of Court after verdict and before judgment.

THIS was an issue directed by the Court under the Interpleader Act. The company had paid the moneys into Court to abide the event. A verdict having been given for the plaintiff, before judgment was signed,

Jones, Serjt., applied for the money to be paid out of Court, stating that, in general, on feigned issues judgment is not entered.

Sed per Curiam. The rule cannot be granted in this case till judgment has been signed on the feigned issue. The object of the proceeding is to secure in future the company (who are ready to pay the money to either of the two claimants) from the adverse claims of both parties to the issue. By the second section of the Interpleader Act the judgment is made final and conclusive. Till judgment is signed the company are not completely secured from a future demand by the assignees who have failed in the issue; and, therefore, until that period, the money cannot be paid out of Court.

*WORLEY v. BLUNT. Jan. 31.

[*635]

The demandant having omitted to set forth his pedigree upon the count in a writ of right, the Court refused to allow him to amend, even upon an affidavit of merits, and that the omission had been occasioned by the oversight of an experienced pleader at the bar.

THIS was a writ of right, in which the demandant counted as nephew and heir of the ancestor last seised, without deducing his pedigree, and showing how he was heir. An omission which has been held fatal. *Slade v. Dowland*, 2 B. and P. 577.

Stephen, Serjt., moved to amend the count in this respect upon an affidavit that the omission was occasioned by the oversight of an experienced pleader at the bar, who had been employed to draw the count, and who, from the infrequency of proceedings by writ of right, was not aware of the necessity of setting out the demandant's pedigree upon the face of the count.

There was also an affidavit as to the nature of the demandant's title, who, it was alleged, had commenced proceedings as soon as he could, and sought to disturb a possession of no more than thirty years' duration.

The Court referred to *Dumday v. Hughes*, 3 B. and P. 453, where a similar application had been rejected, and to the uniform practice of this Court to refuse amendments in writs of right; but

Stephen referring to *Webb v. Lane*, 5 Bingham 285, where a blank was allowed to be filled up with the word *esplees*, and to *Goore v. Goore*, Roscoe, Real Act, 179, where Wood B. in the Common Pleas of Lancaster allowed the demandant to insert the word *right*, which had been omitted in the count; and being urgent that the principle of the decisions against amendment should be reconsidered; the Court with some reluctance granted a rule nisi.

**Goulburn*, Serjt., who showed cause, relied on the uniform practice of this Court to refuse amendments in writs of right, and referred to *Dumday v. Hughes*; *Charlwood v. Morgan*, 1 N. R. 64; *Hull v. Blake*, 4 Taunt. 572; *Adams v. Padway*, 1 Marsh. 602; and *Tooth v. Bodington*, 1 Bingham 208, in support of that proposition. In *Webb v. Lane* the tenant had improperly signed judgment for a mere blank in the count, which might be ascribed to a clerical error; and *Goore v. Goore* was decided in an inferior court contrary to *Slade v. Dowland*, 5 B. and P. 577, a decision by Lord Alvanley and the whole of this Court.

Stephen, Serjt., contended at considerable length, and with much instance, that the principle on which amendments were refused in writs of right could not be sustained. It might be expedient that the practice of interfering with long possession by writs of right should be abolished by the legislature; but as long as it was permitted to form a part of the law, the Courts were bound to view it in the same light as any other legal proceeding. It could not be correct to say that the Courts favoured or discountenanced any legal course of proceeding; the same justice must be administered in all; and if amendments

were allowed in personal actions, they ought equally to be allowed in real. The Courts could not discriminate between rights established by law, but were bound to give equal effect to all; and it would in any case be contrary to the principles of justice that a suitor should fail from the ignorance or inadvertence of his professional adviser.

The decisions in *Webb v. Lane*, and *Goore v. Goore*, showed that, at least, the practice had not been uniform; and in *Dumsday v. Hughes* the Court expressly refused *to amend on account of the insufficiency of the affidavit on which the amendment was prayed. Here the affidavit showed that there had been no laches on the part of the demandant, and the Court would not punish him for a mistake which he had no means of avoiding.

TINDAL, C. J. I have always understood it to be an established rule of this Court, that after an error pointed out, a writ of right is not allowed to be amended. It was so considered by Serjeant Williams, whose work is now esteemed a text book of our law, and it is not to be said that this rule has been established on an erroneous principle.

The objection to permitting an amendment in such cases is twofold: one is, that it would tend to relax that vigilance which ought always to attend the assertion of contested claims; for it is essential to justice that the claimant should, if possible, come to the Court within such time as his opponent may reasonably be expected to be furnished, if at all, with the evidence on which he may defend his right. The other objection arises on the peculiar form of a writ of right, in which the tenant can often take no other course than that of joining the mise upon the mere right; in that case he must begin, expose his whole title, which the claimant, having thus obtained a knowledge of, may come the next year prepared to claim such a portion of the property as may appear to him to be the least secure. The proceeding, therefore, is one which has no claim to favour.

I look now at what has been done on these occasions by successive judges, and I find that this application has been uniformly rejected.

In *Dumsday v. Hughes*, 3 B. and P. 453, the amendment sought was precisely the same as on the present occasion. Lord *Alvanley then presided *638] in this Court; a judge well versed in the law of real property, and who, from his connexion with courts of equity, might be supposed rather to lean to applications of this nature than to entertain a disposition to resist them; and yet the Court discharged the rule, although, as in the present case, there was an affidavit in support of the amendment.

In *Charlwood v. Morgan*, 1 N. R. 64, the Court refused to allow the demandant, in a writ of right, to amend the mistake of a Christian name in the count, though an affidavit, accounting for the mistake, was produced, or to discontinue the suit. And Mansfield, C. J. said, "Had not this been a proceeding by writ of right, the Court would have been willing to amend the mistake which has arisen, and into which the most careful pleader might have fallen. But, considering the nature of this proceeding, how much it has always been discouraged, how much tenants have been permitted to avail themselves of every advantage to defeat the claims of demandants, I am of opinion that, unless some precedent for such an amendment can be produced, the soundest exercise of our discretion will be not to allow the amendment. Every one knows the consequence of overturning titles which have been supposed to exist for near sixty years. Many great purchasers consider sixty years' possession as the best title which can be made, and it has often been lamented by eminent lawyers that the period has not been shortened, who thought that sixty years was too long a time for titles to remain in dubio." Heath, J. said, "I am of the same opinion. In *Dumsday v. Hughes* we thought that writs of right ought not to be encouraged, and that the least slip was fatal to the demandant. We did not choose to *639] say, at that time, that in no case *whatever would an amendment be allowed, since a fit case might, by possibility, be brought before us.

The mistake here is only a common mistake, and not such as entitles the demandant to any favour."

In *Hull v. Blake*, 4 Taunt. 572, where, in a writ of entry, sur disseisin en le post, the disseisor was described as Nicholas Stead, *the elder*, and it appeared he had a father of the same name living, the Court refused to strike out the words "*the elder*," notwithstanding an affidavit that the disseisor had a son named *Thomas*, and that the mistake had been occasioned by its being supposed his name was *Nicholas*.

Next came the case of *Adams*, demandant, *Radway*, tenant, 1 Marsh. 602; in which the Court refused leave to quash a writ of summons, on the ground that no previous notice of executing it had been served on the tenant's attorney; and Gibbs, C. J., said: "The rule which has been adopted, on consideration, is, that as a writ of right generally seeks to disturb a possession which has continued for a considerable length of time, the Court will not assist the demandant in getting over any difficulties that may occur to him." And the rest of the Court concurred in the opinion of the Chief Justice, Heath, J., observing, "that it was in general a very vexatious proceeding."

In *Tooth v. Boddington*, 1 Bingh. 208, the Court discharged a judge's order, under which the demandant sought to amend his count by substituting a claim of copyhold for a claim of freehold.

Then comes the only case in which the application had been acceded to, namely, *Webb v. Lane* (5 Bingh. 285, S. C.; 2 M. & P. 478). There, a blank had been left in the count for the word *esplees*, which the Court afterwards permitted the demandant to insert. But in that case the tenant had taken the *law into his own hands, and, instead of demurring, signed judgment. The Court thought the irregularity was not such as to entitle the party [*640] to sign judgment; and upon hearing counsel on both sides, allowed the blank to be filled up with the word *esplees*. But this was only in furtherance of the old mode of pleading *ore tenus*, in which, if the prothonotary had come to an expression which occasioned him a difficulty, the Court would have assisted their officer in supplying the word for which he might be at a loss.

Here, then, we have a uniform current of authorities in which the Court has refused to allow amendment in a writ of right. Is there anything in the present case to distinguish it from those authorities? The affidavit in support of the amendment discloses no more than appeared upon the record in *Charlwood v. Morgan*; nothing inevitable; no fraud on the part of an opponent; nothing more than that the pleader made a mistake; and what is that but the mistake which was made by the pleader in *Charlwood v. Morgan*? As to the affidavits touching the demandant's title, we cannot, on a motion like this, enter into the title or the state of the equities between the parties, but must decide according to the general rule of the Court applying to such an occasion. I think the present rule should be discharged.

PARK, J. I am of the same opinion, and am satisfied with the reasons adduced by the Chief Justice for refusing to amend in writs of right. Men ought not to be lightly disturbed in their possessions, after thirty years' enjoyment, and it is hard that, in such a case, they should be compelled to produce their title, putting it in the power of any stranger to pick a hole in it. With respect to the decisions, it ought to be remembered that Lord Alvanley was assisted by Mr. Justice Heath, who possessed great knowledge in this branch of law, and *that Sir James Mansfield was assisted by Mr. Justice Heath, and also [*641] by Mr. Justice Chambre, another eminent lawyer. We have, then, decisions in the time of Sir Vicary Gibbs; and the more recent case of *Tooth v. Boddington*, which is an exceedingly strong one, shows that, to the latest period, the opinion of the Court has remained unchanged. It would be arrogance in us to presume that such a long course of decisions is wrong, and to overturn at once the uniform course of practice. *Webb v. Lane* is totally different from the present case, because the tenant there, proprio motu, entered

up judgment on a record which did not entitle him to it, and the Court was bound to set the judgment aside. As to the case before Mr. Baron Wood, in the Common Pleas of Lancaster, it is well known that that learned Baron had always a bias on the subject of amending writs of right.

BOSANQUET, J. This amendment could not be allowed without reversing the settled practice of this Court for many years. I speak from personal experience of it since the year 1797. It has been contended that if amendments are permitted in personal actions, and the law allows the proceeding by a writ of right, the Courts should extend the same facilities on both occasions. I cannot accede to that proposition. The principle of this Court has always been, that a party who resorts to this species of remedy must come prepared in every way; and if he fails, the Court will not assist him. The only case in opposition to that principle is the case in the Common Pleas of Lancaster; but the guide to the practice in writs of right is to be taken from the decisions of the Common Pleas at Westminster: and though that Court has not said that it will never permit an amendment, it has said that it will not amend in such a case as *642] this. *Dumsey v. Hughes* is not to be distinguished from the present case; and in some other of the cases, the application was in effect the same as upon the present occasion, to introduce a step omitted. As to the decision in the Common Pleas of Lancaster, although Mr. Baron Wood was assisted by Mr. Justice Bayley, I cannot but express my surprise at an amendment by which the demandant was permitted to insert the word *right*, because in *Slade v. Dowland*, 2 B. & P. 577, Lord Alvanley said he considered the omission of that word as a fatal objection, and Mr. Justice Bayley, when a serjeant, was one of the counsel in *Charlwood v. Morgan*. But it is well known that Mr. Baron Wood entertained, on the subject of writs of right, notions very different from those which this Court has sanctioned.

With respect to the affidavit in the present case, it presents nothing which entitles the demandant to a more favourable consideration than was obtained in the case of *Charlwood v. Morgan*. If in *Webb v. Lane*, a blank was left for the word *esplees*, perhaps because it was not legible in the draft, that might be a case in which the Court ought to interfere to assist the demandant; but it is a case clearly distinguishable from the present.

ALDERSON, J. I am of the same opinion. The tenant in a writ of right, is obliged to begin, and to expose his title to his opponent: this is a hardship; but it is some compensation that the demandant is bound to show his pedigree on the face of the count. "It is an established rule," says Serjt. Williams (2 Wms. Saund. 45 a, n. 4), "that in all real actions brought by an heir on the seisin of his ancestor, the demandant must show *how* he is heir;—he must set forth specially in what manner:—and that too with accuracy and correctness, otherwise it will be bad on demurrer or after judgment for the demandant, *643] by default or on demurrer." And the rule is established on the plainest principles of equal justice. Here the demandant has failed to observe the established rule, and having failed to observe it, has equally failed to make out a favourable case for amendment. On the contrary, it has been the uniform course to refuse amendment in cases more favourably circumstanced; and whatever may be our private opinion, it is better to adhere to precedents where the matter is not *res integra*. I concur in thinking that this rule ought to be discharged.

Rule discharged.

KNIGHT v. BROWN. Jan. 31.

Upon a declaration in assumpsit of several counts, to which the general issue is pleaded, and a verdict is found on one count for the plaintiff, and on the remaining counts for the defendant, the defendant is entitled, under the rule *Trin.*, 2 W. 4., to have the costs of the counts found for him deducted from the plaintiff's costs.

A VERDICT was found for the above named plaintiff upon the fifth count of the declaration in this cause, assumpsit, for the use and hire of divers horses and carriages by the defendant; and a verdict for the defendant upon all the remaining counts contained in the declaration, namely, upon four special counts for damage done to a horse, carriage, and harness of the plaintiff, through the negligence and improper conduct of the defendant, as was alleged and set forth in those counts, and upon the remaining common counts, for work and labour, materials found and provided, and the usual money counts: and the *postea* was entered accordingly. The plea, was the general issue.

Upon the taxation of the plaintiff's costs, it was contended that the defendant was entitled to have deducted from the plaintiff's costs the defendant's costs incurred upon the counts found for the defendant, inasmuch as every count in the declaration was by the plea of general issue, made an issue of itself, and therefore came within *the rule of Court in that behalf. The prothonotary having refused to allow the defendant the costs of the counts found [*644 for him as above,

Coleridge, Serjt., obtained a rule nisi for a review of the taxation, which

Wilde, Serjt., opposed, contending that within the meaning of the seventy-fourth rule Trinity, 2 W. 4, no distinct issue had been raised on these counts; but

The Court, thought otherwise, and the rule for a review of the taxation was made Absolute.

HAMLET and Others v. RICHARDSON. Jan. 31.

Where money is paid after suing out process to recover it, the defendant, before he pays, knowing the cause of action for which the writ is sued out, and there being no fraud on the part of the plaintiff, no action is maintainable to recover such money back.

THIS was an action for money had and received, in which the plaintiffs sought to get back a sum paid, as they alleged, to the defendant by mistake, in the course of some transactions arising out of a charter-party. It appeared, however, upon the trial of this cause, that the payment in question was made by the plaintiffs after, and in consequence of the issuing of a writ against them for the amount. The payment was proved to have been made in the month of May, 1827, after process had been issued against the plaintiffs, in the month of April preceding, for the purpose of recovering this very sum, and after an appearance entered to such process. Before the writ was issued, the defendants in that action (the present plaintiffs) had received letters addressed to each of them, stating the intention to sue for the money now in question, in terms sufficiently *explicit, to call their attention to the subject in dispute; after [*645 which, the money claimed in that action was paid.

But the jury having found a verdict for the plaintiffs, and also, that the payment had been made without knowledge or reasonable means of knowledge of the facts on which the demand had proceeded,

Jones, Serjt., obtained a rule nisi to set aside the verdict as contrary to evidence, and also, because the plaintiffs having paid the sum in question under legal process, were, by that circumstance, estopped from suing to recover it back. *Marriott v. Hampton*, 7 T. R. 269, *Brown v. M'Kinally*, 1 Esp. 279.

Wilde, Serjt., who showed cause, after attempting to reconcile the verdict with the evidence, observed, that in *Marriott v. Hampton*, the plaintiff sought to recover back money which he had paid under a judgment entered upon a cognovit: here the plaintiffs had paid upon *mesne* process, and according to the finding of the jury had paid without knowledge, or means of knowledge of the propriety of the demand. They were not estopped therefore by any judgment

of the Court, and the mere circumstance of payment after process was no recognition of the justice of the suit. In *Cobden v. Kendrick*, 4 T. R. 432, an objection was taken at the trial, that that action was in effect to put the same sum in litigation a second time, which had been recovered in the former action by Kendrick against Cobden; but Lord Kenyon overruled the objection, on the ground that the money had been paid under a compromise, and not under the judgment of a court.

*646] *Jones and Bompas*, Serjt., in support of the rule, observed that in *Cobden v. Kendrick*, the defendant had been guilty of fraud.

Cur. adv. vult.

TINDAL, C. J. Upon the motion to set aside the verdict for the plaintiffs in this case, two points have been made: first, that the verdict is against evidence; and secondly, that the payment made by the plaintiffs was a payment made after, and in consequence of the issuing of a writ against them, and being a payment under compulsion of legal process, the money paid cannot be recovered back. As to the first point, after full consideration of the evidence in the cause, we think the jury have not drawn a right conclusion from the facts proved before them; but we hold it better not to enter into a discussion upon the particular facts in order that the case may be laid before a second jury with the least possible prejudice against either party.

The consideration of the second point becomes therefore unnecessary; but as it may be important for the plaintiffs to be acquainted with the opinion we have formed upon the law, as it applies to the facts given in evidence on the former occasion, in order to regulate the course of their future proceedings, we shall state shortly such opinion. The payment was proved to have been made in the month of May, 1827, after process had been issued against the plaintiffs in the month of April preceding, for the purpose of recovering this very sum, and after an appearance entered to such process. Before the writ was issued the defendants in that action (the present plaintiffs) had received letters addressed to each of them, stating the intention to sue for the money now in question, in terms sufficiently explicit, to call their attention to the subject in *647] dispute; after which the money claimed in that action was paid. We think this money was paid under compulsion of legal process. In *Mariott v. Hampton*, it does not appear to what precise point the action had been carried before the money was paid, though, from the circumstance of a cognovit having been given for the costs, it is probable the declaration had been delivered. But the judgment of the Court is expressed in very general terms, namely, that "after a recovery by process of law, there must be an end of litigation." In *Brown v. M'Kinally*, 1 Esp. 279, the payment made by the plaintiff in the former action, which had been brought against him by the defendant, was a payment made after action brought, but in what stage of the action does not appear. Lord Kenyon held the action not maintainable, for that to allow it, would be to try every such question twice. In *Milnes v. Duncan*, 6 B. & C. 679, Mr. Justice Holroyd says, "if the money had been paid after proceedings had actually commenced, I should have been of opinion that, inasmuch as there was no fraud in the defendant, it could not be recovered back." And as to the case of *Cobden v. Kendrick*, if it can be supported as to this point, we think it can only be so on the ground of fraud in the defendant. We think the rule of law is accurately laid down by Mr. Justice Holroyd; and that, as the money was paid in this case after the suing out process to recover it, the defendants in the former action knowing the cause of action for which the writ was sued out before they paid the money, and there being no fraud on the part of the plaintiff in that action, it appears to us, that no action is maintainable to recover it back. The rule for a new trial must therefore be made absolute on payment of costs.

Rule absolute.

*ROBSON and Others v. ROLLS and Another. Jan. 31. [*648]

If a trader, from the dread of an arrest, abstains from going to a place to which he would have gone but for such dread, he thereby commits an act of bankruptcy by "absenting himself with intent to delay creditors."

THE plaintiffs sued as assignees of George, a bankrupt, to recover money alleged to have been paid by him to the defendants by way of fraudulent preference.

The validity of the commission was disputed by the defendants, on the ground that George had committed no act of bankruptcy; as to which, it appeared that George being apprehensive that a creditor of the name of Green, who had signed judgment against him, would take out execution thereon against his person, was desirous to ascertain whether a *ca. sa.* had been issued against him by Green, before he, George, returned from the city to his own house in Middlesex. And for that purpose he came to the lower end of Chancery Lane, which is in London, and beckoned to Whitaker, the assistant of the officer of the sheriff off Middlesex, who was at the sheriff's office, which is situated higher up Chancery Lane, to come to him where he then stood, in order that he might make that inquiry. George, at the time, believed that the sheriff's officer was in the county of Middlesex, and he stated to the officer, that his motive in procuring the officer to come to him, instead of going himself to the officer, was to avoid being arrested at the suit of Green, in case Green had sued out a *ca. sa.* The officer accordingly came to George, and informed him, as the fact was, that Green had not then sued out any execution upon his judgment.

George repeated the inquiry at several different times, until he was told by the officer that Green's execution was a *fi. fa.* Tindal, C. J., before whom the cause was tried, thought that this did not amount to an act of *bank- [*649]ruptcy; and a verdict having been found for the defendants,

Wilde, Serjt., moved to set aside this verdict, for a misdirection as to the alleged act of bankruptcy.

In order to constitute an act of bankruptcy "by absenting himself," it is not necessary that a writ should be in the hand of the officer whom the trader avoids, nor that any creditor should be actually refused or delayed; it is sufficient, if from fear of meeting a creditor or the sheriff's officer, the trader abstains from going to a place to which he would otherwise have gone. *Robertson v. Liddell*, 9 East. 487, *Dudley v. Vaughan*, Id. 491, *Chenoweth v. Hay*, 1 M. & S. 676, *Gillingham v. Laing*, 6 Taunt. 532. The consequence of the act is not looked to; its character, as an act of bankruptcy, is derived alone from the motive by which the trader is actuated. In *Chenoweth v. Hay*, the sheriff's officer, whose appearance was the cause of alarm, had no writ against the trader who retreated from his front room; and in *Gillingham v. Laing*, the forbearing to go to the Royal Exchange, which the trader had previously frequented, was held to be an act of bankruptcy. And, recently, in *Green v. Marshal* (not reported), Lord Tenterden held *ad nisi prius*, on a state of facts in no wise differing from those of the present case, that the conduct of the trader amounted to an act of bankruptcy.

A rule nisi having been granted,

Jones, Serjt., showed cause. No reported case has gone so far as the present: and no trader will be safe, if the abstaining to visit a place in which he has no engagement with a creditor, is to be deemed an act of bankruptcy. The motive alone is not sufficient to constitute *an act of bankruptcy; the [*650] motive must be followed by an act which either delays, or has a tendency to delay, some creditor. A mere omission to go in an intended direction is not sufficient, where no engagement is broken and no creditor delayed. In *Chenoweth v. Hay*, the trader actually fled from his shop, and concealed

himself in a back room. In *Gillingham v. Laing*, he violated an engagement to meet a creditor at the Royal Exchange, and the creditor was delayed accordingly. In *Bernasconi v. Farebrother*, 10 B. & C. 549, it was held that a trader does not commit an act of bankruptcy by absenting himself, unless he absents himself from his place of abode, or place of business, or from some particular creditor.

And in *Fisher v. Boucher*, Id. 705, where a trader being under apprehension of arrest, gave directions to his servant to deny him in case A., a sheriff's officer, called, it was held that the sheriff's officer not having called, that, of itself, was not any evidence of a beginning to keep house. And the Court inclined to think that in order to constitute an act of bankruptcy by departing from the dwelling house, the departure must be with an *absolute* intent to delay creditors. But if it were only with intent to delay creditors in case a particular event occurred, and that event did not occur, it was not an act of bankruptcy.

Wilde. In *Bernasconi v. Farebrother* there was no intention to delay creditors, the trader at the time he was absent having long ceased to be in business. In *Fisher v. Boucher* the trader did not follow up the direction to his servant to deny him by retiring to a part of the house which he did not usually occupy, so that there was no evidence of a beginning to keep house with intent to delay creditors; and as to the departure, it did not take place with an absolute, but *651] only with an **inchoate or conditional intention to delay creditors*. In the present case, the trader abstained from going into Middlesex with an absolute intention to delay his creditor.

Cur. adv. vult.

TINDAL, C. J. The principal question in this case is, whether the facts proved at the trial with respect to the transaction between George and the sheriff's officer amounted to an act of bankruptcy? The facts were these: George being apprehensive that a creditor of the name of Green, who had signed judgment against him, would take out execution thereon against his person, was desirous to ascertain whether a ca. sa. had been issued against him by Green before he returned from the city to his own house in Middlesex; and for that purpose he came to the lower end of Chancery Lane, which is in London, and beckoned to Whitaker, the assistant of the officer of the sheriff of Middlesex, who was at the sheriff's office, which is situated higher up Chancery Lane, to come to him where he then stood, in order that he might make this inquiry. George at the time believed that the sheriff's office was in the county of Middlesex, and he stated to the officer that his motive in procuring the officer to come to him, instead of going himself to the office, was to avoid being arrested at the suit of Green, in case Green had sued out a ca. sa. The officer accordingly came to George, and informed him, as the fact was, that Green had not then sued out any execution upon his judgment. George repeated the inquiry at several different times, until he was told by the officer that Green's execution was a fi. fa.

At the trial of this cause at Westminster, I thought at the time that the case fell within the principle laid down by the Court of King's Bench in *Fisher v. Boucher*, 10 B. & C. 705, as being only an intent to delay a creditor *652] **in case a particular event had occurred* (namely, in case Green had actually sued out a ca. sa.), which event had not taken place. But, upon further consideration of the cases which have been brought before us in argument, I am satisfied, and my learned brothers agree with me, that my first impression was wrong; and that the forbearing to go into the county of Middlesex, where he would have gone for the purpose of making this inquiry but for the dread of being arrested, falls within that class of acts of bankruptcy which are grounded upon the words of the statute, "if he shall otherwise absent himself with intent to delay creditors." In fact, the stopping at the end of Chancery Lane, and abstaining from entering it, was as much an act done, as if he had gone off for the same purpose in a different direction. It was not a mere intention to do an act, which intention was afterwards laid aside in consequence of information

received before it became necessary to do it, which formed the ground of decision in the case last referred to. If the officer of the sheriff of Middlesex had actually had a warrant against George at the time of this transaction, the causing the officer to come into London, where the warrant would have been inoperative, instead of going to the officer in Middlesex, would have been absenting himself within the principle laid down by the decided cases, whereby an actual delay of the creditor would have been occasioned, and would therefore have been an absenting himself "with intent to occasion such delay." And the circumstance that the officer had no warrant, but was only supposed to have a warrant, makes no difference, according to the doctrine laid down by Lord Chancellor Eldon in *Ex parte Bamford*, 15 Ves. 449.

But it is urged, on the part of the defendants, that *as the case went to the jury on the question whether these bills of exchange were delivered to the defendants in contemplation of bankruptcy, and to give them a fraudulent preference, and the jury have negatived the fraudulent preference, there can be no use in sending the cause to a second trial, for that this transaction must be protected under the eighty-second section of the bankrupt act, as a payment "really and *bonâ fide* made by the bankrupt before the commission, not being a fraudulent preference." But we think it enough to say, that the precise point which now arises, viz., whether this payment, *after* a previous act of bankruptcy, was or was not a real *bona fide* payment, not being a fraudulent preference, has not been submitted to the consideration of the jury, and that the plaintiffs have the right to have their opinion upon that fact. We therefore think the rule for a new trial should be made absolute.

Rule absolute.

BASSETT v. DODGIN and Others. Jan. 31.

An accommodation endorser is a person *liable* to pay the bill for the party accommodated; against whom, therefore, if he become bankrupt, such endorser, though not called on to pay the bill till after the bankruptcy, may prove the amount under sect. 52 of 6 G. 4, c. 16. And the bankrupt being discharged from any suits for the amount by his certificate, is, in an action on the bill, a competent witness for such endorser.

THIS was an action brought by the plaintiff to recover the amount of two bills of exchange drawn by Joseph Francis Taylor on, and accepted by, George Daniel, endorsed by Taylor to the defendants, and endorsed by the defendants to the plaintiff. The bills became due in the month of August, 1831.

The defendants had endorsed these bills for the *accommodation of Taylor, and to enable him to raise money by procuring them to be discounted, for the purpose of taking up a former bill then due, of which they were the acceptors, for his accommodation. Taylor, who was called by the defendants as a witness to prove usury, stated upon the *voir dire* that he had been bankrupt, and had obtained his certificate; and it was thereupon contended by the defendants that the witness was discharged from all liability over to the defendants, both as to the principal debt and the costs, inasmuch as the defendants might have proved, and might still prove the amount of both bills under the commission against Taylor, by virtue of the fifty-second section of the bankrupt act; and consequently that Taylor's certificate would be a bar to any action against him.

The defendants had been called on to pay the bills after Taylor's bankruptcy.

It was objected by the plaintiff's counsel, that he was an interested witness, because the defendants would be entitled to recover against him, not only the amount of the bill, but the costs of this action also, while to Bassett he would be liable to the bill only. *Jones v. Brooke*, 4 Taunt. 464. *Tindal*, C. J.,

before whom the cause was tried, London sittings after Michaelmas term last, allowed the objection, and Taylor's evidence was rejected.

A verdict having been found for the plaintiff,

Jones, Serjt., moved to set it aside, on the ground that Taylor was a competent witness.

At the time of Taylor's commission, *Dodgin & Co.* being endorsers for the accommodation of Taylor, were liable to the debt incurred by Taylor as drawer of the bill in question; and by 6 G. 4, c. 16, s. 52, "any person who, at the *655] time of issuing the commission, shall be *surety or liable for any debt of the bankrupt, or bail for the bankrupt, either to the sheriff, or to the action, if he shall have paid the debt, or any part thereof in discharge of the whole debt (although he may have paid the same after the commission issued), if the creditor shall have proved his debt under the commission, shall be entitled to stand in the place of such creditor as to the dividends and all other rights under the said commission which such creditor possessed or would be entitled to in respect of such proof; or, if the creditor shall not have proved under the commission, such surety, or person liable, or bail, shall be entitled to prove his demand in respect of such payment as a debt under the commission, not disturbing the former dividends, and may receive dividends with the other creditors, although he may have become surety, liable, or bail, as aforesaid, after an act of bankruptcy committed by such bankrupt: provided that such person had not, when he became such surety or bail, or so liable as aforesaid, notice of any act of bankruptcy by such bankrupt committed." *Dodgin & Co.*, therefore, might have proved under Taylor's commission, or have stood in the place of the creditor proving for the bill; they are therefore barred by the certificate from any claim against Taylor, and he was a disinterested witness. In *Vansandau v. Corsbie*, 3 B. & Ald. 13 (see *Hoffham v. Foudrinier*, 5 M. & S. 21), where the acceptor of an accommodation bill brought an action against the drawer, who had become bankrupt, for not providing him with funds to pay the bill when due, whereby he had incurred the costs of an action, and was obliged to sell an estate in order to raise money to pay the bill, the certificate was held to be a good bar.

A rule nisi having been granted,

Coleridge, Serjt., showed cause. It is not contended that *Dodgin & Co.* *656] were sureties; for, in *Yallop v. Ebers*, 1 B. & Adol. 698, Lord Tenterden says, that *Laxton v. Peat*, 2 Campb. 185, where it was held that an accommodation acceptor might be considered as a surety, has been very long overruled; and at the time of the commission they were not liable to pay the bill on account of Taylor; they were liable on their own account only. And they might have escaped liability altogether; as if the bill had been paid by the acceptor or drawer. *Dodgin & Co.*, therefore, had no claim against Taylor at the time his commission issued; it was not certain that they would ever be liable on the bill; and if ever liable, it must have been on their own account: they could not prove, therefore, under Taylor's commission, and are not barred by his certificate. In *Vansandau v. Corsbie*, the party held to be barred by the certificate was avowedly an accommodation acceptor, and as such, liable in respect of the drawer at the time the commission issued against him. So in *Wood v. Dodgson*, 2 M. & S. 195, and *Afalo v. Foudrinier*, 6 Bingh. 306, S. C.; 3 M. & P. 743, the party barred was, at the time of the commission, expressly liable for the debts of a firm in which the bankrupt had been a partner. But, in *Yallop v. Ebers*, 1 B. & Adol. 698, where defendant, on certain considerations, undertook to pay the balance due on a bill of exchange, of which plaintiff was acceptor; and he afterwards, by a new undertaking, engaged to deliver up the acceptance to plaintiff within a month, or indemnify him against it; defendant became bankrupt, and did not pay or give any indemnity; and plaintiff was obliged to take up the bill, the bankrupt having then obtained his certificate: on action brought by plaintiff for the breach of promise, it was held that he

could not have proved in respect of it under the defendant's commission, either for *a debt not payable at the time of bankruptcy, or for a contingent debt, or in the character of a surety; and, therefore, that the bankruptcy [*657 was no defence.

The case of bail is introduced into the new act, and the present liability of the endorsee is precisely like that of bail, and is not provided for by the act.

Jones. No distinction can be drawn between an accommodation acceptor, and an accommodation endorser. Both are liable on account of the party for whom they have accepted or endorsed, and both are liable on their own account. In *Yallop v. Ebers*, the party who was held not to be barred by the bankrupt's certificate, was himself acceptor for value, and had no claim on the bankrupt, except on an agreement by the bankrupt for certain considerations to pay the balance due on that acceptance, which agreement was holden not to constitute a debt before the certificate. But in *Ex parte Yonge*, 3 Ves. & B. 40, Eldon, C., said, "The drawer of a bill of exchange is not strictly a surety for the acceptor. In general cases, the acceptor is primarily liable upon the bill; and the drawer may be in the nature of a surety; but, if the real transaction is, that as between them the drawer shall be first liable, after what has passed at law, and here with reference to the acceptor having, or not having effects, I state from a perfect recollection, that when that bill passed (49 G. 3, c. 121), it was in contemplation, where justice required it, that the acceptor should be considered a person liable for the drawer: but, further, the circumstances of each are to be looked at; and if a person has become liable under this section (Sect. 8) of the act, he is to have relief." *Cur. adv. vult.*

*TINDAL, C. J. The only question in this case is, whether Taylor, the drawer and endorser of a bill of exchange, was a competent witness [*658 on the part of the defendants in an action brought against them as subsequent endorsers by the holder of the bill. Dodgin & Co. had endorsed this bill for the accommodation of Taylor, and to enable him to raise money by discounting it, for the purpose of taking up a former bill then due, of which they were the acceptors, for his accommodation. If the matter had rested there, no doubt Taylor would have been incompetent, on the authority of *Jones v. Brooke*, 4 Taunt. 464; inasmuch as he would be liable as to the costs to the defendant only, though he stood indifferent both to plaintiff and defendant as to the principal debt. But Taylor stated upon the *voir dire*, that he had been bankrupt, and had obtained his certificate; and it was thereupon contended by the defendants that the witness was discharged from all liability over to the defendants, both as to the principal debt and the costs, inasmuch as the defendant might have proved, and might still prove, the amount of both under the commission against Taylor, by virtue of the fifty-second section of the bankrupt act, and consequently, that Taylor's certificate would be a bar to any action against him.

The question, therefore, is, whether this case falls within the fifty-second section of that statute. That section provides for the case "of any person who at the issuing of the commission shall be surety, or liable for any debt of the bankrupt, or bail for the bankrupt, either to the sheriff, or to the action." Now the defendants in this case cannot with any propriety be considered as *sureties* for the debt of Taylor to the plaintiff; inasmuch as they are liable primarily and immediately to the holder of the bill as endorsers, that is, as principals, and not merely *upon the failure of Taylor, the prior en- [*659 dorser. The only question, therefore, is, whether they come within the meaning of the words "persons liable at the issuing of the commission for any debt of the bankrupt." In *Ex parte Lloyd*, 1 Rose's Cases in Bankruptcy, 6, Lord Chancellor Eldon holds expressly that the acceptor, for the accommodation of the drawer, though not surety, is a *person liable* within the act. He states the same opinion again in *Ex parte Yonge*, 3 Ves. & Beames, 40. The cases -f *Wood and Another v. Dodgson*, 2 M. & S. 195, and *Affalo v. Fourdrinier*,

though distinguishable in some respects from the present, yet lead to the same conclusion. It is said the case of bail is introduced into the new act, and that the present liability of the endorsee is precisely like that of bail, and is not provided for by the act. But it is to be observed, that in the case of bail, there is no debt due from the defendant at the time of the recognisance entered into, and whether there ever will be a debt or not, is contingent and uncertain, until the action in which the bail is given is determined. The bail, therefore, were not persons *liable* for a debt of the bankrupt at the time of the issuing the commission. Upon the whole, we think Dodgin & Co. might have proved the amount of the bill under Taylor's commission, or might even now prove it, immediately after payment of the amount of the bill to the holder; and, consequently, that the certificate of Taylor is a bar to any future action by Dodgin & Co. against him after they have paid the bill; and as the case of *Vansandau v. Corsbie* puts the costs upon the same footing as the debt, we think Taylor is an admissible witness on the part of the defendants. Rule absolute.

*660]

*LYONS v. WALLS. Jan. 23.

To a declaration on a general acceptance of a bill of exchange, defendant pleaded that the acceptance was qualified, and that according to the statute in such case made and provided, in the acceptance he expressed that he accepted the bill "payable at a certain place only, to wit, No. 82 Albany Street, that is to say, *and not otherwise or elsewhere*;" plaintiff replied that the acceptance was a general acceptance, and that the defendant did not in the acceptance express "that he had accepted the bill payable at a certain place only, in manner and form as the defendant had alleged:"

Held, on special demurrer, a sufficient traverse.

Held, also, that the plea should have alleged that no presentment for payment was made at the place appointed.

THE declaration stated that the plaintiff, on the 2d of January, 1832, to wit, at London, made his bill of exchange in writing, and directed the same to the defendant, and thereby required the defendant to pay to the order of him, the plaintiff, the sum of 17*l.* for value received, two months after the date thereof, which period had then elapsed; and then and there delivered the same to the said defendant, and the defendant then and there accepted the same, and promised the plaintiff to pay the same according to the tenor and effect thereof, and of his acceptance thereof: yet he did not pay the amount thereof, although the said bill was there presented to him on the day when it became due, and thereupon the same was then and there returned to the plaintiff, of all which the defendant then and there had notice.

The second count stated, that the defendant, on the 2d of April, 1832, was indebted to the plaintiff in 80*l.*, for the price and value of goods *then and there* sold and delivered by the plaintiff to the defendant at his request, and afterwards, on the day and year last aforesaid, at London aforesaid, in consideration of the premises, then and there promised to pay the last-mentioned sum of money to the plaintiff on request. Breach, nonpayment.

To the first count the defendant pleaded, that the said acceptance by the defendant of the bill of exchange in the first count mentioned, was a qualified acceptance, *and that the defendant did, according to the form of the statute
*661] ceptance, *and that the defendant did, according to the form of the statute in such cases made and provided, in his said acceptance express that he accepted the same payable at a certain place only, to wit, at No. 82 Albany Street, Regent's Park, that is to say, and not otherwise or elsewhere; as by the said bill of exchange, reference being thereunto had, would more fully appear; and that, he was ready to verify; wherefore he prayed judgment, &c. The defendant demurred to the second count, assigning for cause of demurrer that it did not contain a sufficient venue.

The plaintiff joined in demurrer, and to the plea to the first count replied,

that the said acceptance by the defendant of the bill of exchange in the first count mentioned, was a general acceptance, as in that count was set forth, and that the defendant did not, in his said acceptance, express that he accepted the said bill payable at a certain place only, in manner and form as the defendant had above in his said first plea alleged.

To this replication the defendant demurred, assigning for cause, that it did not traverse and put in issue the material fact contained in the first plea, namely, whether the said acceptance was a qualified acceptance according to the form of the statute in such case made and provided, and payable at a certain place only, and *not otherwise or elsewhere*; the full traverse of which said matter so alleged by the defendant could alone take the said acceptance out of the intent of the said statute; but that the said replication contained only an argumentative averment that the defendant did not, in his said acceptance, express that he accepted the said bill payable at a certain place only.

Ludlow, Serjt., in support of the demurrer, referred to *Bowdell v. Parsons*, 10 East, 359, as an authority that, upon special demurrer at least, the mention of a venue in the first count of a declaration will not cure the omission of it in the second; and with respect to the replication contended, that all the allegations contained in it might be true, and yet the defendant's acceptance might have contained the words "and not elsewhere," which are the express words prescribed by the statute for qualifying an acceptance, and the only words which can have that effect: *Selby v. Eden*, 3 Bingh. 611.

TINDAL, C. J. The plaintiff is entitled to our judgment. As to the alleged omission of venue, one cannot read the second count without incorporating the place where the goods were sold with the existence of the debt at the same time. The count states that the defendant, on the 2d of April, 1832, was indebted to the plaintiff for goods then and there sold by the plaintiff to the defendant at his request, and at London, in consideration of the premises, then and there promised to pay: in other words,

The defendant, on the 2d of April, promises, at London, to pay the sum in which he is there indebted for goods sold to him on that day. The debt arises there, and the venue is sufficient.

With regard to the acceptance, the defendant pleads, "that the acceptance was qualified, and that, according to the statute in such case made and provided, in the acceptance he expressed that he accepted the bill 'payable at a certain place only, to wit, at 32 Albany Street, that is to say, and not otherwise or elsewhere.'"

It is not immaterial to observe, that the allegation that the bill was accepted "not otherwise or elsewhere" is not expressly averred by the defendant, but only pleaded under a *viz.* But the plaintiff replies, "That the acceptance was a general acceptance, and that the defendant did not, in the acceptance, express 'that he had accepted the bill payable at a certain place only, in manner and form as the defendant had alleged.'" And he seems to me to incorporate in that traverse the particular mode in which the bill was accepted. I should also go higher, and say, that if this were a qualified acceptance, the act says the acceptor shall not be liable, except on default of payment, after demand, at the place appointed. I should have been better satisfied, therefore, with the defendant's plea, if he had gone on to say that no demand was made at the place appointed for payment.

The other Judges concurring, the Court gave

Judgment for the plaintiff.

REGULA GENERALIS.

IT IS ORDERED, That in case a rule of Court or Judge's order for returning a bailable writ of *capias* shall expire in vacation, and the sheriff or other officer having the return of such writ shall return *cepi corpus* thereon, a Judge's order may thereupon issue requiring the sheriff, or other officer, within the like number of days after the service of such order as by the practice of the Court is prescribed with respect to rules to bring in the body issued in term, to bring the defendant into Court by forthwith putting in and perfecting bail above to the action. And if the sheriff or other officer shall not duly obey such order, and the same shall have been made a rule of Court in the term next following, it shall not be necessary to serve such rule of Court or to make any fresh demand *664] of such order, but an attachment shall issue *forthwith for disobedience of such order, whether the bail shall or shall not have been put in and perfected in the mean time.

T. DENMAN,	J. GURNEY,
N. C. TINDAL,	S. GASELEE,
LYNDHURST,	J. VAUGHAN,
J. BAYLEY,	J. PARKE,
J. A. PARK,	W. BOLLAND,
W. E. TAUNTON,	J. B. BOSANQUET,
E. H. ALDERSON,	J. LITTLEDALE.
J. PATTESON,	

MEMORANDUM.

Thomas Noon Talfourd, Esquire, was called to the degree of the *coif*, and gave rings with the following motto, "*magna vis veritatis*."

END OF HILARY TERM.

C A S E S .

ARGUED AND DETERMINED

IN THE

COURT OF COMMON PLEAS,

AND

OTHER COURTS,

IN

Easter Term,

IN THE THIRD YEAR OF THE REIGN OF WILLIAM IV.

GOODBURNE *v.* BOWMAN. *April 16.*

Where immaterial issues are found in favour of defendant, and judgment is afterwards entered for plaintiff *non obstante veredicto*, neither party is entitled to the costs of the immaterial issue.

In this cause several issues were found for the defendant, which the Court afterwards decided to be immaterial issues, and gave judgment for the plaintiff *non obstante veredicto*.

The prothonotary having declined to allow the defendant or the plaintiff costs upon these immaterial issues, a rule nisi was obtained, on the part of the defendant, for a review of the taxation; against which

Jones and Stephen, Serjts., showed cause. By the seventy-fourth rule, Trin. W. 4, no costs shall be allowed on taxation to a plaintiff upon any counts or issues upon which he has not succeeded; and the costs of all issues found for the defendant shall be deducted from the plaintiff's costs. In *Kirk v. Nowill*, 1 T. R. 266, it was held, that, if plaintiff took issue on several pleas, one of which was insufficient in law, and had a verdict on all the issues except that joined on the insufficient plea, which was found for the defendant; and afterwards judgment was entered up for the plaintiff; still he should not be allowed any costs upon the issue found for the defendant. But upon the new rule the plaintiff must be taken to have *succeeded*, and the defendant to have failed. At all events, it is impossible that the defendant can claim any costs, for the judgment of the Court is against him.

Bompas, Serjt., *contra*, was requested by the Court to confine himself to the defendant's claim for costs. He contended that, as the plaintiff, by omitting to demur, had compelled the defendant to go to trial on the immaterial issues, the defendant must be taken to have succeeded when those issues were found for him by the jury. The new rule of Court must be considered as a comment on the case of *Kirk v. Nowill*, and there the Court said, "Suppose the judgment had been arrested, no costs would have been given. The reason is obvious; the plaintiff has contributed to the costs as well as the defendant. He should have demurred to the defendant's plea; on going on to trial he is equally in fault." (a)

TINDAL, C. J. It appears to me that neither the plaintiff nor the defendant is entitled to costs on these issues.

*669] First, as to the plaintiff. The rule says, No costs *shall be allowed on taxation to a plaintiff, upon any counts or issues upon which he has not succeeded; and the costs of all issues found for the defendant shall be deducted from the plaintiff's costs. Now the issues in question were found for the defendant, and in no sense of the word can the plaintiff be said to have *succeeded* on them. If the verdict were *for* him on a bad count, he would not be entitled to costs; still less can he be so entitled, where, upon an immaterial issue, the verdict is *against* him. By obtaining judgment *non obstante veredicto*, he has not succeeded on such issue; he has only put it out of the way.

Now, with respect to the defendant. In order to entitle him to costs, the issues found for him must be such as he can ultimately succeed on; real issues in point of law, on which judgment can be signed.

Suppose he had pleaded only one plea, bad in point of law, and a verdict had been given for him on that plea; if the plaintiff afterwards obtained judgment *non obstante veredicto*, could it be contended that the defendant should have the costs of the cause? This is a *casus omissus* in the rules; and the best course is to hold that neither party shall have his costs.

GASELEE, J., at first thought the plaintiff was not entitled to the costs of these issues, because he ought to have demurred, instead of allowing the defendant to go down to trial on them; and he likened the case to a motion in arrest of judgment: but, with respect to the defendant, although he was first to blame for putting a bad plea on record, yet he considered him entitled to his costs as having *succeeded* on the issues in question. The following day, however, the learned Judge said, that, on consideration, he had altered his opinion in this respect, and agreed with the rest of the Court that neither party was entitled to costs on these issues.

*670] *ALDERSON, J., concurred with the Chief Justice on both points. The plaintiff had not succeeded on the issues in question, but *notwithstanding* those issues; and as to the defendant, he could not be said to have succeeded, because the issues were not such as judgment could be entered up on. In *Cox v. Thomason*, 2 Cr. & Jer. 498, there were nine counts for a malicious prosecution, and nine for slander, and a verdict for the defendant on fifteen. The plaintiff was held entitled to the general costs, because on the whole record the judgment was for him; but the defendant was allowed to deduct the issues found for him, because he had relieved himself from that portion of the charges against him: here the defendant has not relieved himself from any of the charges brought against him.

PARK, J. I had intended to express no opinion; but the way in which this has been put by my Lord Chief Justice, and my brother Alderson, has convinced me, and I agree with them that neither party should have the costs of these issues.

Rule discharged.

(a) Vide 2 Vent. 196, 1 Barnes, 4to. edit. 125.

BOWYEAR v. BOWYEAR. April 16.

The Court will not stay the proceedings in a writ of right, till the costs of a prior ejectment for the same lands are paid.

THIS was a writ of right for the recovery of lands in Middlesex. The demandant had brought an ejectment in the King's Bench for the same lands, which was tried and failed: whereupon the demandant commenced a second ejectment in the same Court, the proceedings in which that Court staid till the demandant should have paid the costs of the former ejectment. The demandant had also filed a bill in Chancery for a discovery; *but upon a plea being put in, he omitted to appear to the plea, and the bill was dismissed. [*671]

Upon affidavit of these facts, *Wilde*, Serjt., obtained a rule nisi to stay the proceedings in the writ of right till the costs of the two actions of ejectment should have been paid.

Ludlow, Serjt., who showed cause, relied on *Chatfield v. Souter*, 3 Bingh. 167, (he cited also 3 B. & P. 23, note), as a case in point. There, the Court would not stay the proceedings in a writ of right till the costs of a prior ejectment were paid.

Wilde. It is a general rule, that in a second ejectment, the Courts will stay the proceedings until costs are paid of a prior ejectment for the trial of the same title. See *Tidd's Pr.* 538 (9th edit.), and the authorities there cited. The plaintiff frustrates that rule, if he be allowed to proceed by writ of right for the same premises before paying the costs of previous ejectments, for the proceeding differs only in name. And *Chatfield v. Souter* is clearly distinguishable, for there the ejectment never proceeded to trial. Where the demandant has had a trial, and has failed upon the merits, further litigation for the same property, unless upon payment of costs, would be in the highest degree vexatious.

TINDAL, C. J. The case of *Chatfield v. Souter* is too strong in its circumstances, and in the principle of the decision, for us to decide against it. In proceeding by a second ejectment, the action is in substance the same as the first; but a proceeding in this Court by writ of right, is altogether different from the proceeding by ejectment. The ejectment may have failed because the lessor's entry has been tolled, or because the twenty years within which it ought to have been commenced, may have elapsed. Here the party is pursuing a remedy which is of a different nature, and which, for aught that appears, may have been rendered necessary by the inefficacy of the proceeding by ejectment. [*672]

PARK, J. I adhere to the opinion I pronounced in *Chatfield v. Souter*.

GASELEE, J. *Chatfield v. Souter*, which is reported more at length in 10 B. Moore, p. 572, is not distinguishable from the present case.

ALDERSON, J. I am of the same opinion. The authority of *Chatfield v. Souter* is decisive, and not to be distinguished. Rule discharged.

MORGAN v. BIRNIE. April 17.

Condition precedent. Defendant was to pay for building upon receiving an architect's certificate that the work was done to his satisfaction. The architect checked the builder's charges, and sent them to defendant:

Held, that this did not amount to such a certificate of satisfaction as to enable the builder to sue defendant, although defendant had not objected to pay on the ground that no sufficient certificate had been rendered.

THIS was an action on a builder's contract, by which it was stipulated, among other things, that all the proposed erections should be done in a good and work-

manlike manner, and with good sound and well-seasoned materials, and be completed to the reasonable satisfaction of A. B. Clayton, or other the architect for the time being of the defendant, his executors or *administrators, on or before the 29th day of October next ensuing the date thereof, or such further day as the said A. B. Clayton, or such other architect, and the said plaintiff should mutually agree upon. It was further provided, that no additions or alteration should be admitted unless directed by the defendant, his executors or administrators, or his or their surveyor, in writing; nor should any additions to or alterations of the works thereby contracted for, and contained in the particulars therein specified, vitiate or vacate the contract thereby made, but the price or allowance to be made in respect of any agreed additions or alterations, should be added to or deducted from the moneys that should become payable by virtue of the said memorandum of agreement as the case might require, such price or allowance being first estimated or settled by the surveyor or architect of the said defendant, who should be sole arbitrator in settling such price or allowance, and all disputes that should or might arise in or about the premises: And the defendant thereby promised and agreed, in consideration of the buildings and works to be done and executed by the said plaintiff, in manner in the said memorandum of agreement mentioned, that the defendant would pay or cause to be paid to the plaintiff the sum of 1250*l.* in manner following, that is to say, that he would pay or cause to be paid such a sum of money, as would be equal to three-fourth parts of the price of the works thereby contracted for, which should have been executed and performed according to the true intent and meaning of the said memorandum of agreement, upon receiving a *certificate in writing* signed by the said A. B. Clayton, or other the architect of the defendant, testifying that the flooring-joists of the first story of the said dwelling-house had been actually laid, and his approval of the works so executed; such further sum of money as would be equal to three-fourth parts of *674] the price or value of the further works that should have been done subsequently to the date of the architect's said certificate, upon the completion of the carcass of the dwelling-house; and the balance or sum which should be found due to the plaintiff, after deducting the two previous payments, *within two calendar months after receiving the said architect's certificate that the whole of the buildings and works thereby contracted for had been executed, and completed to his satisfaction.*

The work having been completed, the plaintiff sought by this action to recover his charges for some additional work not contained in the original contract.

At the trial it appeared, that Mr. Clayton, the architect, had examined and approved of the plaintiff's charges for the buildings mentioned in the agreement, and had written the following letter to the defendant, more than two months before the action:—"With this you will receive Mr. Morgan's account. My private statement, showing the variations of prices and qualities, shall be copied and forwarded to you. As regards to when and where executed, my only data exist in my measuring book, which shall be open for your inspection at any time at my office. I also forward you the drawings marked 6 and 7, and the original elevation and plan submitted to the commissioners of woods and forests. I remain, &c.

"March 24, 1832.

A. B. Clayton."

This letter contained an account, headed, "Final statement of extras and omissions of the carcass of a house for George Birnie, Esq., by T. Morgan, builder."

A letter was also put in, addressed to Clayton by the defendant, April 4th, 1832, in which he asked for Clayton's private statement of prices and quantities; expressed himself anxious to have the matter speedily settled; and made *675] no objection on the ground of not *having received a certificate. But as it did not appear that Mr. Clayton had ever given any certificate of his

satisfaction as to the mode in which the work had been executed, Tindal, C. J., directed a nonsuit, on the ground that the delivery of such a certificate was a condition precedent to the plaintiff's right of action.

Spankie, Serjt., now moved to set aside this nonsuit on the ground that the agreement did not require the certificate touching the additions, to be in writing; and that Mr. Clayton's allowance of the plaintiff's charges must be deemed an implied certificate, for he could not allow the charges to be correct without implying thereby that the building had been executed to his satisfaction. Besides, it might be doubtful whether any certificate were requisite with respect to charges for additional work: the certificate was to apply only to the building as originally contracted for; and the defendant had never objected to pay on the ground that a proper certificate had not been rendered.

TINDAL, C. J. I was of opinion at the trial, and am still of opinion, that the production of a certificate from Mr. Clayton was a condition precedent to the bringing this action. The agreement stipulates, that the price of additions or alterations should be added to the sum contracted for by the agreement, such price being first settled by the architect of the defendant, who should be sole arbitrator in settling such price, and all disputes that should arise about the premises. Then follows the stipulation for payment in proportion to the work done at two different periods upon receiving a certificate in writing of Mr. Clayton's approval, and for payment of the balance of the whole within two calendar months after receiving the said architect's certificate, that the whole of the buildings contracted for had been executed *to his satisfaction. That appears to involve not only the original, but the addi- [676] tional or extra works. Unless the letter and delivery of the plaintiff's account, and the checking that account by Clayton amount to a certificate, no certificate has been given. It appears to me that the effect of a certificate would be altogether different; applying to the manner in which the work has been done, while the checking the accounts applies only to the propriety of the charges.

The rest of the Court concurring, the rule was

Refused.

FENTON v. LOGAN. April 18.

An implement of trade is only privileged from distress if it be in use, and if there be no other distress on the premises.

To *replevin* for a thrashing-machine the defendant avowed for rent arrear, and the plaintiff pleaded that the machine was an implement of trade, not liable to distress, being in use at the time, and there being a sufficiency of other goods on the premises.

At the trial it appeared that the machine had been let to hire by the plaintiff to the tenant on whom the defendant had distrained; that the work for which it had been let was completed on a Saturday, and that the distress was made on the Monday following.

There was no evidence that any other goods were to be found on the premises.

The jury found that the machine was not in use, and that there was no other distress on the premises, and gave their verdict for the defendant.

Storks, Serjt., moved for a new trial, on the ground that, under these circumstances, the learned Judge who *presided should have directed a verdict for the plaintiff. As an implement of trade the machine was privileged from distress while in actual use, and if so, must be deemed also privileged for a reasonable time, *eundo et redeundo*, otherwise the privilege would be nugatory. Monday might reasonably be allowed for returning, after work completed on Saturday. In *Gorton v. Falkner*, 4 T. R. 565, it was held, that [677]

implements of trade might be distrained for rent if they were not in actual use at the time, and if there were no other sufficient distress on the premises.

TINDAL, C. J. The plaintiff seeks to set aside this verdict, on the ground that the thrashing-machine was an implement of trade in use, and as such privileged from distress. There are several distinct grounds on which certain things are privileged from distress; some absolutely, as materials deposited to be worked up; others, conditionally, that is, if a sufficient distress cannot be had without them. Again, implements of trade are, in some instances, privileged, if they be in use, and if no other distress can be found on the premises. In this case neither of those conditions has been fulfilled. In the first place, the machine was not in use, the whole purpose for which it had been hired having been completed on Saturday, and the distress having been made on Monday; and it is unnecessary to enter into the question whether or not it would have been privileged in the course of removal, for here, in the absence of any evidence of other goods being on the premises, the second condition entirely fails. The case of *Wood v. Clarke*, 1 Cr. & J. 484, is conclusive on both points. There it was held that materials delivered by a manufacturer to a *678] weaver, to be by him manufactured at his own home, *were privileged from distress for rent due from the weaver to his landlord; but that a frame or other machinery, delivered by the manufacturer to the weaver, together with the materials, for the purpose of being used in the weaver's house in the manufacture of such materials, was not privileged unless there were other goods upon the premises, sufficient to satisfy the rent due.

PARK, J. *Gorton v. Falkner* is a decisive authority against the plaintiff, for it shows that implements of trade can only be distrained if not in use, and there be no other distress.

The rest of the Court concurred in

Refusing the rule.

ANDERSON and Another v. THOMAS. April 18.

The mis-statement of the form of action at the commencement of a declaration is an irregularity only, and not fatal on special demurrer.

THE plaintiff commenced a declaration in *assumpsit* on a bill of exchange, with the usual money counts, by alleging that the defendant was summoned to answer them "of a plea of trespass on the case;" and stated that the defendant had accepted a bill, payable to plaintiff or order, of 500*l.*, valued in freight, four months after the arrival thereof. Breach, that the plaintiff had disregarded his promises, and had not paid any of the said moneys.

Upon special demurrer,

WILDE, Serjt., objected that the declaration did not commence with stating correctly the form of action, pursuant to the rule of Court, M. 1654, s. 16, and *679] that the breach *was too general, inasmuch as a question might arise as to what was or was not the arrival on which payment was to be made.

TINDAL, C. J. The omission to state the form of action is a mere irregularity, or non-compliance with a rule of Court. There is nothing illegal on the face of the record. The general allegation of non-payment is sufficient, and there must be

Judgment for the plaintiff.

PERRIMAN v. STEGGALL. April 19.

The Court refused to set aside the award of a barrister, on the ground that he had admitted an incompetent witness.

WILDE, Serjt., moved to set aside an award in this cause, made by a barrister.

ter. on the ground, that, notwithstanding an objection to such a course, he had received the testimony of Tucker, a witness who had been held by this Court to be incompetent. See ante, vol. 8, p. 369. Tucker had, indeed, released any claim to a surplus under a commission on which he had been declared a bankrupt, but subsequently to the bankruptcy he had been discharged under the insolvent debtor's act, and in that respect was still incompetent.

The Court, advertng to the general rule which precludes interference where the award has been made by a barrister, requested the learned Serjeant to consider the cases on that subject.

After having looked into those cases, *Wilde* now submitted that the award of a barrister was only deemed final on a point of law where such point was expressly referred to him; and he referred to *Wade v. Huntly*, Tidd's Pr. 894, 8th edit., *where it is said that the Court will set aside an award for a clear mistake on a point of law; to *Wohlenberg v. Lageman*, 6 Taunt. [680 251; to *Chace and Others v. Westmore*, 13 East, 357, where the Court declined laying down any general rule, and refused to set aside the award, only because they thought the parties intended to refer the point in question. In *Richardson v. Nourse*, 3 B. & Ald. 237, Lord Tenterden said, "I do not go the length of saying, that where arbitrators proceed upon a mistake of a clear principle of law, the Court will not set aside their award." And in *Young v. Walter*, 9 Ves. 364, Lord Eldon said, "If there is a question of law, and the parties choose to refer that to the decision of an arbitrator, instead of the Court, why may not he take all moral considerations into his judgment? If they refer to a person to decide all matters in difference according to law, and he means to decide according to law, and mistakes, the Court will set that right. But if a distinct question of law, and nothing else, is referred, and the parties choose to say they will not take the decision of the Court, but will take whatever an arbitrator shall say is the law between them, why may they not so agree?" [PARK, J. What is the use of the condition frequently inserted in arbitration rules, that the arbitrator shall be at liberty to state any point of law on the face of his award, if the point can thus be raised in the way of motion?] The denial of appeal, except upon the insertion of special conditions in the rule, will tend to repress the practice of referring to arbitration; and if such a custom has crept in, it should be reconsidered.

Talfourd, Serjt. (*amicus curiæ*), stated, that yesterday the Court of King's Bench, upon the application of *Hoggins*, refused to set aside the award of a barrister, *upon affidavit that he had admitted the testimony of an in- [681 competent witness.

TINDAL, C. J. I have always thought that, where the parties appoint a lawyer their arbitrator, they appoint him judge of law as well as judge of fact, and it has been the constant practice to refuse any appeal on the merits of the decision.

GASELEE and ALDERSON, Js., expressed a similar opinion. Rule refused.

APPERLEY, Clerk, v. BISHOP of HEREFORD. April 20.

1. In quære impedit, the ordinary, unless he has collated, cannot counterplead the plaintiff's title to the patronage.
2. The declaration shows a sufficient avoidance of a living, if it alleges that the incumbent accepted another benefice with cure of souls, although it contains no allegation that the benefice held by the incumbent was of the value of 8l.

QUARE impedit. In the declaration, the plaintiff, after setting out his title to the advowson of the rectory of Stoke Lacy, and his own institution and induction upon a vacancy occasioned by his predecessor being instituted and inducted into the chapelry of Bartestry, with cure of souls, alleged that, in

January, 1832, he, the plaintiff, accepted, and was admitted, instituted, and inducted into the vicarage of the parish church of Ocle Pritchard, that vicarage and the rectory of Stoke Lacy being each of them a benefice with the cure of souls, whereby it belonged to the plaintiff, patron as aforesaid, to present a fit person to the church of Stoke Lacy; that he presented to the Bishop of Hereford, being the proper ordinary in that behalf, William Betham, Clerk, to be admitted, instituted, and inducted, Betham being a fit person, but that the bishop refused to admit, &c.

The defendant pleaded, first, that before the church of Stoke Lacy became *682] vacant, after the plaintiff accepted *and was admitted, instituted, and inducted into the vicarage of Ocle Pritchard, and before the plaintiff presented W. Betham, as in the declaration mentioned, the plaintiff, by indenture, bargained and sold, and released respectively the advowson, right of nomination, &c., of and to Stoke Lacy to James Holbrook. Secondly, that the plaintiff having a benefice with cure of souls, to wit, Stoke Lacy, of the value of 8*l.* and upwards, did accept, and was admitted, instituted, and inducted into the vicarage of Ocle Pritchard, being also a benefice with cure of souls, and the plaintiff was possessed of the same; whereby and immediately after such possession, the first benefice became void, and six months from the avoidance elapsed before any person was presented to the same.

The third plea was similar to the second, but more general, omitting the value.

The plaintiff replied to the first plea, that the indentures in that plea mentioned, were made and sealed after, and not before the plaintiff accepted and was admitted, instituted, and inducted into the vicarage of Ocle Pritchard; and demurred to the second and last.

Joinder.

The defendant demurred to the replication to the first plea.

Joinder.

Stephen, Serjt., in support of the demurrer to the plea. The pleas are ill, because none of them allege collation by the ordinary; and unless the ordinary has collated, he cannot counterplead the plaintiff's title to the patronage; 25 Ed. 3, stat. 3, c. 7; *Elvis v. Archbishop of York*, Hob. 315; Com. Dig. *Pleader*, 3 (1), 9.

*683] And the count shows a sufficient avoidance of the *rectory, because by the canon law (fourth council of Lateran, A. D. 1215), recognised by the common law—*Evans v. Ascough*, Latch. 233; *Staveley v. Ullithorn*, Hardr. 101;—the acceptance of a second living is a positive avoidance of the first: *Wolferstan v. Bishop of Lincoln*, 2 Wils. 174, 184; *Shute v. Hogden*, Vaugh. 129, *Watson's Clerg. Law*, 95; *Baker v. Rogers*, Cro. Eliz. 788, *Dyer*, 129 b, 283.

The Court considering *Elvis v. Archbishop of York* a decisive authority against the pleas,

Ludlow, Serjt., *contra*, relied chiefly on an alleged insufficiency of the declaration. The acceptance of a second living does not avoid the first at all events, but only where the first is above the value of 8*l.* in the king's books; 21 Hen. 8, c. 13, s. 9; by which it is enacted, "that if any person or persons having one benefice, with cure of soul, being of the yearly value of 8*l.* or above, accept and take any other with cure of soul, and be instituted and inducted in possession of the same, then and immediately after such possession had thereof, the first possession shall be adjudged in the law to be void;" and by sect. 10, "That it shall be lawful to every patron, having the advowson thereof, to present another, and the presentee to have the benefit of the same, in like manner and form as though the incumbent had died or resigned; any license, union, or other dispensation to the contrary hereof obtained notwithstanding." That statute would have been unnecessary, if every acceptance of a second benefice avoided the first. If the first be under the value of 8*l.* in the king's books, it

is only voidable by sentence of deprivation: Wats. Clerg. Law, c. 2, p. 6, Com. Dig., *Eglise*, N. 5. And the successor is not entitled to the *profits [*684 during the vacancy, under 28 H. 8, c. 11, s. 3, from the time his predecessor accepted the second benefice, but only from the time he avoids the first benefice de facto: *Halton v. Cove*, 1 B. and Adol. 538; but he would be entitled from the time of the acceptance of the second benefice, if by such acceptance the first became actually void. The plaintiff, therefore, should have alleged either that the first living was above value, or that it had been avoided by sentence of deprivation. The count contains no such allegation, and is therefore ill.

TINDAL, C. J. This is an action of *quare impedit* brought by the patron of the rectory of Stoke Lacy, against the Bishop of Hereford, for disturbing him in his right of patronage to present to a void turn in that living: and the mode in which he states the void turn, is, that in January, 1832, he, the plaintiff, incumbent of Stoke Lacy, accepted and was admitted, instituted, and inducted into the vicarage of the parish church of Ocle Pritchard, that vicarage and the rectory of Stoke Lacy being each of them a benefice with cure of souls, whereby it belonged to the plaintiff, patron as aforesaid, to present a fit person to the church of Stoke Lacy. The bishop answers, that before Stoke Lacy became vacant, the plaintiff conveyed away the advowson, and that the void turn passed under that conveyance. He then pleads more generally, "that the plaintiff having a benefice with cure of souls, to wit, Stoke Lacy, of the value of 8*l*. and upwards, did accept, and was admitted, instituted, and inducted into the vicarage of Ocle Pritchard, being also a benefice with cure of souls, and was possessed of the same; whereby and immediately after such possession the first benefice became void; and that six months from the avoidance elapsed before any person was presented *by the plaintiff;" leaving us to infer that [*685 upon such lapse the bishop had a right to present. It is admitted, however, that the second and third pleas cannot be supported, because they contain no allegation of presentation within six months, and the first plea is that on which the defendant relies. But with respect to that plea the authority of the case in *Hobart*, *Elvis v. Archbishop of York*, is perfectly decisive. In its facts it is almost the same case: and the ground upon which it proceeds is, that two persons in litigation shall never be admitted to dispute the interest of a third. The law is laid down in that case with great precision. Before the statute 25 Edw. 3, c. 7, *pro clero. stat.* 3, the bishop could in no case whatever dispute the title of the patron; but by that statute, "when an archbishop, bishop, or other ordinary hath given a benefice of right devolute unto him by lapse of time, and after the king presenteth and taketh his suit against the patron, who percase will suffer that the king shall recover without action tried, in deceit of the ordinary or the possessor of the said benefice, in such cases, and in all other cases like, where the king's right is not tried, the archbishop, or bishop, ordinary, or possessor, shall be received to counterplead the title taken for the king, and to have his answer, and to show and defend his right upon the matter, although he claim nothing in the patronage." *Hob.* 318.

The present case does not fall within the provisions of that statute; and in *Elvis v. Archbishop of York*, the Court says, "For the common law, it was plain, that neither ordinary, as ordinary, neither before collation or after, nor incumbent, either of his collation, nor of the presentation of any other, could plead to the title of the patronage; whereof the reason was pregnant; because neither of them had interest in the patronage, and therefore could not dispute that with which they had *nothing to do; which is the reason that his [*686 collation by lapse (or before the lapse incurred, though it be a wrong) doth not displace the patronage, but shall be said to be done in the right of the very patron, being nothing but institution and induction, which are his office as ordinary as well upon presentation as without, though he doth them out of season. And though this seemed and was indeed extremely mischievous,

yet the law would not let in a thing so absurd, and against the law of nature and reason, as to admit two to dispute the interest of a third."

This, then, being the answer to the first plea, objection is taken to the count that the plaintiff has not made out his title to present, because he has failed to show that the rectory was void; having omitted to allege that the rectory of Stoke is above the value of 8*l.* in the king's books; and that, if it be under, the benefice is only avoidable by sentence of deprivation. Undoubtedly it is only by the canon law that the acceptance of a second benefice avoids the first in *all* cases. But the canons down to the statute of 21 H. 8, c. 13, are binding on the subject; for Lord Coke says, in *Holland's case*, 4 Rep. 75, that the statute is "in this point but a confirmation and affirmation of the law before." And the only necessity for a sentence of deprivation is to give notice to the patron: but that can scarcely apply to a case in which the party who has accepted the second living is himself the patron. That this is the true distinction, I desire no better authority than *Holland's case*; where it was resolved, "that before the statute of 21 H. 8, c. 13, if one had a benefice with cure, and accepted another benefice with cure, the first benefice was void; but it was not an avoidance by the common law, but by the constitution of the pope, of which avoidance the patron might take *687] notice if he would, and might present if he would without any deprivation; but because the avoidance accrued by the ecclesiastical law, no lapse incurred without notice, as upon deprivation or resignation, and yet the patron might present, and take upon him notice if he would: so that for the benefit of the patron the church is void in the principal case, but not for his disadvantage."

Then came the statute which renders the presentation void to all intents, if the living be of a certain value in the king's books. We think the count sufficient without alleging sentence of deprivation, and that our judgment must be for the plaintiff.

The rest of the Court concurred in giving Judgment for the plaintiff.

SPIERS *v.* MORRIS. April 22.

1. In a writ of right the tenant must begin.
2. Entries of receipt of rent by a deceased executor, under whom demandant claimed, held admissible evidence for demandant, the rent having been received and accounted for by the deceased in his capacity of executor.

THIS was a writ of right tried at bar before Tindal, C. J., and Park, Gaselee, and Alderson, Js.

Before the jury were sworn to try the issue on the mere right,

Stephen, Serjt., on the part of the tenant, tendered the demi-mark, and required that the proceedings should commence with the inquisition as to the seisin of the demandant's ancestor. The Court referred him to *Tooth v. Bagwell*, 3 Bingh. 446, where it was decided by this Court, that in a writ of right the tenant must begin.

Stephen. In that case the demi-mark was tendered at the trial, a tender, *688] the validity of which is questionable; *here it is tendered on joining the issue. Besides, the decision in *Tooth v. Bagwell* is inconsistent with prior authorities, and cannot be sustained. In *Hardman v. Clegg*, Holt, N. P. C. 657, Wood, B., required the defendant to begin; and in *Litt.* 514, it is said, that in a writ of right between John Barre, demandant, and Reynold, Herle, J., said to the grand assize, after they were charged upon the mere right, "You good men, Reynold gave halfe a marke to the king for the time, to the intent that if you find that the ancestor of John was not seised in the time that the demandant hath pleaded, you shall inquire no further upon the right." No case but *Tooth v. Bagwell* has laid it down that the tenant is

bound to begin, and the practice is highly inconvenient. It is a great hardship on the tenant that he should be compelled to expose his title before it appears whether or not the demandant has any real claim.

TINDAL, C. J. I can see no real and substantial distinction between the present case and that of *Tooth v. Bagwell*. If this could have been distinguished, I should have been almost glad to get rid of the rule laid down in that case; but the demi-mark was tendered there at the same stage of the proceedings as on the present occasion, and the facts are in all respects the same. Two of the judges who concurred in that decision are now on the bench, and it would be unseemly in us, under those circumstances, to overrule a case which is consistent with the general practice on similar occasions.

PARK, J. From the time of the decision in *Tooth v. Bagwell* to the present, it has been considered a settled point that the tenant shall begin. In the case of *Angel v. Angel*, on the northern circuit, I acted on that *decision without objection, Sir James Scarlett being of counsel for the demandant, and the present Lord Chancellor for the tenant. [*689]

GASKLEE, J. I have always understood this to be the practice, from July, 1798, when I was present at the trial of a writ of right in which Galton was the demandant and Harvey tenant; and the then Chief Justice of the Common Pleas decided that the tenant should begin, Burrough, Lens, and Pell being of counsel for the tenant, and Jekyll and Cooper for the demandant. At that time the rule was said to have been so settled in a case of *Leckie v. Harris*. The only case the other way, is that before Mr. Baron Wood, which was overruled in *Tooth v. Bagwell*.

ALDERSON, J. *Tooth v. Bagwell* cannot be distinguished from the present case, and must be the governing authority in this Court till it has been overruled. I pronounce no opinion on that decision; but *Hardman v. Clegg* certainly goes too far the other way, because the learned Baron required, after the tender of the demi-mark, a separate issue on the seisin of the demandant's ancestor, before the jury considered the issue on the mere right, and these two issues were tried on two succeeding days. Now, according to the authority of *Littleton*, it is clear that the judge summed up on both issues at once, telling the jury that it was not necessary to consider the seisin of the tenant, if they held there was no seisin in the demandant: just as in questions of principal and accessory, it becomes unnecessary to consider the guilt of the accessory where the jury acquit the principal. The authority in *Littleton*, therefore, is compatible with an opening the case by either demandant or tenant. *Tooth v. Bagwell* was acted on during the last circuit by Bosanquet, J., and Taunton, J.

**Stephen* then tendered a bill of exceptions, and *Coleridge*, Serjt., of counsel for the demandant, having opened the pleadings, [*690]

Stephen proceeded to prove the tenant's case, by showing a possession of about twenty-five years, but no conveyance or other title.

Wilde, Serjt., on the part of the demandant, put in the will of Charles Parker, bearing date 1779, by which he devised the premises in question to Thatcher and Spiers, under whom the demandant claimed, and appointed Thatcher his executor. Thatcher was shown to have died in 1814.

To show Thatcher's seisin by receipt of rent, an account kept by Thatcher, as executor of Parker, was brought from the proper custody, and Thatcher's handwriting being proved, entries of receipt of rent by him as such executor were offered in evidence. It was proved that a bill had been filed against him for an account, upon which he had paid a balance over.

Stephen objected to this evidence, that though it might be admissible from a stranger, it could not be admissible from a party through whom the demandant claimed, and whose interest was the same as his own. A plaintiff in ejectment could not produce in support of his case receipts in the handwriting of his deceased ancestor.

Wilde, and *Coleridge*, Serjt., *contra*. The entries are not made by Thatcher in the character of landlord, but in his character of executor; and, as such, were entries against his own interest, he having been liable and compelled to account. The case, therefore, stands on the same ground as any other entries of a similar description.

*691] *TINDAL, C. J. Whatever interest Thatcher may have had in the land, these entries were not made by him in the character of landlord, but in the character of executor; as such, they were entries against his interest, and are properly receivable in evidence.

PARK and GASELEE, Js., concurred.

ALDERSON, J. The fact of the receipt of rent by Thatcher would be clearly evidence if it could be shown; and the question is, whether, after his decease, Thatcher's declarations as to that fact are admissible in evidence. He had full means of knowledge, and he makes entries, which, in his character of executor, are against his interest; upon his decease, therefore, these entries become evidence, as in other cases where the Courts have been in the habit of admitting entries of deceased persons, made against their interest.

The entries were then received in evidence. After the demandant's case was closed, and Stephen had replied, the Court recommended a special verdict, when

Wilde, referring to Booth *on real actions*, suggested that it was not competent to the jury to find a special verdict in a writ of right.

The Court, however, thinking it might be done by consent of both parties, the proposal was acceded to; the jury being directed to find first which of the parties had the best mere right.

*692] *(IN THE EXCHEQUER CHAMBER.)

SMYTH *v.* LATHAM. *April 23.*

1. The office of paymaster of exchequer bills is an office during pleasure only, and not during good behaviour, under the provisions of 48 G. 3, c. 1.
2. The appointment of a paymaster in the room of another is, of itself, a revocation of the first appointment.
3. Such former appointment may be so revoked, although the writing conferring that appointment contain no power of revocation.

ERROR on a bill of exceptions. The plaintiff declared in assumpsit for money had and received, and at the trial before Lord Tenterden, put in a writing dated June 21, 1811, under the hands and seals of Spencer Perceval and others, commissioners of the treasury, by which, after reciting the appointment of Planta, with Nevinson and Jadis in April, 1811, to the office of paymaster or paymasters of exchequer bills, at a salary of 400*l.* a year each, and the subsequent resignation of Planta, the commissioners appointed the plaintiff, with Nevinson and Jadis, to be such paymaster or paymasters, at the salary aforesaid, provided the plaintiff gave approved security for the due execution of the office.

It was admitted, that the plaintiff had given the requisite security, had discharged the duties of the office, and received the emoluments thereof from June, 1811, to 5th July, 1824, when he ceased to act; the commissioners having put the defendant in his place.

Nevinson, who was called as a witness, then proved that he had been appointed in September, 1810, in the room of an officer who had been dismissed in consequence of an investigation into his official conduct before a committee of the House of Commons, and Nevinson's appointment contained an express revocation of the writing under which the dismissed functionary had been ap-

pointed. He further proved, that from September, 1810, there had always been three paymasters *of exchequer bills, and never more; and that he, the witness, had never heard of there having been, at any one time, prior [*693 to the 11th of September, 1810, more than three paymasters of exchequer bills. That there was an iron chest in the office of the paymasters of exchequer bills, in which was deposited a great portion of the treasure entrusted to their charge; that there were three keys to the said iron chest, one of which was uniformly held by each of the three individuals acting as paymaster; that immediately upon the defendant entering upon the duties of a paymaster of exchequer bills, the same key which had been previously held by the plaintiff was delivered to the defendant, and retained by him; that the defendant, in conjunction with Jadis, and the witness, had acted as the three paymasters of exchequer bills from the 5th day of July, 1824, up to the present time; and that the defendant had received during such period the total sum of 3040*l.* for salary, and extra allowances upon the fundings of exchequer bills in respect of the said office.

The defendant then put in a writing dated July 5th, 1824, under the hands and seals of Lord Liverpool and others, commissioners of the treasury, reciting the writing of June 21, 1811, and, also, that the plaintiff, appointed one of the paymasters by that writing, *had resigned*, and appointing the defendant a paymaster of exchequer bills with Nevins and Jadis; salary and security as in the former writing.

The plaintiff was not shown to have been guilty of any misconduct.

The plaintiff contended, that his tenure in the office in question was during good behaviour; and he relied on the 48 G. 3, c. 1, s. 10, which, after reciting that "it is expedient that permanent regulations should be established in relation to the making out, issuing, and paying *off all exchequer bills which may hereafter be issued for any money under the authority of parlia- [*694 ment; and that by reason of the multiplicity of payments which may be to be made in paying of exchequer bills, it may be difficult, if not impossible, that every payment should be made by the several officers of the receipt of exchequer; therefore, and to the end the exchequer may regularly be discharged of all the moneys required by any act to be applied for paying off any exchequer bills and other charges attending the same;" enacts, "that the commissioners of the treasury shall and may from time to time, by writing under their hands, constitute and appoint such person or persons as they shall think fit, to be the paymaster or paymasters, and shall and may appoint a comptroller, and such other officers and clerks as they shall deem necessary, to pay and discharge the principal sums which shall from time to time be in course of payment upon any exchequer bills; and to pay the interest due thereupon, and the premium or premiums, rate or rates, which, according to any contract or contracts made or to be made for exchanging and circulating the said bills, or any of them, shall be due or payable to such contractors; and to take in and put upon a file or files from time to time all such bills as shall be paid off, to be cancelled as the commissioners of the treasury shall direct; and to do and perform, or cause and procure to be done and performed such other matters and things in relation to the said bills, or the principal and interest therein to be contained, as to the said commissioners of the treasury shall seem meet, and shall be by them directed to be done and performed by such paymaster or paymasters, comptroller, or other officers and clerks for the time being; all which payments shall be made at an office to be kept in or near the receipt of the exchequer at Westminster for that purpose; and that the commissioners *of the treasury shall take or cause to be taken security from every person so constituted [*695 or appointed, for his duly paying, answering, and accounting for all the moneys which he shall receive, and for his true and faithful performance of his office or trust." Section 11, "That the said paymaster or paymasters shall be subject and liable to such inspection, examination, control, and audit, and to such rules

in respect to paying, accounting, and other matters relating to the execution of the said office or trust of paymaster as the commissioners of the treasury shall think fit or reasonable to establish or appoint from time to time, for the better execution of the intent and end of that act, and the satisfaction of the proprietors of exchequer bills." Section 12, "That as well the person or persons so constituted or to be constituted paymaster or paymasters, as also the person or persons appointed or to be appointed to examine and control the receipts, payments, and acts of such paymaster or paymasters shall severally have and receive for the service of themselves, and for the officers and clerks to be employed under them respectively, and for such charges as shall be necessarily incident to the execution of their respective offices, such salaries, rewards, and allowances, as the commissioners of the treasury for the time being shall judge to be reasonable, and shall direct to be allowed to them the said paymaster or paymasters, or comptrollers."

Lord Tenterden directed the jury, first, That by the true intent, meaning, and legal construction of the several clauses of the said act, the tenure of the paymaster or paymasters of exchequer bills is in law *during pleasure*.

Secondly, That by the legal construction of the above-mentioned writing, *696] bearing date the 21st day of June, 1811, the plaintiff had an estate in his said office of paymaster of exchequer bills *only during the pleasure* of the lords commissioners of his Majesty's treasury.

Thirdly, That the writing of the 5th day of July, 1824, was a legal revocation of the above-mentioned writing, bearing date the 21st day of June, 1811.

Fourthly, That the allegation contained in the above-mentioned writing of the said 5th day of July, 1824, namely, that the said plaintiff *had resigned* his said office of paymaster of exchequer bills, was a matter of no importance to the issue between the said parties.

Fifthly, That there was no fact at issue between the said parties for the consideration of the jury. And,

Sixthly, That the jury ought to find a verdict for the defendant.

To which direction the plaintiff tendered the following exceptions:—

That by the true intent, meaning, and legal construction of the several clauses of the said act, the tenure of the office of the paymaster or paymasters of exchequer bills is, in law, *during good behaviour*.

Secondly, That even had the said act empowered the lords commissioners of his Majesty's treasury to revoke and determine *at pleasure* the appointment of paymaster of exchequer bills, no such power having been reserved in the deed poll, bearing date the 21st day of June, 1811, the lords commissioners of his Majesty's treasury had not by law the power to revoke and determine the same *at pleasure*. And the plaintiff further insisted, That, there not being any limitation of the estate expressed in the deed poll bearing date the said 21st day of June, 1811, by the delivery of such deed poll *a freehold* in the said office of paymaster of exchequer bills passed to him the said plaintiff.

*697] Thirdly, That, admitting for the sake of argument that by the true intent, meaning, and legal construction of the several clauses of the said statute, the tenure of the office of the paymaster and paymasters of exchequer bills is in law *during pleasure*; and admitting further, for the sake of argument, that by the deed poll bearing date the 21st day of June, 1811, the plaintiff had an estate in his said office of paymaster of exchequer bills *only during the pleasure* of the lords commissioners of his Majesty's treasury; still the lords commissioners of his Majesty's treasury, who executed the deed poll bearing date the said 5th day of July, 1824, not having therein or thereby revoked and determined the deed poll bearing date the said 21st day of June, 1811, the deed poll bearing date the said 5th day of July, 1824, was not a legal revocation of the deed poll bearing date the said 21st day of June, 1811.

Fourthly, That the lords commissioners of his Majesty's treasury, who executed the deed poll bearing date the said 5th day of July, 1824, having therein and thereby founded their right to execute the same solely upon the allegation

that the said plaintiff had resigned his aforesaid office of paymaster of exchequer bills, that allegation was the only matter of importance to the issue between the said parties.

The exceptions were argued in Hilary term by the plaintiff in person.

In Co. Litt. 79, a, it is laid down, "The preamble of a statute, which is the beginning thereof, going before, is, as it were, a key to the knowledge of it, and to open the intent of the makers of the act; it shall be deemed true, and, therefore, good arguments may be drawn from the same."

From the language of the preamble of the 48 G. 3, *c. 1, as to the expediency of permanent regulations in relation to exchequer bills, [698 coupled with the absence of any clause or power to revoke or determine appointments at pleasure, it must be inferred, that the paymasters hold their offices during good behaviour; for Holt, C. J., in *Harcourt v. Fox*, 1 Show. 531, fol. edit., distinctly lays it down, that an indefinite limitation, in an act of parliament, confers an estate for life.

The words "*from time to time*" can only be read as if followed by the words "as circumstances may occur to render it necessary by death, resignation, or removal for misconduct," and cannot be taken as words of limitation of the estate of the person to be appointed.

The eleventh section expressly declares the degree of authority which the commissioners of the treasury are to exercise over the paymasters; but as the authority therein given does not extend to their dismissal at pleasure, no inference can legally be drawn that they have any such authority; for *expressio unius, or rather particularis designatio est exclusio alterius*. Upon this principle, although a wife, convicted of adultery, forfeits her dower by the statute of 13 Ed. 1, c. 34, she does not forfeit her jointure for the commission of that crime, because it is not so expressed in the statute, 3 P. Will. 276.

And this being a remedial act must be construed liberally. Previously to the passing of this act, the lords of the treasury, holding their offices themselves only during the pleasure of the crown, could not confer on their subordinate officers a more enlarged estate. This was the mischief which was to be remedied by establishing permanent regulations in regard to the matters referred to in the act; and the remedy could not be better attained than by giving the paymasters a *permanent tenure in their office. Lord Holt says, in [7699 *Harcourt v. Fox*, "When men hold their offices for life, it is an encouragement for the faithful execution of their duties. It is then, also, they acquire knowledge and experience in their employments, having a durable and fixed estate therein, and not being liable to be displaced at the pleasure of those who put them in. And the grant shall be construed most favourably to answer the intents of the law makers, whose design it is to have the office well supplied, which will be best effected when the officer has an estate for life."

If it had been intended that the commissioners should have a power of revoking the appointments at pleasure, such power would have been expressly given by the legislature; for powers must be expressed, not implied, and are construed strictly: *Hixon v. Oliver*, 13 Ves. 114: and where justices, commissioners, and others have special authority by statute, they have none but what is under the statute; *R. v. Loxdale*, 1 Burr. 445. In the following statutes *in pari materia* the power of removal at discretion is expressly reserved;—25 G. 3, c. 10, s. 7, 26 G. 3, c. 57, s. 14, 26 G. 3, c. 101, s. 5, 38 G. 3, c. 86, s. 4, 39 G. 3, c. 13, s. 117, 39 G. 3, c. 21, s. 8, 42 G. 3, c. 116, s. 75, 43 G. 3, c. 21, ss. 2, and 4, 43 G. 3, c. 119, ss. 1, 5, 6, and 7, 46 G. 3, c. 101, s. 6, 46 G. 3, c. 106, s. 2, 47 G. 3, c. 12, s. 1, 49 G. 3, c. 120, s. 74, 50 G. 3, c. 43, s. 11, 50 G. 3, c. 72, s. 1, 50 G. 3, c. 103, ss. 27–45, 51 G. 3, c. 15, ss. 5, 7, 51 G. 3, c. 35, 51 G. 3, c. 71, s. 2, 52 G. 3, c. 44, ss. 1, 4, 9, 56 G. 3, c. 63, s. 6, 52 G. 3, c. 126, s. 2, 43 G. 3, c. 21, s. 5, 52 G. 3, c. 134, s. 2, 53 G. 3, c. 107, ss. 1, 4, 53 G. 3, c. 116, s. 1, 53 G. 3, c. 121, s. 6, 54 G. 3, c. 114, ss. 3, 12, 54 G. 3, c. 131, ss. 1, 6, 54 G. 3, c. 157, *ss. 2, 3, 8, 55 G. [7700 3, c. 1, ss. 1, 7, 55 G. 3, c. 42, s. 10, 55 G. 3, c. 81, 55 G. 3, c. 107,

ss. 1, 4, 55 G. 3, c. 138, s. 6, and 55 G. 3, c. 190, 55 G. 3, c. 191, ss. 1, 2, 56 G. 3, c. 56, 56 G. 3, c. 62, s. 1, 56 G. 3, c. 84, s. 1, 56 G. 3, c. 128, s. 9, 57 G. 3, c. 34, ss. 6, 8, 57 G. 3, c. 107, s. 7, 58 G. 3, c. 20, ss. 2, 21, 22, 58 G. 3, c. 61, s. 1, 58 G. 3, c. 72, ss. 1, 2, 4, 23, 58 G. 3 c. 100, ss. 1-6, 59 G. 3, c. 98, s. 11, 59 G. 3, c. 120, s. 1, 59 G. 3, c. 135, 1 G. 4, c. 39, ss. 1-4, 1 G. 4, c. 49, s. 1, 1 G. 4, c. 69, s. 6, 1 G. 4, c. 112, ss. 2, 5, 25, 1 G. 4, c. 113, 1 & 2 G. 4, c. 57, s. 8, 3 G. 4, c. 100, s. 17, 4 G. 4, c. 23, ss. 1, 5, 4 G. 4, c. 90, ss. 4, 9, 4 G. 4, c. 97, s. 5, 5 G. 4, c. 67, s. 2, 5 G. 4, c. 82, ss. 1, 2, 5 G. 4, c. 92, s. 8, 6 G. 4, c. 106, ss. 2, 4, 7, 6 G. 4, c. 122, 7 G. 4, c. 62, s. 2, 7 & 8 G. 4, c. 53, ss. 1, 4, 7 & 8 G. 4, c. 55, ss. 2, 8, 7 & 8 G. 4, c. 58, s. 3, 7 & 8 G. 4, c. 65, s. 4, 9 G. 4, c. 41, s. 7, 10 G. 4, c. 44, ss. 1, 10, 10 G. 4, c. 50, ss. 12, 18, 11 G. 4, and 1 W. 4, c. 14, s. 10, 11 G. 4, and 1 W. 4, c. 27, s. 15, 1 W. 4, c. 8, ss. 1, 2, 3, 1 & 2 W. 4, c. 17, ss. 1, 3, 3 W. 4 c. 113, s. 19.

Secondly, the writing of June 21, 1811, is a deed poll, by the delivery of which a freehold passed in the office of paymaster, of exchequer bills. If a common person grants a rent, or other thing that lies in grant, without limitation of any estate, by the delivery of the deed a freehold passes. Co. Lit. 9, a; 2 Bl. Com. 316. The deed is in conformity with the act 48 G. 3, c. 41, which empowers a permanent appointment, and it contains no power of revocation. In *Worrall v. Jacob*, 3 Mer. 256, it is laid down, that a deed executed according to a power, containing no clause of power to revoke, cannot be revoked, though the original power contained such clause.

Thirdly, The deed of 5th July, 1824, under which the defendant had 701] been appointed to the office of paymaster, does not operate as a revocation of the deed of June 21, 1811, for it contains no revocation of that deed; and of the allegation that the predecessor had resigned no proof was offered.

Fourthly, The deed of the 5th July, 1824, must be taken most strongly against the grantors; Lit. s. 370, Plowd. 134; the commissioners are therefore estopped to deny the recital of any particular fact; Co. Lit. 352, a; *Rees v. Lloyd*, Wightw. 123; Roll. Abr. 872; and having failed to substantiate in evidence the recital of the predecessor's resignation, they are estopped from averring any other right in law or fact to justify the granting of the office to the successor.

Fifthly, That allegation of resignation was the most material fact for the consideration of the jury; for unless that allegation were true, the office was full, and if a man grant that to one which he hath before granted to another for the like term, the second grant will be void.

Wightman, for the defendant, contended that though the statute 48 G. 3, c. 1, contemplated permanent regulations in the office of paymaster of exchequer bills, it did not contemplate the appointment of irremovable functionaries, an appointment wholly incompatible with the security of the public, where the officer has the disbursement of large sums of money; that the words "*from time to time*" in the statute would be superfluous, if a power of removal and re-appointment were not implied; and that the powers of revocation expressly introduced into other statutes were only *ex abundanti cautela*. Then, the instrument of June 21, 1811, was not a deed, but merely a *writing under 702] seal, like an award. The statute did not require a seal; and if the commissioners had no power to appoint for life, the writing could not confer such an estate. If the appointment was only during the pleasure or will of the commissioners, the nomination of a new officer was a sufficient determination of their will to revoke the former appointment; as a demise to a new tenant would revoke an estate at will in a former tenant. And it was not necessary that the plaintiff's resignation should be shown; for if he had only an interest during pleasure, the new appointment was an effectual determination of such interest.

Cur. adv. vult.

TINDAL, C. J. This case comes before us from the Court of King's Bench,

and the questions raised upon the record, arise upon a bill of exceptions tendered by the plaintiff below, who is, also, the plaintiff in error, to the directions given to the jury on the trial of the cause, by the late Lord Tenterden, then Chief Justice of the Court of King's Bench.

The plaintiff, at the trial of the cause, took five exceptions to the direction given by the Chief Justice to the jury; of which, the first was in substance this:—That by the legal construction of the several clauses of the statute, 48 G. 3, c. 1, the tenure of the office of one of the paymasters of exchequer bills is not, as was stated by the Chief Justice to the jury, "during pleasure only," but a tenure during good behaviour. Upon this, the first exception, and by far the most important, as the answer to all the other exceptions appears to depend on this point, we are all of opinion that, according to the legal construction of the statute above referred to, the tenure of the office of a paymaster of exchequer bills is a tenure during pleasure only, and not during good behaviour, or (which is the same in contemplation of the law) for the life of the grantee.

*As the office of a paymaster of exchequer bills is not an ancient common law office, of which the duration and the appointment are governed by ancient usage, but is an office of modern origin, and not made the subject of legislative enactment until the statute above referred to, the question as to its duration and tenure is no other than an inquiry into the meaning and intention of the statute itself. And looking to the object of the act, the language of the act, and the various provisions contained in it, we think the meaning and intention of the legislature was, that the appointment should be during pleasure only, and not during the life of the grantee. [*703]

The object of the new provision appears with sufficient certainty, by the preamble to the tenth section: "Whereas by reason of the multiplicity of payments, which may be to be made in paying off exchequer bills, it may be difficult, if not impossible, that every payment should be made by the several officers of the receipt of the exchequer; therefore, and to the end the exchequer may regularly be discharged of all the moneys required by any act to be applied for paying off any exchequer bills, and other charges attending the same, be it enacted," &c. The object, therefore, expressed by the legislature in this preamble, was to secure the due and regular payment of the exchequer bills from time to time directed to be paid off, by giving new and additional assistance to the officers of the receipt of the exchequer, whenever such assistance should be necessary. The assistance contemplated by the act was necessarily uncertain, both in its extent and its duration. The issue of exchequer bills might at one time, and under one state of circumstances, be much larger than at another; it might be large in time of war, inconsiderable in time of peace; and, consequently, the regular discharge of the exchequer of all moneys applied to the payment of exchequer bills, might require at one time a greater, and *at another a smaller number of officers. Any given number of officers, [*704] therefore, however well adapted to the exigencies of the public at the time of their appointment, might be insufficient for the despatch of business, or might be unnecessarily large at a subsequent period. Indeed it is within the reach of possibility that all the exchequer bills might be paid off, and no issue of any new bills take place; in which case, the officers of the receipt of the exchequer would stand in need of no assistance whatever. The object, therefore, of the act could not be that any certain definite number of paymasters, and other officers, should be permanently appointed, but that there should at all times be a number adequate and sufficient, and not more than adequate and sufficient, for the regular payment of the bills which might be outstanding at any particular time. The language of the enacting part of the section leads to the same conclusion. It is enacted that the commissioners of the treasury "shall and may," which, for this purpose, may be taken to be compulsory on them, "from time to time, by writing under their hands, constitute and appoint such person and persons as they shall think fit to be the paymaster or paymasters, and shall and may ap-

point a comptroller, and such other officers and clerks as they shall deem necessary," to pay off the exchequer bills in the particular manner stated in the tenth section of the statute. The enacting words of the clause, therefore, are equally free from any restriction as to the number of paymasters or other officers. Under these words it might, perhaps, be contended, that they could appoint but *one comptroller*, as one only appears to be mentioned; but they might, at all events, appoint as few or as many *paymasters*, and *other* officers and clerks, as the exigency of the public service might require. They might begin with ap-
 *705] pointing one paymaster only, if they thought one paymaster, and *the clerks and officers under him, sufficient at first; and, when need required, they might appoint another paymaster, and so on from time to time, until there were as many as they thought necessary. Such is the obvious and necessary construction of the enacting words of this section. The object, therefore, of the legislature manifestly being that of providing new officers in aid of the old officers of the receipt of the exchequer, uncertain in number, but adequate at all times to the discharge of duties varying in their extent and demand of labour, unless the construction be adopted that the appointment shall be during pleasure only, such object cannot be completely attained. For if the appointment is necessarily during good behaviour, that is, for life, the commissioners of the treasury might, indeed, always *increase* the number when the service of the public demanded more; but they could never *reduce* the number, when, from new circumstances, it became greater than the performance of the public service required. It is, therefore, upon the principle that the object of the act cannot be completely carried into effect, if the commissioners of the treasury have only a power to appoint, but no power to remove, that we hold the construction of the act to be that the power to appoint is a power to appoint during pleasure only, and not for life. Again, the power given to the commissioners of appointing paymasters, is expressed in the enacting part of the tenth section in precisely the same language as that which authorizes them to appoint "such other officers and clerks as they shall deem necessary." The same words, in the same sentence, must receive the same construction: but it would surely be an unreasonable construction of the clause to say, that *all the officers and clerks* appointed to assist the paymasters had a freehold interest in their office, and were not removable at the pleasure of the commissioners.

*706] The provisions contained in the 12th section of the act, appear to us to lead to the same conclusion. By that section, the paymasters are to have and receive for their services such salaries, rewards, and allowances as the commissioners of the treasury, for the time being, shall judge to be reasonable, and shall direct to be allowed to them. The general terms of this provision include an authority to diminish, or to increase, from time to time, the salaries of the paymasters, just as the nature of their services deserve. The commissioners, therefore, under this section, might undoubtedly reduce the salary to a nominal sum, if the duties of the office should become merely nominal. But it is surely much more consistent with the general object of the act, that they may altogether dispense with the officers themselves when they think them no longer of use, that is, that they should have the power of removing them at pleasure, than that the officers should continue to hold their offices for life, without any real salary, and without any duty to perform. For it would seem to be an unreasonable construction of the act, to hold, that if ten paymasters had been appointed when ten were necessary, and from a change of circumstances one alone was sufficient to perform all the duties, yet that the commissioners of the treasury have no power of removing the nine, but must still retain the full number at a tenth part of the salary to each. We, therefore, think the meaning and intention of the statute was, and consequently that the necessary construction of it must be, that the office so newly created was to be determined at pleasure, and was not an office for life.

It is objected, however, by the plaintiff in error, that the general preamble
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to the act contemplates the establishment, for the first time, of *permanent* regulations for the making, issuing, and paying off exchequer bills; and it is contended, that the commissioners *of the treasury have, consequently, [*707 only a power to select proper persons, not a power to displace or remove them. But we think this consequence does not necessarily follow. It may be true that the commissioners of the treasury for the time being have, under the act, a permanent power of selecting paymasters and other officers, and of making regulations; but it does not follow, that the office itself of paymaster should be on that account permanent during the life of the appointee. The regulations established under the act for the paying off exchequer bills will be just as permanent, whether the commissioners have the power to appoint paymasters for life, or during pleasure only. All that the statute contemplates is, the permanency of the office, notwithstanding the change by appointment of new sets of commissioners of the treasury; not the permanency of the office in a particular individual, or that the regulations which have been once made should be considered unalterable.

It is further objected, that by the 11th section, the paymasters are made subject to such rules and regulations as to the performance of the duties of their office as the commissioners shall think fit or reasonable to establish for the better execution of the act, and the satisfaction of the proprietors; and it is contended, that such provisions would be altogether unnecessary, if the commissioners have the power of dismissal, or if the appointments were during pleasure only. If, indeed, acts of parliament never contained anything but what was strictly necessary, this argument might be entitled to some weight; but if the necessary inference to be drawn from the other parts of the act is, as we conceive it to be, that the commissioners can appoint during pleasure only, then this provision, even though in strictness unnecessary, must be considered as introduced *pro majori cautela* only. But we think this clause not [*708 without its use, even though the office of paymaster should be held to be an office during pleasure. For under it the commissioners of the treasury would have power to make regulations to bind successive paymasters, once for all, instead of making them *de novo* upon each new appointment.

It is then argued, that, as no mention is made in this section of the power of dismissal, it must be considered that none such exists. The answer to this argument appears to be, that the clause only refers to the duty of the officer, whilst he continues such officer, and such particulars only are mentioned, as equally relate to the duties of the office whether it be for life or during pleasure: the clause being framed with reference to the duties of the office, not to the duration of it. Upon the whole, therefore, that clause seems to leave the question where it was before.

It is further objected, that the statute is a remedial act, and is, therefore, to be construed liberally; that one of the mischiefs intended to be remedied, was the want of permanency of the office of paymaster, which before the passing of the act was at pleasure only, being limited in duration to the continuance in office of the commissioners of the treasury by whom such appointment was made. It may be granted, that one object of the act was to make the office permanent; but if the officer continues to hold his office, as undoubtedly he now will, notwithstanding the change of the commissioners of the treasury, that object is equally answered whether the office itself be for life or during pleasure only. But then it is argued, that the appointment for life is the only, or at all events the best mode by which the persons appointed can be expected to become qualified to perform the duties of the office. It may be, however, at least doubtful whether such conclusion is just, when applied to an office which is merely *ministerial, and not in its nature demanding any very great extent of experience or ability, but depending for its discharge in a more [*709 especial manner on the industry, assiduity, and integrity of the officer.

Lastly, it is argued, that if the terms of this statute be doubtful, it ought to

be construed by analogy to various other statutes, cited on the part of the plaintiff, in which a similar provision as to the appointment of officers has been made, and in all of which it is urged, that whenever it is intended there should be a power of revocation or dismissal, such power is expressly reserved by the act, or the appointment itself is directed to be made during pleasure only.

This kind of argument is well founded only in the cases where the construction of a statute is doubtful or obscure; but in the present case, we think the construction of this statute, for the reasons before given, is clear and unambiguous. Where, however, such powers of revocation or dismissal are expressly given by any act, in which the necessary object of the act itself implies, as here, that the officer shall be appointed during pleasure only, we think, in such cases, the insertion of the power of dismissal, or of the clause that the appointment is held during pleasure only, must be referred to the principle before adverted to, namely, that the provision is inserted *ex abundanti* and *pro majori cautela* only.

As we think, for the reasons above given, the first exception must be overruled, those exceptions which follow will require less discussion. For, as to the second exception, viz., that, upon the legal construction of what is called the deed poll, by which the plaintiff was appointed, he had a freehold in his office, the first observation which arises is, that the instrument is no deed at all. The mere annexation of a seal will not make an instrument a deed which is not a deed in its own nature. An award by an arbitrator, although under *710] seal, does not thereby become a deed. And in the present case, where the commissioners have merely a statutory power to constitute paymasters "by writing under their hands," the annexation of a seal, without the requisition or authority of the statute, will not give a different effect, or impart different legal consequences to the instrument by which the authority is executed, than if the commissioners had appointed by writing under their hands only. But the more direct answer to this exception is, that if the commissioners had no authority by the statute to appoint for life, whatever may be the frame of the instrument by which they make the appointment, it cannot create a greater estate than they had power by the statute to grant.

The 3d exception to the charge of the Chief Justice is, that even if the deed poll, 21st of June, 1811, granted the office to the plaintiff during pleasure only, still the deed poll of 5th of January, 1824, is no legal revocation of such pleasure, inasmuch as it contains no distinct clause of revocation, and no provision which rendered such clause unnecessary. But when it is considered that the subsequent appointment is that of a new officer in the stead and place of Mr. Smith, it seems to bear so close an analogy to the case of tenancy at will, where a demise to a new tenant would be a determination of the will as to the former tenant, as to make it difficult to maintain that the new appointment is not a virtual revocation of the former: at all events, as the appointment of the defendant to the *same office*, and to the receipt of the *same salary*, is the sole ground upon which the plaintiff founds his right to recover in this action, we think it cannot be contended *by him* that such new appointment, inconsistent with the continuance of the former, is not a sufficient revocation, in fact, of the pleasure of the commissioners that the plaintiff should continue in his office.

*711] The 4th ground of exception is, that the commissioners having stated in the appointment of the defendant, that the plaintiff had resigned his office, and this allegation not having been proved, the subsequent appointment cannot operate as a revocation of the former. But we agree entirely in opinion with the late Lord Chief Justice, that the fact of resignation was not a fact necessary to be proved by the defendant in this cause: and that, whether the plaintiff had resigned or not, the fact of the appointment of a successor to the same office was a sufficient indication of the commissioners' pleasure that he should no longer continue in the possession of the office.

And this gives the answer to the 5th and last exception taken, viz., that the defendant was bound to prove the fact of resignation. In the first place, it is no fact asserted by the defendant; but secondly, and principally, it is a fact immaterial to the issue between the parties; for as the office is an office during pleasure only, the will of the commissioners to determine the former appointment has been sufficiently declared by the appointment of a successor. But we think, independently of the reasons before given for overruling the several exceptions taken by the plaintiff at the trial, that upon another ground he is not entitled to the judgment of this Court. For, either the defendant has, as the plaintiff contends, been put into his, the plaintiff's place, and appointed his successor to the same identical office, and in that case the new appointment operates as a revocation of the plaintiff's grant; or the defendant has not been placed in the very same identical office, and in that case the plaintiff's grant is still unrevoked, and in existence; the plaintiff is still one of the paymasters of the exchequer; and as the commissioners of the treasury are not limited in the number of paymasters appointed, it follows that the defendant has *been appointed to another and distinct paymastership from that of the plaintiff. Upon the latter supposition, the money received by the [712] defendant has not been money received in respect of the plaintiff's office, as is the case where there can be but one officer, and the officer *de facto* has received the several fees paid for performing the duties of the office; but the money received by the defendant is the amount of salary and allowances received by him in respect of his own appointment; and in that case, such money cannot be money had and received to the use of the plaintiff. And, indeed, we cannot but think the decision at which we have arrived is no less consistent with the justice of the case than with the rule of law. For it would indeed have been most unjust with respect to the present defendant, that after having performed the duties of the office for nearly six years, he should be called upon to pay over the emoluments of it to the plaintiff, who had bestowed neither labour nor time in the execution of its duties, nor for anything that appears in this special verdict, had given any previous notice to the defendant of his intention to dispute his appointment.

Upon the grounds above stated, we think the exceptions tendered at the trial are untenable, and must be overruled; and that in no view of this case can the plaintiff be entitled to judgment in his favour, but that the judgment of the court below must be affirmed. Judgment affirmed.

*HODGES v. LORD LITCHFIELD. April 24.

[713]

In *assumpsit* for the breach of an agreement to sell an estate, the Court refused to allow the defendant to select certain of several allegations of damage contained in a single count, and pay money into Court on those particular allegations.

THE plaintiff declared in *assumpsit* for damages occasioned to the plaintiff by the defendant's refusal to perform an agreement for the sale of an estate by the defendant to the plaintiff. By the agreement set out, it appeared that the plaintiff had paid 1500*l.* towards the purchase money, and that the estate was described as paying tithes by a *modus*.

After averring the defendant's breach of the agreement, the plaintiff alleged his damage as follows:—By reason of which said several premises, the plaintiff not only lost and was deprived of all the benefits and advantages which might and would otherwise have arisen and accrued to him from the completion of the said purchase by the plaintiff, but was put to great charges and expenses, amounting in the whole to a large sum of money, to wit, the sum of 1000*l.*, in and about the negotiating and agreeing for the purchase of the said

estate by the said articles agreed to be sold, and having the same conveyed;—and in and about the investigating the title to the said estate, and the existence and effect of the said supposed *modus* in the said articles mentioned;—and in and about the defence of and in a certain suit, commenced and prosecuted by the defendant against the plaintiff in the Court of Chancery, for compelling a specific performance by the plaintiff of the said articles of agreement, and in which suit, the bill filed by the defendant against the plaintiff was dismissed by the same Court;—and in and about the making and performing of divers journeys, and otherwise respecting the said purchase:—and also thereby the defendant lost and was deprived of a great part of the gains and *profits *714] which he might and would otherwise have made and acquired from using and employing the said sum of 1500*l.*, so paid by him as aforesaid, and other moneys provided and kept by the plaintiff for the completion of the said purchase;—and suffered and sustained divers losses to a large amount, to wit, to the amount of 200*l.* on the resale of certain sheep, bricks, and hurdles, purchased by the plaintiff for the stocking of the said farms, lands, and hereditaments, and improving the same, with a view to the completion of the said purchase.

The plaintiff delivered the following particular of his demand:—

To interest at 1 per cent., on 1500 <i>l.</i> deposit, from 7th of November, 1828, to 23d of June, 1832, when the deposit was returned,	£54	3	3
To moneys paid by the plaintiff in and about the negotiating and agreeing for the purchase of the estate to be sold by the defendant to the plaintiff, and having the same surveyed, and in and about the investigation of the title to the said estate, and the existence and effect of a supposed <i>modus</i> in lieu of tithes, to which the same was stated to be subject, and the making and performing of divers journeys, and otherwise respecting the said purchase,	262	1	3
To the amount of the extra costs paid by the plaintiff, in and about his defence of a certain suit commenced and prosecuted against him by the defendant in the Court of Chancery, for compelling a specific performance by the plaintiff of certain articles of agreement, *bearing date the 7th of November, *715] 1828, and in which suit the bill, filed by the defendant against the plaintiff, was dismissed by the same Court,	227	9	3
To the amount of the losses suffered and sustained by the plaintiff in the resale of certain sheep, bricks, and hurdles, purchased by the plaintiff for stocking and improving the farms, lands, and premises mentioned in the said articles of agreement, with a view to the completion of the said purchase,	100	0	0

Talfourd, Serjt., obtained a rule nisi to pay money into Court, upon the allegations in the first count of the declaration, of damage, occasioned by loss of interest on the 1500*l.*, and by expenses incurred in negotiating and agreeing for the purchase of the estate, in having the same surveyed, and in investigating the title to the estate, and the existence and effect of the supposed *modus* in lieu of tithes.

Wilde, Serjt., who showed cause against the rule, referred to *Hallett v. East India Company*, 2 Burr. 1120, *Salt v. Salt*, 8 T. R. 47, *Strong v. Simpson*, 3 B. & P. 14, and *Fail v. Pickford*, 2 B. & P. 234, as conclusive authorities to show that money cannot be paid into Court, in an action like this, for unliquidated damages; still less upon a selected portion of an entire count. The effect of confining the payment to particular allegations would be to try the cause on affidavit.

Talfourd. If the damages, though unliquidated, are capable of being esti-

mated, money may be paid into *Court, and the mere form of action will not preclude such payment. *Fleuro v. Thornhill*, 2 W. Bl. 1078; *Hutton v. Bolton*, 1 H. Bl. 299, n. And that part of the count being excluded on which the damages, if any, may be more especially deemed unliquidated, the paying in on the residue of the count would be the same thing as paying in on an action on a surveyor's bill. But no action lies for the third and fourth item in the plaintiff's particular. Damages cannot be recovered for the loss of profits contingent upon a bargain, *Walker v. Moore*, 10 B. & C. 416; or for the costs of a Chancery suit, which if the plaintiff had been entitled to them, would have been awarded to him in the Court of Chancery.

TINDAL, C. J. In the case supposed, the surveyor would have been acting on a contract; here he proceeded *ex mero motu*. Besides, you have broken a contract with the plaintiff; why is the Court to help you to pare down his demand, so as to compel him to go to trial at his own risk.

PARK, J. I decide on the ground that it is not the practice to allow a party to pay money into Court on the part of a count.

GASELEE, J., concurred.

ALDERSON, J. The whole count, taken together, being in substance a demand of unliquidated damages, we cannot interfere. Rule discharged.

*REYNARD, Assignee of BIRCH, an Insolvent, v. ROBINSON. [717
April 24.

Sept. 10th, defendant, after previous application, wrote to his debtor, "I want my money, and must have it in a few weeks; and if you do not bring or send it, I certainly shall put it into the hands of an attorney to get."

In the beginning of October, in consequence of this letter, the debtor, then in insolvent circumstances, paid the debt. On the 21st of November he petitioned the Insolvent Debtor's Court for his discharge:

Held, that the payment to defendant was not *voluntary*, within the meaning of s. 32, 1 G. 4, c. 57, although the defendant never commenced in action.

UPON a special case from the Northern Circuit, it was stated that the defendant lent to the insolvent, in or about the month of November, 1830, the sum of 40*l.* upon the application of the insolvent's brother, John Birch, and under a stipulation that it was to be repaid in a few months. The money being only advanced for a short period, no security was taken.

By letter of June, 1831, the defendant applied for payment; but

The insolvent not having paid the money, another letter was written, and sent by the defendant to him, as follows:—

"September 10th, 1831.

"I wrote to you some months ago, to desire you to bring me the money I lent you last November, to which I have received no reply. I fully expected you would have paid it back about May-day, and I think it strange I have not seen or heard from you. Now, the fact is, I want the money, and must have it in a few weeks; and if you do not bring or send it, I certainly shall put it into the hands of an attorney to get, and hope you will save me the trouble and yourself the expense of such proceedings."

No action or other proceeding in law was commenced by the defendant against the insolvent for the recovery of the money; nor was any attorney or solicitor employed to bring such action or other proceeding, or to threaten to bring the same.

*In the beginning of October, 1831, Joseph Birch, the insolvent (who, as it afterwards appeared, was then in insolvent circumstances), in consequence of the letters above-mentioned, repaid the sum of 40*l.* to the defendant. When the payment was made, the insolvent told defendant that he need not be alarmed about his money, as he could pay all his creditors 20*s.* in the pound. [718]

The insolvent was arrested on the 18th of November, 1831, at the suit of the plaintiff, for debt, and was committed to York castle on the 21st. He presented his petition to the Court for relief of insolvent debtors, and executed the usual assignment of his estate and effects, pursuant to the statute, on the 23d of November, 1831, and was declared and adjudged to be entitled to the benefit of the act of parliament for the relief of insolvent debtors, on the 7th of March, 1832.

The question for the opinion of the Court was, whether or not the payment of the said sum of 40*l.*, made by the insolvent to the defendant under the circumstances above-mentioned, was a voluntary payment or transfer of money within the meaning of the thirty-second section of the statute 7 G. 4, c. 57; and if the Court should be of opinion that it was a voluntary payment or transfer of money within the meaning of the last-mentioned section, a verdict was to be entered for the plaintiff, damages 40*l.*; but if otherwise, a verdict was to be entered for the defendant.

Wilde, Serjt., for the plaintiff. By 7 G. 4, c. 57, s. 32, it is enacted, "That if any prisoner who shall file his or her petition for his or her discharge under this act, shall, before or after his or her imprisonment, being in insolvent circumstances, voluntarily, convey, assign, transfer, charge, deliver, or make over *719] any estate, real or personal security for money, bond, bill, note, money, *property, goods, or effects whatsoever, to any creditor or creditors, or to any person or persons in trust for, or to or for the use, benefit, or advantage of any creditor or creditors every such conveyance, assignment, transfer, charge, delivery and making over, shall be deemed, and is hereby declared to be fraudulent and void, as against the provisional and other assignee or assignees of such person appointed under this act: provided that no such conveyance, &c., shall be deemed fraudulent and void, unless made within three months before the commencement of such imprisonment." This was a voluntary payment made within three months of the insolvency. There was no immediate pressure, no actual proceeding by legal compulsion; and the statement in the special case, that the defendant paid in consequence of the letter of September 10, means only that he paid subsequently to the receipt of it. In *Herbert v. Wilcox*, 6 Bingh. 203, it was held that a payment by an insolvent to a creditor within three months before the insolvent's imprisonment, was void under 7 G. 4, c. 57, s. 32, although the word *pay* was not employed in that section; and in *Cook v. Rogers*, 7 Bingh. 438, it was holden by the Court, that where a bankrupt made a payment to defendant on the eve of bankruptcy, as *he* said, and as circumstances indicated, to benefit the defendant, the assignee might recover the amount of the defendant, notwithstanding the defendant adduced evidence to show that he had pressed for payment, and had threatened to arrest the defendant.

TINDAL, C. J. Upon the best construction of the facts in this case, coupled with the letter of the 10th of September, we must take this to have been money paid under actual pressure. The applicant says, "I want the money, and must *720] have it in a few weeks; and if you do not *bring or send it, I shall certainly put it into the hands of an attorney to get." It is clear, therefore, that he intended to have recourse to legal proceedings; his letter was calculated to excite the debtor's apprehensions, and it appears to me to have had the effect, for the money was paid in three weeks. The case, in finding that the money was paid in consequence of this letter, has, in effect, stated the legal conclusion, that the payment was not voluntary.

PARK, J. Putting ourselves in the place of a jury, which, upon this statement of facts, we are required to do, I am opinion that this was not a voluntary payment. So far from giving the debtor time, the letter of the creditor requires payment in a few weeks, and the debtor pays within a few weeks to avoid an attorney's bill. I must infer that this was done in compliance with the letter, and under pressure; and I cannot agree that *in consequence* means only subsequently to the receipt of the letter. It is, in fact, a finding that the payment was under pressure.

GASELEE, J. If the letter had been, "I shall apply to my attorney if you do not pay to-morrow,"—or, "to-morrow fortnight," there could have been no doubt. But I think the letter is the same in effect, and that our judgment must be for the defendant.

ALDERSON, J. By stating that the payment was made in consequence of the letter of the 10th of September, the plaintiff has decided the case against himself. Judgment for the defendant.

*GROTTICK v. PHILLIPS and Others. April 25. [*721]

Declaration on bail-bond set out *capias* in *assumpsit*, to take S. P. and W. P., the arrest of S. P., and the execution of a bail-bond conditioned that S. P. should appear to answer plaintiff in an action of *assumpsit*.

Held, not such a discrepancy between the *capias* and condition of the bond as to be objectionable on general demurrer.

THE plaintiff, as assignee of John Gamaliel Lloyd, the sheriff of Warwickshire, declared that he had issued a *capias* against Samuel Phillips and William Phillips, in an action of *assumpsit*, endorsed for bail for 20*l.* and upwards, commanding the sheriff to take him S. P. and the said W. P., and him the said S. P. and the said W. P. safely to keep, until the said S. P. and the said W. P. should have given bail, or made deposit in an action of *assumpsit*, or should by other lawful means be discharged; under which writ the sheriff arrested S. P., and took bail for him to the action; on which occasion S. P., S. P. Senior, and R. S. executed a bond to the sheriff, whereby it was conditioned that Samuel Phillips should appear in the Court of Common Pleas, to answer the plaintiff in an action of *assumpsit*, and should cause special bail to be put in to the action in eight days. Averment of his omission to do so, and of the assignment of the bond to the plaintiff.

Plea, that the sheriff did not take the said Samuel Phillips by his body, under and by virtue of the said writ of *capias*; without this, that the said writing obligatory, in the declaration mentioned, was taken by the said John Gamaliel Lloyd, as such sheriff as aforesaid, by virtue of and in pursuance of the said writ of *capias*, conditioned for the appearance of the said Samuel Phillips in the said action in the writ mentioned, in manner and form as the plaintiff had above in his declaration in that behalf alleged.

Replication, that the writing obligatory was taken by the sheriff by virtue and in pursuance of the said writ *of *capias*, conditioned for the appearance of the said Samuel Phillips. [*722]

General demurrer and joinder.

Coleridge, Serjt., in support of the demurrer. The declaration is ill, for it discloses a variance between the *capias* and the bail bond. The *capias* is against Samuel and William Phillips, but on the face of the condition of the bail bond, the inference is that Samuel Phillips is to appear in an action in which he is to be sued alone. Now the bail bond should set forth the parties, and the time and place of appearance. 2 Wms. Saund. 60, a. In Renalds v. Smith, 6 Taunt. 551, where upon a *capias* returnable in the Common Pleas, the sheriff made a mandate to the high bailiff of the honour of Pomfret to take the defendant, so that the sheriff might have him before his majesty at Westminster, in five weeks of Easter, a bail bond, taken with condition for the defendant's appearance before his said majesty, in five weeks of Easter, was held to describe an appearance in the Court of King's Bench, and therefore void.

TINDAL, C. J. This is an objection of which the party cannot avail himself on general demurrer. There is not necessarily that variance for which the defendants contend. By the writ it is alleged the sheriff was commanded to take and keep Samuel Phillips and William Phillips, and to keep them till

they should have given bail, or made deposit in an action of *assumpsit*. The words are general; in an action of *assumpsit*; and although I admit the intention upon the *capias* appears to be to sue jointly, yet, as the condition of the bond when set forth is stated also to be to answer the plaintiff in an action of *assumpsit*, how are we to say of *necessity that this condition does not *723] mean the same action as the mandate in the writ. If the objection be made on the score of ambiguity, the ambiguities ought to have been pointed out by special demurrer. Judgment for the plaintiff.

This case was called on for argument on a former day, when it appearing that the party demurring had omitted to state on the margin of the paper books the point to be discussed, the Court were about to give judgment for the plaintiff, but, upon the supplication of Coleridge, allowed the matter to stand over, giving out at the same time, that in future the penalty of immediate judgment would always be attached to the omission by the party demurring to state the points of his argument.

COCKS v. NASH. April 26.

H. held as trustee for N. and her creditors, a composition deed containing a release of N. The defendant being sued as surety for a debt due from N. to plaintiff who had executed the composition deed at defendant's request, and upon his undertaking to continue responsible for the debt, the Court refused to compel H. to produce the composition deed for defendant's inspection.

Adams, Serjt., on the part of the defendant Folliott Nash, obtained a rule nisi, calling on the plaintiff, and Hammond, an attorney of this Court, to produce, in order that it might be inspected and copied by the defendant, a deed of assignment and release, bearing date February 17, 1827, between Mary Nash of the first part, the plaintiff and Hammond of the second part, and certain creditors of Mary Nash of the third part; or that, in default of compliance, the defendant might be allowed, on the trial of the cause, to give secondary evidence of this deed.

*724] *From affidavits filed in the cause, it appeared that by this deed, now in the custody of Hammond, Mary Nash's estate had been assigned to the plaintiff and Hammond, in trust for the discharge of debts due to the plaintiff, and other creditors of Mary Nash, and after the discharge of the sums due to them, in trust for Mary Nash, to whom there was, in the deed, a general release. At the time this deed was executed, the defendant Folliott Nash was a surety to the plaintiff for the debt due to him from Mary Nash; and the plaintiff refused to execute the deed, or to become a trustee, unless he could be assured of retaining his claim upon the defendant. The plaintiff ultimately executed the deed at the entreaty of the defendant, and upon his undertaking to continue responsible as before. (See *ante*, p. 341.) Hammond was not an attorney when the deed was first placed in his hands.

Wilde, Serjt., on the part of the plaintiff, and *Coleridge*, Serjt., on the part of Hammond, showed cause against the rule. They referred to *Ratcliffe v. Bleasby*, 3 Bingh. 148, where all the cases are considered, and where it was established as a principle, that the production of a deed can only be compelled at the hands of a party to the suit, and where he holds the deed as trustee for the party applying. Hammond was no party to this suit; nor did he hold the deed as trustee for the defendant, but as trustee for Mary Nash. The circumstance that Hammond was an attorney of the Court made no difference, since he never held the deed in that character.

Adams. According to the decision in this cause, *ante*, p. 341, this deed, operating as a release of the principal debtor Mary Nash, is a release also of

her *surety, Folliott Nash. Hammond, therefore, must be deemed to hold it as trustee for Folliott Nash; he may also be called on as an officer of the Court. [ALDERSON, J. We have no evidence that the deed there pleaded is identical with that to which the present motion applies; and Hammond does not hold it as an officer of the Court. *Ex parte Aitken*, 4 B. & Ald. 47.] The Court may accede to the application on the principle laid down in *Blakely v. Porter*, 1 Taunt. 386, where it was held, that if one part only of an indenture be executed, the Court of Common Pleas would compel the party having the custody of it to produce it for inspection, upon an action commenced against him by the other party; or *Bateman v. Phillips*, 4 Taunt. 157, where the Court compelled a defendant to produce an unstamped agreement in his custody, to which the plaintiffs claimed to be parties in interest, in order that they might get it stamped, although they were not an instrumentary party.

TINDAL, C. J. This is a rule which calls on the plaintiff in the cause, and Hammond an attorney of the Court, to produce, in order that it may be inspected and copied by the defendant, a deed of assignment and release, bearing date February 17th, 1827, between Mary Nash of the first part, the plaintiff and Hammond of the second part, and certain creditors of Mary Nash of the third part; or that, in default of compliance, the defendant may be allowed on the trial of this cause to give secondary evidence thereof.

The application fails as to the plaintiff, because, on the face of the affidavits it appears that he is not in the possession of the deed. Hammond is not a party to the suit; he, therefore, is in the condition of a person who may be compelled to produce the instrument on a subpoena duces tecum, if the instrument be such as he *ought to produce. If, therefore, we were to compel the production now, we should deprive the party of his appeal from [726 the decision of the judge at Nisi Prius, as to the propriety of withholding the instrument in question. But it is urged, that Hammond is a trustee for the defendant: now, first, no authority has been cited to show that one, not a party to the suit, may be compelled to produce a deed because he holds it in the character of trustee: but, then, is Hammond a trustee for the defendant? By the deed in question, Mary Nash's estate is assigned to the plaintiff and Hammond, in trust for the benefit of the plaintiff and other creditors of Mary Nash, and, after the discharge of the sums due to them, in trust for the debtor. Now, the defendant was never a debtor to the plaintiff; he was only surety for a debt due from Mary Nash to the plaintiff; and it by no means follows that the plaintiff and Hammond, because they are trustees for the principal debtor, are trustees for her surety also. Supposing, however, that Hammond is a trustee for the defendant, still, enough appears on these affidavits to show that we ought not to grant this rule. We must interpret the trust in the same way as a court of equity would do; and after the undertaking by which the defendant induced the plaintiff to execute the deed in question, a court of equity would never allow the defendant to interpose that deed as a shield against the plaintiff's demand. We should therefore be disposed to discharge the rule, even if we had authority to compel a person, not a party to the suit, to produce a deed which he holds only as a trustee. It has been urged, however, that Hammond is an officer of the Court, and that, as such, he may be called on by the Court to produce the deed in question. But the distinction has been correctly pointed out in the case to which my Brother Alderson has referred, *Ex parte Aitken*. To give the Court jurisdiction, the deed must come into his hands in his capacity of such office. *Here, the [727 deed was entrusted to Hammond in his ordinary capacity, and before he was an attorney of the Court.

PARK, J. It is now eight years since all the cases on this subject were canvassed in *Ratcliffe v. Bleasby*, 3 Bingh. 148, the rule then laid down has been acted on ever since, and I see no reason for extending it. With respect to the argument, that Hammond is an officer of the Court, he is not therefore bound to produce the deed. The applicant, in order to avail himself of that argu-

ment, should have shown that the deed was placed in Hammond's hands in his capacity of officer of the Court, and not in his individual capacity. It would be premature for us to decide on his liability to produce the instrument, because, by so doing, we should take from the party the opportunity of contesting the decision of the Judge at Nisi Prius.

GASELEE, J. One ground appears to me, in the exercise of our judicial discretion, quite sufficient for rejecting this application: namely, that it might interfere with the remedy, which, upon the affidavits, it appears the parties may seek in a court of equity.

ALDERSON, J. We should run the risk of doing great injustice if we were to accede to this application, for it involves a matter which may be tried in a court of equity, although, in this Court, that matter presented only an immaterial issue.

The practice has been to compel a party to the suit to produce a document required by the adverse party, where both have an interest in the same document; and this, in order that the suit may proceed;—that the adverse party *728] may not have an obstacle thrown in his way. *Here, the parties have come to issue, and when the defendant has called Hammond under a subpoena duces tecum, his liability to produce the deed may be argued on both sides upon the facts appearing at the trial. We should preclude that discussion if we were to accede to this application. Over trustees as trustees, this Court has no jurisdiction: they must be left to the court of equity. But see what injustice we should occasion here, if we were to admit that Hammond is a trustee. This Court has determined that a parol agreement cannot stand in the way of a release under seal. But if the plaintiff executed the release to Mary Nash, under an agreement that it should not be used to discharge Folliott Nash, that may be an answer in a court of equity to any discharge claimed under it by Folliott Nash.

As to the circumstance of Hammond's being an attorney, unless he received or holds the deed in his character of attorney the Court cannot interfere. But Hammond received and holds the deed in his individual capacity, and not as the attorney of Folliott Nash.

Rule discharged.

HARTLEY v. COOK and Another. *May 8.*

Two parishes having been united, in which before the union the parish clerk was appointed by the parishioners and the rector, Held, that after the union, an appointment by the rector alone was invalid.

ASSAULT and battery.

The defendants pleaded that before and at the time when, &c., in the first count mentioned, the defendant, William Cook, was one of the churchwardens of the parish of St. Mary Colechurch, in London, united with the parish of St. Mildred, Poultry, in London aforesaid, duly elected and appointed, and that *729] the *plaintiff, just before, and at the said time, when, &c., in that count mentioned, to wit, on, &c., being Sunday, wrongfully and improperly intruded himself into and took possession of the reading desk in the said first count mentioned, such reading desk then and there being in a part of the parish church of the said parishes so united, and being the place assigned and duly set apart for the parish clerk of the said parishes, for the performance by him of his duties as such clerk, in assisting in the celebration of divine service in the said church; and the plaintiff thereby then and there hindered and prevented a certain person, to wit, one T. S. Bullard, who then and there was the parish clerk of and for the said parishes, duly appointed and entitled to act in that behalf, from taking possession of the said reading desk, as he was entitled and about to do, in order to assist and for the purpose of assisting in the cele-

bration of divine service in the said church, and which service, before and at the time, when, &c., in the first count mentioned, was about to commence, and was accordingly celebrated in the said church: and thereby also the plaintiff unlawfully and improperly hindered, delayed, and prevented the due, proper, orderly, and devout celebration of divine service in the said church, to the great scandal of divers devout parishioners of the said united parishes, then and there being assembled for the purpose of such service; whereupon the defendant, W. Cook, so being such churchwarden as aforesaid, then and there gently admonished the plaintiff of the impropriety and indecency of such his behaviour, and requested him to come out and from, and leave the said reading desk, in order that the said T. S. Bullard might, as such clerk, take possession thereof, for the purpose aforesaid, and that divine service might not be interrupted or delayed, and might then and there immediately commence, but the plaintiff then and there *neglected and refused so to do, and wrongfully remained in possession of the said reading desk, whereupon the defendant, W. Cook, so being such churchwarden as aforesaid, and the defendant, William Payne, at his request, and his aid and assistance, and by his command, gently laid their hands upon the plaintiff, in order to remove him from the reading desk, and to prevent his further delaying and hindering the due and orderly celebration of divine service; and in so doing, did necessarily and unavoidably commit the said several supposed trespasses in the said count mentioned, as they lawfully might for the cause aforesaid; doing no unnecessary damage or violence to the plaintiff, or his apparel, upon that occasion; without this that the said defendants or either of them were guilty of the said supposed trespasses in the first count mentioned; and that, the defendants were ready to verify, &c. [730]

Another plea, in other respects the same, omitted the allegation of Bullard being clerk.

At the trial before Tindal, C. J., the plaintiff gave in evidence a writing, deposited at the Bishop of London's office, by which the rector of the united parishes had appointed him clerk on the 16th of April, 1831, and proved that he had officiated from that time till the 15th of January, 1832.

It appeared, however, that a body of the parishioners, expressing dissatisfaction at this appointment, and claiming a right to appoint in conjunction with the rector, the rector yielded to their wishes, and on the 9th of October withdrew his appointment of the plaintiff, and confirmed an appointment of T. S. Bullard, made at a joint vestry of the two parishes, in the month of April preceding.

The plaintiff, nevertheless, had refused to relinquish his appointment, and persisted in doing the duty of *parish clerk till the 15th of January, 1832, [731] when the affray took place, which was the subject of this action.

The parishes of St. Mildreds and St. Mary Colechurch, originally distinct, were united by the 22 Car. 2, c. 11, one of the acts passed in consequence of the great fire of London. By sect. 63 of that statute it is enacted, "That the several parishes hereafter mentioned shall be respectively united into one parish, in manner hereafter following; that is to say (amongst others), the parishes of St. Mildreds Poultry, and St. Mary Colechurch, shall be united into one parish, and the church heretofore belonging to the said parish of St. Mildreds Poultry, shall be the parish church of the said parishes so united." By sect. 65, "That the plate and goods belonging to the churchwardens of the parishes of those churches to be rebuilt, whereunto the other churches burnt down are united by this act, shall be enjoyed by the parishes of those churches to be rebuilt, whereunto the churches burnt down are united by this act, to the use of the said churches and parishes respectively." And by sect. 68, "That notwithstanding such union as aforesaid, each and every of the parishes so united, as to all rates, taxes, *parochial rights*, charges and duties, and all other privileges, liberties, and respects whatsoever, other than what are hereinbefore mentioned and

specified, shall continue and remain distinct, and as heretofore they were before the making of the present act."

Before the union, there was evidence that, in the parish of St. Mildreds at least, the clerk had been appointed by the parishioners in conjunction with the rector. Since the union, the appointments had been made sometimes by the rector alone, sometimes by the rector and parishioners.

The jury having found a verdict for the defendants,

Jones, Serjt., obtained a rule *nisi* for a new trial on the following grounds:—

*732] "That a custom of the two parishes to appoint in conjunction with the parson could not exist by law, as it could not be immemorial, and was not given by the fire act 22 Car. 2, c. 11. That if the custom of each parish was preserved by the statute, the appointment of Bullard was void, as he should have had the majorities of the vestries separately, and not of a joint vestry. That his appointment should have been by the rector and parishioners concurrently, whereas this was an appointment by the parishioners *vigore suo*, and two months after by the rector. That the plaintiff being in peaceable possession, and Bullard having never acted, the defendants could not raise the question by an indecorous assault in the church on the plaintiff, who was sitting there to perform his duty in the usual course.

Andrews and Stephen, Serjts., showed cause.

Whether Bullard has been properly appointed or not, the plaintiff is without any right of action unless he can show a good appointment in himself. Now before the union of the parishes the appointment was clearly in the parishioners and the rector jointly, and the 68th section of the act of union preserves all the rights of the parishioners. The plaintiff's appointment therefore is invalid, unless sanctioned by the vestries of the two parishes at a joint meeting of both, or a separate meeting of each. But as it was never sanctioned by the parishioners in any way, he has no title to sue.

Bullard's appointment, however, was legal, having been made at a joint vestry of the united parishes, and ratified by the rector. Even at common law, after a union, there is but one church, one benefice, and one advowson; per *Powell, J.*, in *Reynoldson v. Blake*, 1 *Ld. Raym.* 196; and under a union by the statute of Car. 2, not only the churches but the parishes are united. *St. Swithin v. St. Mary Bothaw*, *Skin.* 588.

*733] "*Jones.* At the time of the assault in question the plaintiff was in possession of the office of parish clerk, and had discharged its functions for some months. It is therefore a presumption of law that he was legally in possession, and it was for the defendants who dispute that presumption to establish the negative,—*Williams v. East India Company*, 3 *East*, 192,—that he was not legally clerk, by showing that Bullard at least had been duly elected. At common law the appointment of parish clerk is in the rector; Bullard therefore could not have been legally elected, unless it were by statute or custom; now the statute of 22 Car. 2, c. 11, contains no enactment on the subject; and the custom, if it existed before, was certainly destroyed by the union. At all events it has not been observed in the appointment of Bullard, for before the union the custom must have been for the parishioners and rector of each parish to act separately; here the appointment was made at a joint vestry, with the additional objection that the rector was not present, as he ought to have been, to assist in deliberation. His subsequent assent is by no means equivalent. In *Wilson v. M'Math*, 3 *B. & Ald.* 244, it was decided that the rector has a right to preside at a vestry; and in *Rex v. Buller*, 8 *East*, 389, it was held that if a presiding officer, who by the constitution of a borough formed an integral part of an elective assembly, departed from it after the meeting had been regularly formed, and the election entered upon, but before it was completed, an election made after his departure was void. So in *Rex v. Bower*, 1 *B. & C.* 492, where a charter directed that out of certain persons to be nominated in a particular mode, "the mayor, aldermen, bailiffs, principal burgesses, and other burgesses

and inhabitants of the borough for the time being (they being for that purpose congregated and assembled together), or the greater *part of them as should be so congregated, might, by the greater part of the voices of [*734 them, so assembled, choose one to be mayor;" it was held, that a majority of each definite body must be present in order to make a valid election. The absence of the rector therefore at the vestry by which Bullard was appointed, is a conclusive objection to the validity of his appointment. *Cur. adv. vult.*

TINDAL, C. J. This is an action of assault and battery, in which the defendants justified, in one of the special pleas, that the defendant Cooke was one of the churchwardens of the parish of St. Mary Colechurch, London, united with the parish of St. Mildreds Poultry in London, and that the plaintiff on the day on which, &c., being Sunday, wrongfully and improperly intruded himself into and took possession of the parish clerk's reading desk in the parish church of the said parishes so united, and thereby prevented one T. S. Bullard, who was the parish clerk, duly appointed, from taking possession of the reading desk; whereby the plaintiff unlawfully hindered and prevented the devout celebration of the divine service; and because the plaintiff refused to give it up, defendant Cooke, as churchwarden, and the other defendant, Payne, in his aid, gently laid their hands on plaintiff to remove him from the reading desk, &c. In another special plea the defendants justified in a similar manner upon the ground that the plaintiff had wrongfully and improperly intruded himself into and taken possession of the reading desk of the parish clerk, without alleging that Bullard had been duly appointed to that office. To these pleas and to others very similar in substance, the plaintiff replied the general traverse, *de injuria*, &c., upon which the issues were joined.

The cause was tried before me at the sittings for London after last Michaelmas term, when the jury found *a verdict for the defendants; to set [*735 aside which verdict, and for a new trial, a motion was afterwards made upon the ground, that although a custom may have existed in each of the parishes of St. Mildreds Poultry, and St. Mary Colechurch, separately, namely, that the parish clerk of each of those parishes should be chosen by the rector and the major part of the parishioners in each parish; yet, by the union of the two parishes under the 22 Car. 2, c. 11, such custom in each is altogether destroyed, and the common law right of appointment by the rector must prevail in its stead; and consequently that Bullard could have no legal right to the office of parish clerk of the united parishes, inasmuch as the validity of his election rested upon a custom which had already ceased to exist; but that the plaintiff, who was nominated and appointed by the rector of the united parishes to fill the office before Bullard was elected, must be held to have had the right to the office of parish clerk. For the purpose, however, of determining the question immediately before the Court, namely, whether this action is maintainable, it seems to us sufficient to determine the latter point only, whether Hartley was duly appointed to the office of parish clerk; for whatever may be the objection to Bullard's election to the office, yet, unless Hartley was the real parish clerk, he has no right of action. For if Hartley was a stranger, who had intruded himself into the reading desk of the parish clerk immediately before the celebration of divine service, whereby the decent and proper celebration of such service would be prevented, we feel no doubt, whatever, but that the churchwardens of the parish, upon his refusal to give up the possession of the desk, might justify removing him from it without violence. The case of *Hawe v. Planner*, 1 Saund. 13, appears to us a sufficient authority to this point.

*There can be no doubt, after the evidence given at the trial, that before the union of the two parishes in 1670, there was a custom in the parish of St. Mildreds Poultry, and a similar custom in the parish of St. Mary Colechurch, that the parish clerk of each parish should be chosen by the rector and the major part of the parishioners; and the only question as to the validity of Hartley's appointment becomes this, whether by the union of the two

parishes, by the statute 22 Car. 2, c. 11, s. 63, this custom in each parish was put an end to, and the common law mode of nomination by the rector interposed in its stead.

The union of churches (not of parishes) was a proceeding by no means unusual at common law. It is laid down in many authorities, and particularly in Bro. Abr. (*Appropriation, Union and Consolidation*), that where two churches were of little value, and unable to support their charges, they might be united and consolidated by the assent of the ordinary, the patrons and the incumbent, with the leave of the crown; or where the church was vacant at the time of the union (which was much more frequently the case), then, by the assent of the patrons and the ordinary, and the license of the crown: such an union, however, consolidated the churches, not the parishes; it neither extinguished the tithes nor a *modus* for them; 1 Salk. 165; but as to taxes, duties, rates, reparations of the church, &c., the parishes continued distinct as before; Hob. Rep. 67. In giving judgment in *Reynoldson v. Blake*, 1 Ld. Raym. 196, Mr. Justice Powell says, "If there is, after the union, but one church and one benefice (as is proved before), there can be but one advowson, and that is of the church to which the union is made," and this, he says, "agrees with the canon law from which the doctrine of unions was borrowed." Lyndwood's Provinc. 159. "By *737] union, *the church which is united becomes extinct, and of the two benefices the more worthy shall be retained." So that if this had been an union of the two churches at common law, independent of the provisions contained in the statute of Car. 2, then would the church of St. Mildreds Poultry to which the union has been made, have been considered as the church or benefice which was retained, the church of St. Mary Colechurch being extinct; but the parishes of St. Mildreds Poultry and St. Mary Colechurch would have continued parishes as before, having one parish church, one incumbent, one parish clerk; but having all the rights which were before vested in the parishioners of each parish, and which were capable of being still exercised, preserved in full force: separate tithes, separate *moduses*, separate poor rates, separate proportions of church rate, separate officers: and under these circumstances it seems difficult, on any legal principle, to lay it down, that the union of the two churches had deprived the parishioners of either parish of the right of electing the parish clerk which they before possessed: or at all events, that the union of the two churches should deprive the parishioners of St. Mildreds Poultry, of the right which they before possessed of electing, together with the rector, the parish clerk who was to officiate in the same identical church, and the same identical reading desk in which he performed the duty before the union. Unless, however, the parishes of St. Mildreds Poultry were so deprived, and the common law right vested in the rector, the appointment of Hartley by the rector would have been bad if this had been an union at common law.

The question, however, does not rest upon the nature and effect of an union at common law, but upon the construction of the statute of 22 Car. 2, c. 11, under which such union was made. The sixty-third section of that statute, *738] after enacting "that the *fifty-one parishes within the city thereafter mentioned, shall remain and continue as theretofore they were," proceeds to enact "that the several *parishes* hereafter mentioned shall be respectively united into one *parish* in manner hereafter following, that is to say, (amongst others) the parishes of St. Mildreds Poultry and St. Mary Colechurch, shall be united into one parish, and the church heretofore belonging to the said parish of St. Mildreds Poultry shall be the parish church of the said parishes so united." By the seventy-first section the site of the church of St. Mary Colechurch, and the materials thereof remaining in the said site, are given and settled on the company of mercers for the purpose of building a free school thereon. And that the church which remained was considered as that to which the union was made, appears clearly from the sixty-fifth section, where it is

enacted that the plate and goods belonging to the churchwardens of the parishes whose churches are burnt down and not to be rebuilt, shall be enjoyed by the churchwardens of the parishes of those churches to be rebuilt, "*wherunto the other churches burnt down are united* by this act, to the use of the said churches and parishes respectively." The union therefore, created by the act, was not simply an union of *churches* as that which was known to the common law, but in the very terms of the act, an union of *parishes*; and if the legislature had rested there, it might have created a difficulty as to the continuance of a custom which existed before the union in each separate parish; but it appears to us any difficulty of that nature is prevented by the sixty-eighth section of the act, by which it is enacted "that notwithstanding such union as aforesaid, each and every of the parishes so united, as to all rates, taxes, *parochial rights*, charges and duties, and all other privileges, liberties and respects whatsoever, other than what are hereinbefore mentioned and specified, shall continue and *remain distinct, and as heretofore they were before the making of the present act." As therefore, before the union of the two [*739] parishes, there was in the parish of St. Mildreds Poultry, a right belonging to the parishioners to join with the rector of the parish in the election of a parish clerk of such parish; and as by the act the church of St. Mildreds Poultry is the church which remains, and consequently that to which the union is made; this parochial right is preserved and must still continue, unless it is one of those particularly mentioned and specified in the act: there is, however, no mention or specification of this right, and, consequently no reason why it should have been abolished by the union. Indeed the union contemplated by the statute is just as perfect whether the parish clerk performing the duty in the church of St. Mildreds Poultry to which the church of St. Mary Colechurch has been united, is appointed by the rector alone, or by the rector and the majority of the parishioners in both parishes, or by the rector and the majority of the parishioners in the parish of St. Mildreds Poultry. We by no means intend to express any opinion that the election by the rector and the majority of the parishioners in the two parishes, assembled in their united vestry, is not the more proper mode of election. Such a mode appears to have taken place immediately after the union was made, and seems more entirely to preserve the parochial rights of both parties. But as it is not necessary for us to decide this point on the present occasion, we hold it sufficient to say that the appointment of Hartley, being made by the rector alone without the concurrence of the majority of the parishioners of the parish of St. Mildreds Poultry, is a void appointment, and consequently, under the circumstances of this case, that he cannot support the present action of trespass.

Judgment for defendants.

*AIRETON v. DAVIS. April 30.

[*740]

1. A warrant of attorney not filed pursuant to 8 G. 4, c. 39, s. 2, is not void generally, but only as against an assignee under a valid commission of bankruptcy.
2. The sheriff is liable to an action for not selling under a fi. fa. with reasonable expedition.

THE plaintiff sued the defendant, sheriff of Essex, for neglect of duty in the execution of a writ of fi. fa., issued by the plaintiff against one John Barker, endorsed to levy 146*l.* 5*s.* The declaration, after alleging the delivery of the writ to the sheriff in the usual form, proceeded as follows:—"By virtue of which said last-mentioned writ the defendant, so being sheriff of the said county of Essex as aforesaid, afterwards and before the time appointed for the return of the said last-mentioned writ, to wit, on the 16th day of June, at, &c., seized and took in execution divers goods and chattels of the said J. Barker, of great

value, to wit, of the value of the moneys so endorsed on the said last-mentioned writ, and directed to be levied as last aforesaid; and remained and continued in possession of the said last-mentioned goods and chattels for divers long spaces of time, to wit, from the 16th day of June, in the year aforesaid, until the 1st day of August then next ensuing, and from thence until the said J. Barker committed a certain act of bankruptcy as hereinafter mentioned, the said sums of money so endorsed on the said last-mentioned writ, and directed to be levied as last aforesaid, during all that time remaining unpaid to the said plaintiff, to wit, at, &c. And the plaintiff further said that during any part of the time last aforesaid, the defendant as such sheriff as aforesaid, could and might and ought to have sold the said last-mentioned goods and chattels, under and by virtue of the said last-mentioned writ, and to have raised thereout the moneys endorsed on the said last-mentioned writ, and directed to be levied

*741] as last aforesaid, ready to have been paid to the plaintiff *on the return of the said last-mentioned writ, to wit, at, &c. Yet the defendant so being sheriff of the said county of Essex as aforesaid not regarding the duty of his office as such sheriff, but contriving and unjustly and wrongfully intending to injure, prejudice, and aggrieve the said plaintiff in that behalf, and to deprive him of the money so endorsed on the said last-mentioned writ, and directed to be levied as last aforesaid, and of the means of obtaining the same, wilfully neglected the execution of his office, and fraudulently and wrongfully, and without the consent of the plaintiff, forbore to sell the said last-mentioned goods and chattels of the said J. Barker, from the said 16th day of June in the year aforesaid, until the said 1st day of August then next following, and from thence until afterwards and before the return of the said last-mentioned writ, the said J. Barker committed a certain act of bankruptcy, whereupon he the said J. Barker was afterwards and before the return of the said last-mentioned writ declared a bankrupt, under and by virtue of the statute then in force concerning bankrupts. By means whereof the said last-mentioned goods and chattels so being in the hands of the sheriff as aforesaid, under and by virtue of the said last-mentioned writ, unsold, then and there, to wit, from the time of the committing of the said act of bankruptcy, ceased to be the goods and chattels of the said J. Barker, and then and there became and were unavailable for the purpose of levying thereout the said sums so endorsed on the said writ and directed to be levied as last aforesaid, whereby the plaintiff was hindered and prevented from having the same sold under and by virtue of his said last-mentioned writ, as he otherwise might and would have had: by means of which said last-mentioned premises the plaintiff had been and was not only greatly injured and deprived of the benefit of his said last-mentioned writ, and

*742] of the means of *obtaining the said last-mentioned moneys endorsed on the said last-mentioned writ, and directed to be levied as last aforesaid, and which were still wholly unpaid as last aforesaid, and was likely to lose the same, but had also been put to great costs and expenses in and about endeavouring to compel the defendant to make a return to the said last-mentioned writ, and to pay the moneys so endorsed on the said writ, and directed to be levied as last aforesaid, amounting to a further large sum of money, to wit, the sum of 100*l.*"

There were likewise counts for a false return of *nulla bona*.

It appeared at the trial that the *fi. fa.* had been issued on the 16th of June, 1831, on a judgment entered up in the Court of King's Bench two days before, under a warrant of attorney given by Barker to the plaintiff the 19th of January, 1829. The sheriff seized Barker's goods on the 16th of June, when there was sufficient property on the premises to satisfy the plaintiff's debt. But he never proceeded to a sale, although called on to do so by a letter from the plaintiff's attorney on the 29th of July. And Barker carried on his business of a brewer as usual, the sheriff's man being very little in sight. On the 5th of October a commission of bankrupt was issued against Barker. On the 3d of November

the plaintiff ruled the defendant to return the writ of fi. fa., when the defendant, having applied in vain to the plaintiff and to Barker's assignee for an indemnity, obtained from the Court of King's Bench time till the 2d day of Hilary term, 1832, to return the writ, upon an undertaking to pay into Court the amount endorsed on the writ. On the 9th of January, 1832, the defendant, having obtained an indemnity from Lloyd, Barker's assignee, returned *nulla bona*; whereupon on the 28th of January the plaintiff obtained a rule nisi to attach the defendant for not paying the money into Court, *pursuant to his [743] undertaking; and the defendant obtained a rule nisi to discharge such [743] undertaking. Both these rules were discharged, upon the defendant giving a new undertaking to pay the money into Court in a fortnight; and the plaintiff then commenced the present action.

The defendant gave in evidence the commission against Barker, but his proof, as to the act of bankruptcy and petitioning creditor's debt, was such that the jury found there was no good petitioning creditor's debt; no act of bankruptcy subsequent to the 17th of June; and that the sheriff's delay was unreasonable; and gave a verdict for the plaintiff on the count above set forth; which

Jones, Serjt., obtained a rule nisi to set aside, as against evidence and obtained by surprise; contending, moreover, that a new trial should be had, because there was no proof of the plaintiff having filed the warrant of attorney under which the fi. fa. issued; 3 G. 4, c. 39; and that there was no precedent for such a count against the sheriff as that on which the plaintiff had obtained his verdict, the proper course being to compel a sale by writ of *venditioni exponas*.

Wilde, Serjt., showed cause. As to the form of action, it is clear from *Doker v. Hasler*, 2 Bingh. 479, that a sheriff cannot justify keeping possession of goods seized, in case of the debtor and to the loss of the creditor. Bac. Abr. *Sheriff*, N.; Dalton, *Office of Sheriff*, 103, 109. And *Carlile v. Parkins*, 3 Stark. 163, is a conclusive authority that this action lies.

The Court assenting to this,

Wilde proceeded to the objection on the warrant of attorney. By the 3 G. 4, c. 39, s. 2, it is enacted "that *if at any time after the expiration of [744] twenty-one days after the execution of such warrant of attorney, a commission of bankrupt shall be issued against the person who shall have given such warrant of attorney, then and in such case, unless such warrant of attorney or a copy thereof shall have been filed within twenty-one days from the execution thereof, or unless judgment shall have been signed or execution issued on such warrant of attorney within the same period, such warrant of attorney and the judgment, and the execution founded thereon, shall be deemed fraudulent and void against the assignees under such commission; and such assignees shall be entitled to recover back and receive for the use of the creditors of such bankrupt at large, all and every the moneys levied or effects seized, under and by virtue of such judgment and execution." A warrant not filed within twenty-one days is not generally void, but void only as against an assignee under a valid commission of bankruptcy. And if there was no petitioning creditor's debt, Lloyd is not assignee. At all events, as it is to be assumed that a party has acted according to law till the contrary is proved, it is for those who object to prove the omission: as in cases of annuity, the party who objects the want of enrolment is bound to prove it. *Doe v. Mason*, 3 Camp. 7; *Doe v. Bingham*, 4 B. & Ald. 672; *Muskett v. Drummond*, 10 B. & C. 153.

Jones and Stephen, Serjts., in support of the rule.

Unless this warrant of attorney were filed, the plaintiff has no title to sue; and though, as against a party who gives a warrant, the Court may, till the contrary is proved, assume it to have been properly filed, such an assumption is not allowable against the sheriff, or any third party, but the plaintiff must, as in all other cases, *establish a clear title to sue. In cases on the an- [745] nuity act the assumption of enrolment operates only against those who have granted the annuity.

As to the form of action, the sheriff has the whole time, between the delivery and return of the writ, to obey it, and within those *termini* he cannot be guilty of delay. It were hard that he should be subject to this action, and also to applications to the court for a *venditioni exponas*.

TINDAL, C. J.,—after expressing his approbation of the verdict as to the questions of fact,—upon the objection that there was no proof of the plaintiff's warrant of attorney having been filed within twenty-one days of its execution, said, unless the defendant shows that Lloyd was legally the assignee of Barker, he cannot raise the point. It appears to me that a warrant of attorney, not filed, is, still, only void as against an assignee under a valid commission; here there was no petitioning creditor's debt to support the commission against Barker, and, therefore, the sheriff cannot defend himself under the title of the assignee.

PARK, GASELEE, and ALDERSON, Js., concurring in this, and also that on the other questions the verdict should not be disturbed, the rule was

Discharged.

*746]

*SYLVESTER v. ANTHONY. May 2.

The copy of a warrant of attorney, with the affidavit, filed pursuant to 3 G. 4, c. 39, is, as against the party filing it, good evidence of the original, without proof of collation.

In May, 1831, the plaintiff had obtained from one Pearson a warrant of attorney to enter up judgment against Pearson for 150*l.*, and this warrant was conditioned for the payment of 72*l.* by Pearson to the plaintiff, by four instalments, in four months.

The defendant gave the plaintiff a guaranty for the due payment of these instalments.

The first and second instalments were paid, but Pearson having made default in the third instalment, and a commission of bankrupt having been issued against him, the plaintiff sued the defendant on his guaranty.

The defence was, that on the 1st of September, 1831, the plaintiff had issued a *fi. fa.* against Pearson's effects for a third instalment, but instead of selling the goods seized under the *fi. fa.*, had, without the defendant's consent, given Pearson time by taking another warrant of attorney from Pearson and one Furneaux, for the balance due from Pearson, and some other small sums, in all 62*l.*, payable by monthly instalments of 14*l.* each, upon which warrant he afterwards entered up judgment.

To establish this, the defendant, after proving notice to the plaintiff to produce the original warrant of attorney executed by Pearson and Furneaux, gave in evidence a copy filed by the plaintiff on 20th of September, 1831, under the provisions of the statute 3 G. 4, c. 39, and also the affidavit of its being a true copy, filed at the same time. The signature of this affidavit was proved; but no other proof was given that the copy filed was a true copy of the original

*747] warrant of attorney, *or that any search had been made at the proper office for the original warrant.

It was objected on the part of the plaintiff that the copy ought not to be received in evidence, but Tindal, C. J., admitted it, subject to a motion on the point; and a verdict having been found for the defendant,

Coleridge, Serjt., obtained a rule nisi to set it aside, on the ground above stated.

Talfourd, Serjt., who showed cause, contended that the copy filed according to the provisions of 3 G. 4, c. 39, became a species of duplicate original, and was admissible in evidence like any other record.

Wilde, Serjt., and Coleridge, in support of the rule. By rule M. 42 G. 3,

the original warrant of attorney must be filed when judgment is signed. And judgment having been signed upon the warrant in question, the defendant had the means of producing the original from the proper office; the copy, therefore, ought not to have been received; at all events, not till proof of search and failure to find the original.

TINDAL, C. J. If a party thinks proper to avail himself of the provisions of 3 G. 4, c. 39, to file a copy of the warrant, that copy is evidence against him. The object of the legislature was, to prevent him from saying there was anything there not in the original. I infer that, from the language of the second section, which provides that the warrant of attorney shall be deemed void, "unless such warrant of attorney, or a copy thereof, shall have been filed as aforesaid."

PARK, GASELEE, and ALDERSON, Js., concurring, the rule was

Discharged.

*COWPER and Another, Executors of NASH v. GODMOND, [*748
Clerk. May 7.

In an action for money had and received, to recover the consideration money of a void annuity, where the annuity was granted more than six years before the action brought, but was treated by the grantor as a subsisting annuity within that period, although subsequently avoided at his instance, Held, that the statute of limitations did not begin to run until the annuity had been avoided.

THIS was an action of *assumpsit* for money had and received, and was brought to recover the balance of the consideration money for the purchase of a certain annuity. The defendant had pleaded, first, *non assumpsit*; secondly, *non assumpsit infra sex annos*.

At the trial before Tindal, C. J., London sittings, after Michaelmas term, 1832, a verdict was found for the plaintiffs for the balance claimed, subject to the opinion of the court on the following case:—

By a certain indenture produced by the plaintiffs, bearing date on the 31st day of May, 1824, an annuity of 237*l.* was granted by the defendant for his life, to Andrew John Nash and George Augustus Nash: the consideration paid for the same was 1999*l.* The annuity was further secured by a warrant of attorney and judgment thereon for the sum of 4000*l.*, which were set forth in the grant of the annuity.

The indenture was duly executed by the defendant, and the consideration money paid by the grantees. An error was committed in the memorial, by stating the amount of the annuity to be 257*l.* instead of 237*l.* Payments were made on account of the annuity in the year 1829, but not after. Writs of execution and sequestration upon the judgment mentioned in the annuity deed were sued out in 1829, to recover the arrears in that year, and the vicarage of the defendant was sequestered, and his goods and chattels taken in execution. Evidence was offered at the trial, on the part of the plaintiffs, that the said writs of sequestration and execution were sued out at the re- [*749
quest of the defendant.

In Michaelmas term, 1830, the defendant obtained a rule in the Court of King's Bench, for setting aside the warrant of attorney and judgment, and the writs of execution and sequestration, on the ground of the defect in the memorial of the annuity, on the following terms;—"upon payment of all the costs of the judgment and execution of the sequestration, and of the application by the defendant."

The plaintiffs were the executors of Andrew John Nash, who survived George Augustus Nash his co-grantee; and they sought to recover by this action the balance of the consideration money originally paid for the annuity.

The annuity deed was put in evidence upon the trial uncanceled.

The questions for the opinion of the Court were, first, whether the statute of

limitations was an answer to the action ; secondly, whether the plaintiffs were entitled to recover, the annuity deed being uncanceled.

If the Court should be of opinion that the plaintiffs were entitled to maintain the action, the verdict was to stand for the plaintiffs.

If the Court should be of opinion the action was not maintainable, a nonsuit was to be entered.

Wilde, Serjt., for the plaintiffs. First, if the cause of action arose at the time when the deed was executed, it may be admitted that this action would be barred by the statute of limitations. But the plaintiffs and their testator had no cause of action until Michaelmas term, 1830, when the grantor had elected to avoid the annuity. Where a contract for an annuity has become void from a defect in the memorial, it does not lie with the grantee to rescind the contract *750] and avoid the security given, at his option ; nor can he maintain an action for money had and received, to recover back the consideration money, unless the grantor has done an act by which he treats the annuity as void. *Weddell v. Lynam and Jones*, 1 Esp. 309. The principle of that case was recognised in *Waters v. Mansell*, 3 Taunt. 56, and subsequently, in *Davis executrix of Griffiths v. Bryan*, 6 B. and C. 651. The inference from these cases is, that the objection lies only in the mouth of that party for whose protection the formalities required by the annuity acts were prescribed ; and that if he choose to treat the contract as a legal one, the grantee, who is bound to see that the deeds are properly executed and enrolled, shall not be permitted to object. This contract was treated by the defendant as a subsisting contract until 1830 ; the grantee, therefore, was precluded from questioning its validity until that time, and could not have brought this action for the consideration money. Then, the cause of action did not arise before that time, and the statute of limitations does not apply.

Walker v. Liscaray, 6 Esp. 98, will be cited to show that the cause of action arose at the time of the original contract. There the annuity was granted in 1801, and set aside in 1805, for a defect in the memorial. An action was brought to recover the consideration money. The grantor having become bankrupt and obtained his certificate, after the grant, but before the annuity was set aside, it was held by Lord Ellenborough that the annuity, having been set aside, must be considered as if it had never existed ; that the plaintiff's title to the money was by relation, from the time it was paid on the void consideration, and that his right having preceded the bankruptcy, the certificate was a bar. *751] [*TINDAL*, C. J. *That case is at variance with all the others as cited.] It does not appear what else might have taken place between the parties. The case is reported very briefly, and was not afterwards brought before the Court.

But supposing the present case to fall *prima facie* within the statute of limitations, payments have been made within six years on account of the annuity. This was always sufficient before the 9 G. 4, c. 14, and the first section of that act provides that nothing therein contained shall take away the effect of payments, &c.

Upon the second point, that the annuity deed was produced at the trial uncanceled, it is sufficient to observe, that, as all the securities for an annuity constitute but one assurance, the consideration fails upon the avoidance of any one of them. The grantee has a right to have his assurance entire, or to have his money returned. *Chawner v. Whaley*, 3 East, 500 ; *Scurfield v. Gowland*, 6 East, 241.

Jones, Serjt., *contra*, did not insist on the second point ; but, conceding that the grantee could not proceed until the grantor had elected to avoid the annuity, contended, nevertheless, that the period of limitation commenced from the payment of the consideration money. The action was brought for money had and received. Then, when was the money received ? At the date of the void securities. It is true that the grantee could not bring this action until the contract had been treated by the grantor as an invalid contract of annuity ; but, from

the time of the grantor's electing so to treat it, the consideration money became, by relation, money had and received to the grantor's use from the original time of payment. *Walker v. Liscaray*. The present action is only maintainable on the ground that there never was a contract of annuity. [*ALDERSON, J. [752 In *Murray v. The East India Company*, 5 B. and A. 204, which was an action by an administrator upon a bill of exchange payable to the testator, but accepted after his death, it was held, that the statute of limitations began to run from the time of granting the letters of administration, and not from the time the bills became due, there being no cause of action until there was a party capable of suing.] Here it was the fault of the grantee, that he was unable to sue until the grantor had elected. It was his duty, either to see that the memorial was perfected, a duty cast upon him by the annuity acts; or to have given the grantor notice that the securities were invalid, and to have demanded a fresh security. That circumstance distinguishes the present case from *Murray v. The East India Company*, and brings it within the principle laid down in *Hewett v. Young* (a) There the statute was held to run from the time when the defendant, who was employed by the plaintiff to lay out money upon good security, took a bad security; and not from the time when the insufficiency was discovered by the plaintiff.

Then, the payments on account of the annuity, in 1829, are not sufficient to take the case out of the statute. These payments were made *diverso intuitu*, on account of a supposed contract of annuity. They cannot therefore avail in an action for money had and received, which is brought on an implied contract of a different nature, and to which the payments had no reference.

TINDAL, C. J. The second point has been very properly abandoned; and the only question remaining is, whether the plea of the statute of limitations is a bar to *an action for money had and received for the recovery of the [*753 consideration money of a void annuity, when the annuity was granted more than six years before the action was brought, but was treated by the grantor as a subsisting annuity within that period. That question depends upon another: at what time did the cause of action arise? The cause of action comprises two steps. The first is the original advance of the money by the grantee; the second is the grantor's election to avail himself of the defect in the memorial of annuity. The cause of action, therefore, was not complete till the last step was taken in Michaelmas term, 1830.

If we were to decide otherwise, the grantor of a defective annuity might in every case defraud the annuitant, by paying the annuity for six years, and then, having set aside the securities, by pleading the statute of limitations.

I think that this case is tacitly decided by *Waters v. Mansell*, where the statute was also pleaded, but the point was not contended for: on behalf of defendant, nor taken into consideration by the Court.

PARK, J. I am of the same opinion. The grantee could not have sued until the step taken by the grantor in 1830: and until he could, the cause of action was not complete. I cannot assent to the language of Lord Ellenborough in *Walker v. Liskaray*. It is opposed to his own more deliberate judgment in the cases cited at the bar.

GASELEE, J., concurred.

ALDERSON, J. It may be conceded that the consideration money was money had and received by the grantor at the time of payment; but it was not had and *received by the grantor, to the use of the grantee, until the grantor [*754 elected to treat the annuity as void.

If, however, we had decided otherwise, I think that the payments on account would have taken the case out of the statute; so that the plaintiffs are in either way entitled to recover in this action.

Judgment for plaintiffs.

(a) 5 B. and C. 259, and see *Battley and Another v. Faulkner and Another*, 3 B. and A. 288; *Short v. McCarthy*, *Ibid.* 626; *Brown v. Howard*, 2 B. and B. 73, and *Whitehead v. Howard*, *Ibid.* 872.

WOOLLEY, Executor, v. SLOPER, Executor. May 8.

Upon a judgment as in case of a nonsuit, an executor plaintiff who has been guilty of wilful negligence is not liable to the costs of the cause, but only to the costs occasioned to the defendant by such wilful negligence.

COVENANT by an executor, for a breach occurring since the death of his testator. Notice of trial had been three times served and countermanded. After the second default, a rule nisi for judgment as in case of a nonsuit had been discharged on a peremptory undertaking; and, after the third, made absolute. It further appeared from the defendant's affidavits that the plaintiff had been guilty of wilful negligence, on each occasion, in not proceeding to trial according to notice, whereby the defendant had been put to unnecessary expense. On the taxation of costs, the prothonotary had allowed the defendant the costs of the cause; and a rule nisi having been obtained by *Bompas*, Serjt., for the prothonotary to review his taxation,

Wilde, Serjt., contended, that the plaintiff, having been guilty of wilful negligence, could not be protected from the payment of costs by his character of executor. *Shaw v. Mansfield*, 7 Price 709, *Nunez v. Modigliani*, 1 H. Bl. 217.

*755] *Bompas*, in support of the rule, admitting the plaintiff's laches, contended that a plaintiff executor was not liable to pay the costs of the cause after judgment as in case of a nonsuit, although it might be otherwise on non pros, or a discontinuance. *Booth and others v. Wood*, 2 H. Bl. 277, *Hawes v. Saunders*, 3 Burr. 1584, *Harris v. Jones*, 3 Burr. 1451. And,

Per Cur. The plaintiff could only sue as executor upon the contract made with his testator. He would not, therefore, have been liable to pay costs upon becoming nonsuit at the trial; and the statute 14 G. 2, c. 17, directs "that all judgments given by virtue of that act, shall be of the like force and effect as judgments upon nonsuit, and of no other force or effect:" and "that the defendant or defendants shall upon such judgment, be awarded his, her, or their costs in any action or suit, where he, she, or they would upon nonsuit be entitled to the same, and in no other action or suit whatever."

Rule absolute for the prothonotary to review his taxation, allowing to the defendant such costs only as had been occasioned by the plaintiff's wilful negligence in not proceeding to trial.(a)

(a) See also *Howard v. Rathorne*, Willes, 316; *S. C. Barnes*, 180; *Howard v. Radburn*, 4 Burr. 1928; *Bennet v. Coker*, Bull. N. P. 332; *Higgs v. Warry*, 6 T. R. 654; *Cooke v. Lucas*, 2 East, 395. And, that an executor is liable to costs for not going to trial according to notice, see *Eaves v. Mocato*, Salk. 314; *Hawes v. Saunders*, 3 Burr. 1584.

*756]

*(IN THE EXCHEQUER CHAMBER.)

BARDONS v. SELBY.(a)

In replevin, the general plea de injuria, &c., held proper, after an avowry that plaintiff was an inhabitant of the parish; rateable to the relief of the poor in respect of occupation of a tenement in the parish; that a poor rate was made and published, in which plaintiff was rated at 7*l.*; that defendant, as collector, gave him notice thereof and demanded payment, which plaintiff refused; that he was thereupon summoned to appear at a petty sessions, where he appeared and showed no cause; whereupon a warrant under the hands and seals of two justices was directed and delivered to defendant to distrain plaintiff's goods, which defendant therefore avowed and prayed a return.

ERROR from the Court of King's Bench. The case was argued in Hilary

(a) For the pleadings in this case, and the proceedings in the Court of K. B. see 8 B. & Ad. 2.

vacation and Easter term by Coleridge, Serjt., for the plaintiff in error, and by Maule for the defendant in error, and the judgment of the Court, in which the points are so fully discussed as to render any further report superfluous, was delivered in the vacation after Easter term by

TINDAL, C. J. The question raised for our consideration upon this writ of error arises in an action of replevin, in which Bardons, one of the defendants below, avows as collector of a poor rate, and Jenkins, the other defendant, makes cognizance as his bailiff, alleging in the fourth avowry and cognizance, that the plaintiff was an inhabitant of the parish, and by law rateable to the relief of the poor thereof in respect of his occupation of a tenement situate within the same; that a rate for the relief of the poor of the said parish was duly ascertained, made, signed, assessed, allowed, given notice of, and published according to the statute; and that by the said rate the plaintiff was duly rated in the sum of 7*l.*; that Bardons, as collector, gave him notice of the rate, and demanded payment, which he refused; that the plaintiff was duly summoned to appear at the petty sessions to be held at a time and place duly specified, to *show cause why he refused; that he appeared and showed no [*757] cause; that a warrant was thereupon duly made under the hands and seals of two justices of the peace for the county then present, directed to Bardons, the collector, commanding him, according to the statute, to make distress of the plaintiff's goods and chattels; that the warrant was delivered to Bardons, under which he, as collector, avowed, and the other defendant acknowledged, the taking of the goods, praying judgment and a return, &c. The plaintiff pleaded in bar, that the defendants of their own wrong, and without such cause as was alleged, took the plaintiff's goods and chattels. To this plea there was a special demurrer, assigning for cause that the plaintiff by his plea in bar sought to put in issue several distinct matters, and also that the plea in bar was pleaded as if the avowry and cognizance consisted wholly in excuse of the taking and detaining, and did not avow and justify the same, and claim a return. The plaintiff below joined in demurrer. There were other avowries and cognizances pleaded in a similar form, to which similar pleas in bar were pleaded, and to which also there were special demurrers, and joinders in demurrer.

Upon argument before the Court of King's Bench, judgment was given in favour of the plaintiff below by two of the learned Judges of that Court, the late learned and much-lamented Chief Justice, Lord Tenterden, having given judgment in favour of the defendants; and the question raised upon the record for determination is this, whether the general plea in bar pleaded by the plaintiff below, by which all the several matters alleged in the avowry are put in issue, is a good plea in bar or not: and we are all of opinion that such plea in bar is a good plea, and that the judgment of the Court below must be affirmed.

It may be convenient, in the first place, to advert to *the objection which relates to the form of action in which this general plea is used: [*758] namely, that it is in point of form an action of replevin, not an action of trespass: as to which, we are of opinion that no sound distinction can be made in that respect; but that wherever the facts pleaded in bar to an action of trespass for taking goods, constitute such a defence that the plaintiff may, consistently with the rules of law, put the whole of them in issue, by the general replication *de injuriâ suâ propriâ absque tali causâ*, we think the plaintiff may also do the same in his plea in bar to an avowry, stating the same identical facts as a defence in an action of replevin. No case has been cited before us, in which such general traverse of the facts stated in the avowry has been held bad simply upon the ground that the form of action is in replevin, not trespass. For as to the case of *Jones v. Hitchen*, 1 B. & P. 76, the general traverse there pleaded in bar to an avowry for a distress for rent, and which was held bad in that case, would have been equally held bad if it had been replied to a special

plea in trespass stating the same facts ; as appears from the case of *White v. Stubbs*, 2 Saund. 294. It cannot, therefore, as it appears to us, be a safe ground of decision, to rest the validity of the general traverse on the present occasion, not upon the nature and character of the facts which are put in issue by such traverse, and upon the broad question, whether they constitute one single defence, or not ; but upon the consideration that the question arises in an action of replevin. The only ground of distinction that has been suggested is, that the defendant, in this case, by claiming a return of the goods, asserts a right and property in them ; and, therefore, brings the case within the exception in *Crogate's case*,—"that the defendant claims property, or an interest in *759] or out of the goods which *have been taken." But upon reference as well to *Crogate's case*, where this exception to the general rule is laid down, as also to the several cases in which such exception has been held to apply, we think it is limited to instances in which the defendant has claimed by his plea an interest in the land or the goods before and at the time of the trespass complained of. In replevin, however, it is obvious that the defendant does not insist, in ordinary cases at least, and certainly not in the present case, upon any right or interest he possessed in the goods before or at the time of the taking complained of. In the instance of a distress for rent in arrear, the very nature of the transaction assumes that he has seized the goods which belonged to his tenant the plaintiff ; his sole object being to satisfy the rent out of the tenant's property, and the prayer for a return of the goods, &c. is no assertion of right to, or interest in, the goods in himself the defendant, but is a prayer that the *plaintiff's* goods may be returned by the sheriff, in order, so long as the common law on this subject continued, that they might be kept by the defendant as a pledge for the payment of the rent, and since the alteration of the common law, by the statute 2 W. & M. c. 5, in order that they may be sold by the defendant in satisfaction of the arrears of rent and the expenses. Indeed it is evident that the claim of interest mentioned in *Crogate's case*, as forming an exception to the application of the rule there laid down, must mean an interest anterior to and independent of the fact of seizure, from the instances which are there put, of a right of common or a right of way, or passage, and the like ; all of which, from their nature, must have existed in the party before the trespass was committed for which the action is brought. We think, therefore, no distinction can be satisfactorily laid down between the rule of pleading *760] as to the point in question, in an action of replevin and an action of *trespass ; but that the point to be determined is, whether, by the rules of pleading, the several facts alleged in the fourth avowry might have been put in issue by the general traverse, if they had been contained in a plea in bar to an action of trespass. And although it may be very difficult, upon principle, to account for such a departure from the general object which the rules of special pleading have in view, namely, that of bringing the matter in dispute between the litigant parties to one certain and single issue of fact, yet we think the present case falls within the authority of judicial decisions of an early date, and which have been constantly adhered to in later times, and we feel ourselves, on that account, bound by their authority, and no longer at liberty to found our judgment upon the ground of expediency, where the point in dispute is of a nature and description rather to be governed by precedents than by general principles of law.

It is not necessary to refer to any earlier decision than that of *Crogate's case*, 8 Rep. 67, as an authority upon the present question. Indeed, the year books cited in that case, do not, upon reference, throw much light or any degree of certainty on the points there resolved. But from the time of *Crogate's case*, 6 Jac. 1, down to the present period, the resolutions of the Court made in that case have, as to the greater part, been considered to be law. In *Crogate's case* the defendant, in an action of trespass for driving cattle of the

plaintiff, pleaded a right of common in a copyholder over the *locus in quo*, by prescribing in the usual way, in the name of the lord of the manor; and because the plaintiff had wrongfully turned his cattle there, the defendant, as servant of the copyholder, and by his command, justified driving the cattle out. To this plea the plaintiff replied, *de injuriâ suâ propriâ, absque tali causâ*; and upon demurrer it was adjudged that the general replication [761] in that case was insufficient; and Lord Coke then proceeds to lay down four resolutions of the Court, in the course of which he thus states the nature of this general plea viz.: "The general plea *de injuriâ suâ propriâ, &c.*, is properly when the defendant's plea doth consist merely of matter of excuse, and of no matter of interest whatever." The resolutions of the Court are these four: first, that *absque tali causâ* doth refer to the whole plea, and not only to the commandment, for all makes but one cause, and any of them without the other is no plea by itself. Secondly, it was resolved that when the defendant in his own right, or as servant of another, claims any interest in the land, or any common, or rent going out of the land, &c., there *de injuriâ suâ propriâ, &c.*, generally, is no plea; but if the defendant justifies as servant, there *de injuriâ suâ propriâ, &c.*, in some of the cases, with a traverse of the commandment, that being made material, is good. Thirdly, it was resolved, that when by the defendant's plea any authority or power is mediately or immediately derived from the plaintiff, there, although no interest be claimed, the plaintiff ought to answer it, and shall not reply generally *de injuriâ suâ propriâ, &c.*: the same law of an authority given by law, as to view, waste, &c. Lastly, it was resolved, that in the case at bar, the issue would be full of multiplicity of matter, when an issue ought to be full and single; for parcel of the manor, demisable by copy, grant by copy, prescription of common, &c., and commandment, will be all parcel of the same.

The questions, therefore, appear to us to be these two alone; first, whether the facts pleaded in this avowry bring it within that description of plea to which the general replication is admitted in Crogate's case to apply; and secondly, whether the case falls within any of the *exceptions laid [762] down by the Court, in their resolutions in that case. Now the facts stated in the avowry are, the inhabitancy of the plaintiff in a certain parish, and his liability to the poor rate by reason of occupation; the making of a poor rate for the parish, with all the particular observances required by law; notice of the rate; the demand of payment, and refusal to pay; the summoning before the justices of peace in petty sessions, to show cause for his refusal, where no cause was shown; the issuing of a warrant by the justices of the peace; the delivery of the warrant to one of the defendants, and the distress made by him and the other defendant as his bailiff.

In the first place, these facts appear to us, in the language of Crogate's case, to consist merely "of matter of excuse, and of no matter of interest whatever." They fall within the principle of a justification under a proceeding in the admiralty court, the hundred or county court, or any other, which is not a court of record, where *de injuriâ, &c.*, generally is good, "for all is matter of fact, and all make but one cause," as is stated in another part of the same report. The case now under discussion resembles closely that which is last referred to. A justification under a distress warrant for a poor's rate must surely be the subject of a general traverse, if a justification under the process of the Admiralty Court is held to be so.

It remains to be considered, therefore, whether the subject-matter of the avowry brings it within any of the exceptions which are laid down in the leading case above referred to. The first is where the defendant in his own right, or as servant to another, claims any interest in or out of the subject-matter of the action of trespass, in which case the general traverse would be bad. The interest there spoken of would include any title by lease, license, or gift, from

*763] the plaintiff (Bro. Abr. *de son tort demesne*, 41), *or any sub-demise to the defendant. (Bro. Abr. *ib.* 53.) The answer, therefore, to this objection appears to be, that the defendants in this case claim no such interest, nor any other interest of any kind in the goods taken; for that the exception applies only to the case of title or property in the goods, independently of any right conferred by the act of seizure, we have already stated to be our opinion, to which we refer.

The next exception is, where the defendant justifies under any authority or power mediately or immediately derived from the plaintiff; in which case it is said, that although no interest is claimed, the plaintiff ought to answer it, and shall not reply generally *de injuriâ suâ propriâ*. It would not have been necessary to have adverted to this exception, as the proceedings on the part of the defendants are manifestly not under any authority from the plaintiff, but directly against him, if Lord Coke had not proceeded to add, "the same law of an authority given by the law, as to view waste." But the meaning of this distinction is explained by Lord Holt in the case of *Chancy v. Winn*, 12 Mod. 582, who says the case of entering to see *waste* is upon a special reason; for suppose the lessor were seised in fee, such seisin in fee would be involved in the issue. That the dictum of Lord Coke cannot be intended of justification under *all* authorities in law, generally, is abundantly clear from the instances already adverted to of justification under process of law against the person, and against the goods of the plaintiff; so also of justification by peace officers arresting upon breach of the peace, and the like; so also in the case of justification under a statute (see *Chancy v. Winn*, *supra*); in all which cases the general traverse is invariably replied to such pleas, where no matter of record forms

*764] part of it. If so, why may it *not equally be replied, where the justification is under a distress for a poor's rate being an authority of law?

The last of the exceptions mentioned in *Crogate's* case is, where the plea would be full of multiplicity of matter. Whether this is, or is not, a ground of exception that applies to the present case, must depend upon the meaning of the word *multiplicity* in the resolution. If it intends that separate and distinct facts, constituting altogether one defence, cannot be included in the general replication, what becomes of the rule in *Crogate's* case altogether? Why did the discussion in *Crogate's* case take place, and why were the four resolutions made, when the single objection, that the plea included more than one separate fact, would have been sufficient to have determined against the general traverse? How is this interpretation reconcilable with the various instances in which this general form of replication is confessedly held good, such as the justification under process issuing out of a court not of record? Where facts are stated in the plea mixed up with matter of record, or with the claim of interest, or under the authority of the plaintiff, it has always been allowed that the plaintiff might admit the fact which falls within the description of such exceptions, and traverse the remainder of the allegations of the plea, by limiting the traverse by the words "*absque residuo causæ*." How could this practice of pleading be applied to the present case, where none of the facts alleged fall within the exception, and all the facts are of the same nature? It follows, therefore, that such cannot be the meaning of the word *multiplicity*, and, consequently, that the resolution does not apply to this case. And such appears clearly to have been the opinion of the Court of B. R. in two modern cases, *Robinson v. Raley*, 1 Burr. 316, and *O'Brien v. Saxon*, 2 B. & C. 908.

*765] Upon the whole, we think this case falls within the *general rule laid down in *Crogate's* case, and that it is not touched by any of the exceptions there adverted to; and, consequently, that the judgment of the Court below must be affirmed.

Judgment affirmed.(a)

(a) See *Piggott v. Kamp and Others*, 1 Crompton & Messon, 197.

CHRISTOPHER HENRY THOMAS HAWKINS, an Infant, by JOHN HEYWOOD HAWKINS, his next friend, v. JOHN HAWKINS and MARY ANN HAWKINS. *April 26.*

Lands were settled by deed in tail male, on such person as at the decease of T. H. should be the second son then living of T. H. and A. H.; and, for default of such issue, to the third, fourth, and so on (other than and except the eldest), in like manner; for default of such issue, to the eldest or only son in tail male; and, for default of such issue, to T. H. in fee. T. H. died in 1766, leaving four sons, P., A., T., and J.—P. died in 1770, an infant, without issue; C. in 1829, without issue; T. in 1783, without issue.

Upon a suit instituted after the death of C.: Held, that in the events which had happened, J. took an estate tail under the settlement.

By order of the Vice Chancellor the following case was sent for the opinion of this Court:—

By marriage settlement of 16th and 17th of June, 1756, made upon the marriage of Thomas Hawkins with Ann Heywood (after reciting that ample provision had been made for Thomas Hawkins's eldest son by such marriage, under the will of his uncle Philip; that Ann Heywood's father had paid 8000*l.* as a marriage portion to his daughter, and Thomas Hawkins's father 5000*l.* to his son); certain estates in the parishes of Maddern, St. Erth, Ludgvan, Uny, Lelant and Mullion, in the county of Cornwall, were limited, subject to certain prior trusts, to the use and behoof of such person as at the time of the decease of the said Thomas Hawkins should be the second son then living of the body of the said Thomas Hawkins, on the body of the said Ann Heywood to be begotten, and of the heirs of the body of such second son lawfully *issuing; [*766 and for default of such issue, to the use and behoof of the third, fourth, fifth, sixth, and all and every other son and sons, other than and except the eldest son, for the time being, of the body of the said Thomas Hawkins, on the body of the said Ann Heywood to be begotten, who should by the death of such second, third, fourth, or other son, without issue of his or their respective body or bodies, become a second son severally and successively, and in remainder, one after another, as they and every of them should be in priority of birth; and of the several and respective heirs of the body and bodies of all and every such son and sons lawfully issuing; and for such default of such issue as aforesaid, and in case there should be two or more daughters of the said Thomas Hawkins, on the body of the said Ann Heywood to be begotten, then to the use of all and every such daughters of the said Thomas Hawkins, on the body of the said Ann Heywood to be begotten, and the heirs of their several and respective bodies lawfully issuing, to take as tenants in common, and not as joint-tenants: but in case there should be only one son of the said Thomas Hawkins, on the body of the said Ann Heywood, then to the use of the eldest or only son of the said Thomas Hawkins, on the body of the said Ann Heywood, his intended wife, to be begotten, and the heirs of the body of such eldest or only son lawfully issuing; and for default of all such issue, to the use of the said Thomas Hawkins, his heirs and assigns for ever.

Thomas Hawkins died intestate, in 1766, leaving issue of said marriage four sons and one daughter: the sons were, Philip, the eldest, who survived his father, and died, in 1770, an infant, and without issue; Sir Christopher Hawkins, who was the second son, and died in 1829, without issue; Thomas Hawkins, the third, who died in 1783, without issue; and the defendant, John Hawkins, *who was the fourth son of the said marriage, and still living. [*767

In 1780, Sir Christopher Hawkins suffered a recovery of divers estates, comprising amongst others, the manor of Treveneague, and certain tenements in Market Jew, alias Marazion, and in the parish of Maddern, which he took as tenant in tail under the will of his great uncle, Philip Hawkins; and

in the deed to make a tenant to the *præcipe*, after describing such property, were added, "And all other the manors, &c. which were included in the entail under the will of said Philip Hawkins, and all and singular other the manors, messuages, lands, tenements, and hereditaments of him the said Sir C. Hawkins, situate, lying, and being in the several parishes, places, and precincts aforesaid, or either of them, in the said county of Cornwall."

The township of Market Jew, alias Marazion, and the parish of Maddern, were mentioned in the recovery deed, and in the recovery; but the parish of St. Erth was only mentioned in the recovery; and the parishes of Ludgvan, Uny, Lelant, and Mullion, were not mentioned in either the recovery deed or the recovery.

By the will of Sir C. Hawkins, all such parts of the settled property of which he obtained the fee by means of the recovery, and also the reversion in fee of the remainder, subject to the estate tail, if any, limited by the said settlement to the defendant John Hawkins, were devised to the infant plaintiff, Christopher Henry Thomas Hawkins, the son of testator's brother John, for his life, with remainders over.

The questions for the opinion of the Court were, first, Whether John Hawkins, the fourth son of Thomas Hawkins, the father of the said Sir C. Hawkins, did, under or by virtue of the indentures of lease, release, and settlement of 1756, either in the lifetime or on the death of the said Sir C. Hawkins, and in *768] the events *which have happened, take any and what estates or interests in the several messuages, lands, hereditaments, and premises comprised in the said indentures of lease, release, and settlement of 1756, or any and which of them?

Secondly, Whether, having regard to the terms of the indentures to make the tenant to the *præcipe* for, and to lead or declare the uses of, the said recovery, which was suffered by the said Sir C. Hawkins in 1780, such recovery comprised any and which of the several messuages, lands, and hereditaments conveyed by the said indentures of lease, release, and settlement of 1756, and thereby limited to the use and behoof of such persons as at the time of the decease of the said Thomas Hawkins should be the second son then living of the said Thomas Hawkins, on the body of the said Ann Heywood to be begotten, and of the heirs of the body of such second son lawfully issuing?

Taddy, Serjt., for the plaintiff. The defendant, John Hawkins, cannot take under the limitations of this settlement; for neither at the death of his father, Thomas Hawkins, nor at the death of his brother, Sir Christopher, did he answer the description of second son of Thomas Hawkins. The limitation gives a vested indefeasible estate to the person who shall be second son of Thomas Hawkins, living an elder. For in *Driver v. Frank*, 3 M. & S. 32, Dampier, J., says, "It has always been an object with courts of law and equity to vest interests as soon as the words of the instrument will admit of it: such a construction is convenient, as it facilitates provisions for families, by ascertaining the rights and property belonging to each member of it, and tends in general to an equal and fair arrangement and *distribution:—" and cites several authorities *769] in support of that position. So in *Trafford v. Ashton*, 2 Vern. 660, Lord Cowper held that a second son took an estate by that description, being second in order of birth, though the elder brother was dead before the second was born. The case of *Lomax v. Holmden*, 1 Ves. 290, only shows that the first son at the time of a testator's death may take under the description of first son in a will, where a former son has died after the making of the will, in the testator's lifetime. Also, that the same person may answer the description of *primogenitus* and *secundus*. Year-Book, 9 H. 7, 25 a. Here the estate was vested in Sir Christopher, as second son in the lifetime of his brother Philip; nothing has occurred to divest that estate; and therefore it passes to his devisee.

Merewether, Serjt., for the defendant, admitted that no question could arise

as to the estates in Maddern and St. Erth, to which the recovery applied; but, as to the others,—Alwarne, one-third of the manor and barton of Trewinnard, Trewinnard Mills, and Colrogger,—contended; that the manifest intention to be collected from the whole deed of 1756 was, that the eldest son of Thomas Hawkins should never have them, being otherwise amply provided for; and Sir Christopher, having been put in the situation of eldest son upon the death of Philip without issue, could not retain lands which were clearly designed as a provision for a second son. In this respect, the present case was distinguishable from *Driver v. Frank*, where it did not expressly appear that provision had been made for an elder son.

The following certificate was afterwards sent:

We have heard this case argued before us by counsel, *and have considered it, and we are of opinion, that John Hawkins, the fourth son of [770 Thomas Hawkins, father of the said Sir Christopher Hawkins, did, under and by virtue of the said indentures of lease, and release, and settlement of the 16th and 17th of June, 1756, on the death of the said Sir Christopher Hawkins, and in the events which have happened, take an estate in tail general in the messuages, lands, tenements, and hereditaments called Allwarne, alias Alwer-ton, alias Alwarnton, alias Alwarton, and the grist-mill thereto belonging; one-third of the manor and barton of Trewinnard, and the mills called Trewinnard mills; and also all that messuage or tenement called Colrogger, being part of the premises comprised in the said indentures of lease, and release, and settlement of the 16th and 17th of June, 1756.

N. C. TINDAL.

J. A. PARK.

S. GASELEE.

E. H. ALDERSON.

END OF EASTER TERM.

AN

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1. In considering an attorney's bill, the jury may discard an item for work entirely useless, though upon an item for work partly useless, or in respect of which there has been any negligence, the client's remedy is only by a cross action. *Shaw v. Arden and Another, Two, &c.* 287
2. An attorney must deliver his bill under 2 G. 2, c. 23, before suing to recover charges for business done at quarter sessions. *Sylvester and Another v. Webster and Another*. 388
3. An attorney is not compelled to proceed to the end of a suit in order to be entitled to his costs, but may, upon reasonable cause and reasonable notice, abandon the conduct of the suit, and in such case may recover his costs for the period during which he was employed. *Vansandau and Tindale v. Browne. Vansandau and Brown v. Browne*. 402
4. As an attorney may be struck off the roll of this Court upon reading a rule for striking him off the roll of K. B., so he may be readmitted here upon reading a rule of K. B. for his readmission in that Court. *Ex parte Yates*. 455

AUTHORITY.

See EVIDENCE, 2. DISTRESS, 1.

AVOWRY.

See REFLEVIN.

AWARD.

1. An award is to be considered as published, when the parties have notice that it is ready for delivery on payment of the reasonable charges. *Muscelbrook v. Dunkin*. 605
2. The Court refused to set aside the award of a barrister, on the ground that he had admitted an incompetent witness. *Perrinas v. Steggall*. 679

BAIL.

See PRACTICE, 4.

1. An affidavit that the party did not procure sufficient bail, because he expected to settle the cause, is not a sufficient reason to entitle him to change his bail. *Orchard v. Glover*. 318
2. The bail are discharged if a plaintiff on general process declares as executor. *Manesty v. Stevens*. 400

BANKRUPT.

See EVIDENCE, 5, 8. INFANT.

1. The keeper of a private lodging house, who also seeks a profit by furnishing her guests with provisions, is subject to the bankrupt laws as an hotel keeper, although the provisions are set apart as the separate property of each guest. *Smith and Another, Assignees of Roberts, a Bankrupt, v. Scott*. 14
2. H., before his bankruptcy, hired a carriage of M., and let it to defendant; defendant sent it back to H. damaged; M. repaired it with the assent of H., and H. having become bankrupt, proved the amount due for repairs under H.'s commission: Held, that H.'s assignees had a right of action against the defendant, although H.'s estate paid no dividend. *Porter, Assignee of Hurland, a Bankrupt, v. Vorley*. 93
3. The provisional assignee of a bankrupt is not responsible for the fraud of an agent appointed with due care. *Raw and Others, Assignees of Leigh, a Bankrupt v. Cutten*. 96
4. Under 6 G. 4, c. 16, a transfer of goods in satisfaction of a *bona fide* debt, made voluntarily, and in contemplation of bankruptcy, is an act of bankruptcy, and not protected by the eighty-first section, though made more than two months before a commission issues. *Bevan and Another, Assignees of A. Nunn, a Bankrupt, v. B. Nunn and Another*. 107
5. A commission of bankrupt may be supported on a debt accruing before the bankrupt became a trader, and an act of bankruptcy committed after he has ceased to be a trader. *Baillie v. Grant*. 121
6. S. being indebted to J., and G. being indebted to S., S. requested G. to pay J. whatever might be due from G. to S. G. promised J. to do so as soon as the amount was ascertained. After the amount had been ascertained, and before it was paid, S. became a bankrupt. Held, that notwithstanding the bankruptcy of S., J. might sue G. for the amount of his debt to J. *Crowfoot and Others, Assignees of Streater, a Bankrupt, v. W. B. Gurney*. 372
7. If a trader, from the dread of an arrest, abstains from going to a place to which he would have gone but for such dread, he thereby commits an act of bankruptcy by "absenting himself with intent to delay creditors." *Edson and Others v. Rolls and Another*. 648

BILL OF EXCHANGE.

Plaintiff purchased in the market a bill drawn by G. at Rio Janeiro, and payable at sixty days' sight; the exchange falling after the purchase, plaintiff kept the bill nearly five months, and then sold it again.

The drawee having failed before presentment, plaintiff, after paying his endorsee the amount of the bill, sued the defendant, the drawer:

Held, that the jury were correctly directed to consider, whether, looking at the situation and interests of both drawer and holder, there had been unreasonable delay on the part of the plaintiff in forwarding the bill for acceptance or putting it in circulation; and the jury having found for the plaintiff, the Court refused to disturb the verdict. *Mellish v. Rawdon.* 416

BOND.

1. A bond conditioned for the assessment of, and arbitration on, the damages occasioned by the obligor's working a mine, every two months: Held to be imperative, and not merely directory, as to the periods of arbitration. *Stevens v. Lowe. Stevens v. Strick.* 32
2. 1. A bond given to commissioners by a collector of assessed taxes, and his surety, to secure due payment of moneys collected, need not be stamped, although not taken in the precise amount required by 43 G. 3, c. 99, s. 13.
2. Such a bond need not be taken to his majesty and his successors.
3. The collector in default on such bond is a competent witness against his surety.
4. The sale of the collector's lands and goods is not a condition precedent to putting such bond in suit.
5. To pay money collected for a given year to the account of a different year, is a breach of the condition for due payment. *Collins and Others v. Gwynne.* 544

CARRIER.

A coach proprietor is bound to convey his passengers in road-worthy vehicles, and if an accident happen from a defect in construction, the proprietor is liable, although the defect be out of sight and not discoverable upon ordinary examination. *Sharpe v. Grey.* 457

CHARTER-PARTY.

A lien on the lading of a ship having been expressly reserved to the owner by a charter-party, held that goods which the charterer purchased and put on board, and then transferred with a stipulation to convey them to their destination for a certain amount of freight, were, even as against an endorsee of the bill of lading, subject not only to that freight, but to the ship-owner's lien for a balance due to him under the charter-party, whether possession of the ship was by the charterparty completely out of the shipowner and vested in the charterer, or not. *Small and Others v. Moates.* 574

CONDITION.

See BOND, 2.

CONDITION PRECEDENT.

See PLEADING, 4.

Condition precedent. Defendant was to pay for building upon receiving an architect's certificate that the work was done to his satisfaction. The architect checked the builder's charges, and sent them to defendant: Held, that this did not amount to such a certificate of satisfaction as to enable the builder to sue defendant, although defendant had not objected to pay on the ground that no sufficient certificate had been rendered. *Morgan v. Birnie.* 672

CONSIDERATION.

See AGREEMENT, 1.

COSTS.

See PRACTICE, 3, 5, 14.

1. The rules of Hil. 2 W. 4, are not retrospective; and a party who before those rules succeeded on two trials, is still entitled to the costs of both, and to the costs of entering up judgment *nunc pro tunc*, if the delay has not been occasioned by himself. *Carlisle v. Garland.* 85
2. Where, upon a bailable writ, the defendant is not actually arrested, but files common bail in consequence of a defect in the affidavit to hold to bail, he is not entitled to costs under 43 G. 3, c. 46, upon the plaintiff's recovering less than would have entitled him to proceed by bailable writ. *Amor v. Blofield.* 91
3. Costs of an arbitration under an order of *Nisi Prius* are not costs in the cause. *Taylor v. Lady Gordon.* 570
4. Upon a declaration in assumpsit of several counts, to which the general issue is pleaded, and a verdict is found on one count for the plaintiff, and on the remaining counts for the defendant, the defendant is entitled, under the rule Trin. 2 W. 4, to have the costs of the counts found for him deducted from the plaintiff's costs. *Knight v. Brown.* 643
5. Where immaterial issues are found in favour of defendant, and judgment is afterwards entered for plaintiff *non obstante veredicto*, neither party is entitled to the costs of the immaterial issues. *Goodburne v. Bowman.* 667
6. Upon a judgment as in case of a nonsuit, an executor plaintiff who has been guilty of wilful negligence is not liable to the costs of the cause, but only to the costs occasioned to the defendant by such wilful negligence. *Woolley, Executor, v. Sloper, Executor.* 754

COURT OF ERROR.

It is not competent to a court of error to revise amendments in the record, made by a court of record. *Mellish v. Richardson.* 125

COVENANT.

1. Covenant to leave at the end of a term a water-mill, with all fixtures, fastenings, and improvements during the demise fixed, fastened, or set up in or upon the premises, in good plight and condition, reasonable use and wear only excepted:

Held, to include a pair of new mill-stones set up by the lessee during the term, although the custom of the country authorized him to remove them. *Martyr v. Bradley.* 24

LANDLORD AND TENANT.

See REPLEVIN.

1. "Unless you pay what you owe me, I shall take immediate measures to recover possession of the property," addressed to a tenant at will, by the party entitled in fee: Held, a sufficient determination of the will. *Doe dem. R. Price v. T. Price.* 356
2. The property in trees is in the landlord; the property in bushes is in the tenant, even where they are cut down by a stranger. *Berriman v. Peacock.* 384

LIBEL.

See PLEADING, 5.

LIEN.

See CHARTER-PARTY.

LIMITATIONS, STATUTE OF.

In an action for money had and received, to recover the consideration money of a void annuity, where the annuity was granted more than six years before the action brought, but was treated by the grantor as a subsisting annuity within that period, although subsequently avoided at his instance, Held, that the statute of limitations did not begin to run until the annuity had been avoided. *Cowper and Another, Executors of Nash, v. Godmond, Clerk.* 748

MEMORANDA, 286, 453, 664.

MEMORIAL.

See PLEADING, 2.

MONEY HAD AND RECEIVED,
ACTION FOR.

Where money is paid after suing out process to recover it, the defendant, before he pays, knowing the cause of action for which the writ is sued out, and there being no fraud on the part of the plaintiff, no action is maintainable to recover such money back. *Hamlet and Others v. Richardson.* 644

NEWSPAPER.

A person who lets out types and men to print a newspaper, is not the printer within the meaning of 38 G. 3, c. 78; the party who hires the types and superintends the printing is the person responsible to the stamp office. *Bagster v. Robinson.* 77

NEW TRIAL.

See ARBITRATION, 2. COSTS, 1. EVIDENCE, 4. PRACTICE, 2.

OFFICE.

1. The office of paymaster of the exchequer bills is an office during pleasure only, and not during good behaviour, under the provisions of 48 G. 3, c. 1.
2. The appointment of a paymaster in the room of another is, of itself, a revocation of the first appointment.
3. Such former appointment may be so revoked, although the writing conferring that appointment contain no power of revocation. *Smith v. Latham.* 692

PARISH CLERK.

Two parishes having been united, in which before the union, the parish clerk was appointed by the parishioners and the rector, Held, that after the union, an appointment by the rector alone was invalid. *Hartley v. Cook and Another.* 728

PARTNERS.

See JOINT STOCK COMPANY.

PAYMENT INTO COURT.

See PRACTICE, 15.

PEER.

See EXECUTION, 2.

A recovery suffered by the son of a peer may pass, though the acknowledgment be signed with his name of courtesy, and not with his true name, provided he be described on the record as "commonly called lord, &c." *Newark, Vouchee.* 397

PLEADING.

See TURNPIKE.

1. An action for costs incurred in opposing a petition against the return of a member of parliament may be brought against one of several petitioners, under 9 G. 4, c. 22. *Gurney v. Gordon and Another.* 37
2. 1. To a cognizance for the arrears of annuity, the plaintiff pleaded that a memorial of all the deeds, &c., by which the annuity was granted, the names of the witnesses, the consideration, &c., was not enrolled in the Court of Chancery: the defendant replied that a memorial of all the deeds, &c., the names of the witnesses, the consideration, &c., was enrolled; and after setting out the memorial at length, concluded with a *probat per recordum*: Held, sufficient on demurrer alleging that the conclusion should have been to the country.
2. A judgment on a warrant of attorney being one of the securities, and the judgment being referred to, as entered up: Held, that it need not be set forth in the memorial. *Richardson v. Tomkies and Another.* 51
3. To a plea that the plaintiff had released one of two joint obligors, the plaintiff replied that the release was given with an undertaking on the part of the defendant, the obligor, that the release should not operate in his discharge: Held, ill. *Cocks v. Nash.* 341
4. A general averment of performance, "according to the provisions of the said agreement," is sufficient on general demurrer, although the agreement contains conditions precedent, averment of the performance of which would have been indispensable on special demurrer. *Varley v. Mantou.* 363
5. 1. To an action for a libel charging the plaintiff with having, in two mayoralities, bought coals at 6d. a bushel, having sold them to the poor at 4d., and having charged the corporation 8d.; thereby pocketing 2d. a bushel; defendants pleaded that the plaintiff did this in his first mayorality, and in his second altered his charges, buying the coals

at 6d., selling to the poor at 3d., and charging the corporation 6d.; Held, ill.

2. The court will not award a repleader, except where complete justice cannot be answered without it. *Goodburne v. Bowman and Others.* 532

6. Averment, that the defendant, who had made a note promising to pay the plaintiff 10l. fourteen days after date, and had delivered it to plaintiff according to the tenor and effect thereof, Held, sufficient on special demurrer. *Bancks v. Camp.* 604

7. The demandant having omitted to set forth his pedigree upon the count in a writ of right, the court refused to allow him to amend, even upon an affidavit of merits, and that the omission had been occasioned by the oversight of an experienced pleader at the bar. *Worley v. Blunt.* 652

8. To a declaration on a general acceptance of a bill of exchange, defendant pleaded that the acceptance was qualified, and that according to the statute in such case made and provided, in the acceptance he expressed that he accepted the bill "payable at a certain place only, to wit, No. 32 Albany Street, that is to say, and not otherwise or elsewhere:" plaintiff replied that the acceptance was a general acceptance, and that the defendant did not in the acceptance express "that he had accepted the bill payable at a certain place only, in manner and form as the defendant had alleged:"

Held, on a special demurrer, a sufficient traverse.

Held, also, that the plea should have alleged that no presentment for payment was made at the place appointed. *Lyon v. Walls.* 660

9. The misstatement of the form of action at the commencement of a declaration is an irregularity only, and not fatal on special demurrer. *Anderson and Another v. Thomas.* 678

10. 1. In *quare impedit*, the ordinary, unless he has collated, cannot counterplead the plaintiff's title to the patronage.

2. The declaration shows a sufficient avoidance of a living, if it alleges that the incumbent accepted another benefice with cure of souls, although it contains no allegation that the benefice held by the incumbent was of the value of 8l. *Apperley, Clerk, v. Bishop of Hereford.* 681

11. Declaration on bail-bond set out *capias* in assumpsit to take S. P. and W. P.—the arrest of S. P.—and the execution of a bail-bond conditioned that S. P. should appear to answer plaintiff in an action of assumpsit:

Held, not such a discrepancy between the *capias* and condition of the bond as to be objectionable on general demurrer. *Grottick v. Phillips and Others.* 721

12. In replevin, the general plea *de injuria, &c.*, held proper after an avowry that plaintiff was an inhabitant of the parish; rateable to the relief of the poor in respect of occupation of a tenement in the parish; that a poor rate was made and published, in which plaintiff was rated at 7l.; that defendant, as collector, gave him notice thereof and demanded payment, which plaintiff refused; that he was thereupon summoned to appear at a petty sessions, where he appeared and showed no

cause; whereupon a warrant under the hands and seals of two justices was directed and delivered to defendant to distrain plaintiff's goods, which defendant therefore avowed and prayed a return. *Bardens v. Selby.* 756

POOR.

Where a party, having no stock in trade, is rated as an inhabitant of a parish, his remedy is by appeal to the quarter sessions. Replevin does not lie for a distress under such a rate. *Marshall v. Pitman.* 595

PRACTICE.

See AMENDMENT. BAIL, 1, 2. EVIDENCE, 10.

1. The Court refused to restrain the defendants attorneys from acting in the cause, on the ground that they had obtained a knowledge of the plaintiff's case in the course of a Chancery suit, in which they had been acting in conjunction with the plaintiff, and in which the defendant had no interest; the defendant's attorneys deposing, that, in that suit, they acted also for the defendant. *Grisell and Others, Executors of W. Peto, v. J. Peto.* 1

2. After a trial has been had, the Court will not grant a *venire de novo*, on an allegation that the jury has been convened by the partner of the plaintiff's attorney: at least without proof that the party who objects was not aware of the fact at the trial. *Brunskill v. Giles.* 13

3. Before applying to Court to compel a party to give security for costs, application should be made to the party. *Adams v. Brown.* 81

4. Defendant put in bail by affidavit, but omitted to give four days' notice of justification: plaintiff having proceeded on the bail-bond, the Court refused to stay proceedings upon an application made within twenty days after justification. *Goddard v. Jarvis.* 88

5. A judge at chambers has authority to order costs. *Doe d. Prescott v. Roe.* 104

6. The Court will discharge a rule for a special jury, where it has not been duly acted on, and appears to have been obtained for the purpose of delay. *Stanbury v. Gillett.* 319

7. Fine allowed to pass without affidavit on parchment, under what circumstances. *Wickham, Demandant; Foreman and Wife, Deforcians.* 332

8. Under the rule of *Michaelmas, 1654*, s. 17, a party has a right to amend after plea in abatement on payment of costs, but the Court, or a Judge, have a discretion to allow him to amend without costs. *Wall v. Lyon.* 411

9. A *distringas* under 2 W. 4, c. 39, must be issued expressly for one of two purposes, either to compel appearance or with a view to outlawry; not in the alternative. *Fraser v. Case.* 464

10. Where a sheriff has illegally arrested a defendant in one action, he cannot detain him in another. *Barratt v. Price.* 566

11. Affidavit to hold to bail for 50l., for money had and received to plaintiff's use, and money lent by plaintiff, without distinguishing how much is due on one account and how much on the other: Held, sufficient. *Hague v. Levi.* 595

12. Notice of trial given by an attorney who

- has omitted to take out his certificate, is irregular. *Patterson v. Powell.* 620
13. Upon an issue under the interpleader act, where money is paid into Court to abide the event, the successful party is not allowed to take the money out of Court after verdict and before judgment. *Cooper v. Lead Smelting Company.* 634
14. The Court will not stay the proceedings in a writ of right, till the costs of a prior ejectment for the same lands are paid. *Bow-year v. Bowyear.* 670
15. In assumpsit for the breach of an agreement to sell an estate, the Court refused to allow the defendant to select certain of several allegations of damage contained in a single count, and pay money into Court on those particular allegations. *Hodges v. Lord Litchfield.* 713

PREROGATIVE.

See EXECUTOR, 2.

PRINCIPAL AND AGENT.

1. Defendant, an auctioneer, was employed by C., a person in embarrassed circumstances, to sell his property; defendant sold, and paid the proceeds to C.'s order: C. having shortly afterwards been declared insolvent; Held, that the defendant was not liable to C.'s assignee, although the defendant, when he sold the property, was aware of C.'s embarrassment. *White, Assignee of Catling, Insolvent, v. Bartlett.* 378
2. *Hardman v. Willcock, S. P.* 382

PROVISIONAL ASSIGNEE.

See BANKRUPT, 3.

PURCHASER.

- B. after marriage having made a settlement on his wife, obtained from the trustees the title deeds of the property settled, and deposited them with a banker as a security for money advanced:

Held, that the banker was not a purchaser within the 27 Eliz. c. 4, s. 2, and that the trustees were entitled to recover the deeds. *Kerrison and Another v. Dorrien and Others.* 76

QUARE IMPEDIT.

See PLEADING, 10.

REGULÆ GENERALES, 442, 663.

RELEASE.

See PLEADING, 3.

REMAINDER.

Lands were settled by deed in tail male, on such person as at the decease of T. H. should be the second son then living of T. H. and A. H.; and, for default of such issue, to the third, fourth, and so on, (other than and except the eldest,) in like manner; for default of such issue, to the eldest or only son in tail male; and for default of such issue, to T. H. in fee. T. H. died in 1766, leaving four sons, P., C., T., and J.—P. died in 1770, an in-

fant, without issue; C. in 1829, without issue; T. in 1783, without issue.

Upon a suit instituted after the death of C.: Held, that in the events which had happened, J. took an estate tail under the settlement. *Hawkins v. Hawkins.* 765

REPLEVIN.

Defendant having only a defeasible title demised to plaintiff for years; before the first quarter's rent was due, plaintiff was evicted by title paramount to defendant's, and remained out of possession for some weeks; he then entered again under a new agreement with the person who had evicted him by title paramount:

Held, that defendant was not entitled to distrain, and that the eviction might be given in evidence on the issue of non tenuit. *Hopcraft v. Keys.* 613

REVOCATION.

See OFFICE.

SEQUESTRATION.

See ANNUITY.

SHERIFF.

See WARRANT OF ATTORNEY.

A sheriff, who has seized goods under a f. fa., and has sold and delivered them after a secret act of bankruptcy committed by the defendant, but before a commission issues against him, is liable in trover to the assignees under the commission. *Balme and Others, Assignees of Bankhart and Benson, Bankrupts, v. Hutton and Others.* 471

SPECIAL JURY.

See PRACTICE, 6.

TAXES.

See BOND.

TRADING.

See BANKRUPT, 1.

TRAVERSE.

See PLEADING, 8.

TRESPASS.

See LANDLORD AND TENANT, 2.

TROVER.

See SHERIFF.

TRUSTEE.

A fine may be levied by a trustee, substituted for a missing trustee, under 6 G. 4, c. 74, s. 5. *Jackson, Demandant; Ward and Wife Conusees.* 399

TURNPIKE.

Where two persons fill the office of clerk to the trustees of a turnpike road, both must join in executing a contract on the part of

trustees, under 3 G. 4, c. 126, s. 57. *Bell and Head v. Nixon and Davison.* 393

VARIANCE.

See PLEADING, 11.

WARRANT OF ATTORNEY.

See EVIDENCE, 11.

1. A warrant of attorney not filed pursuant to 3 G. 4, c. 39, s. 2, is not void generally, but

only as against an assignee under a valid commission of bankruptcy.

2. The sheriff is liable to an action for not selling under a fi. fa. with reasonable expedition. *Aireton v. Davis.* 740

WITNESS.

See EVIDENCE, 7, 8.

WRIT OF RIGHT.

See PRACTICE, 14. EVIDENCE, 9. PLEADING, 7.

THE END.







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